A NAJABHAI DESURBHAI WAGH

v.

VALERABHAI DEGANBHAI VAGH & ORS.

(Criminal Appeal No. 2339 of 2010)

B FEBRUARY 01, 2017

**[S. A. BOBDE AND L. NAGESWARA RAO, JJ.]**

*Penal Code, 1860:*

*ss. 149 and 141 – Width and amplitude of – Unlawful* C *assembly – When – Accused persons attacked the appellant-complainant after A-1 was rebuked by appellant on damaging the electric pole near appellant's house – Death of appellant's brother – Trial court convicted all the accused u/s. 302 r/w ss.149 and 324, s.325 r/w ss.149/34 – High Court acquitted accused for offence* D *u/s.302 r/w s.149 holding that the accused did not form an unlawful assembly – On appeal, held: Armed with weapons like axe, iron pipes and spear, the accused proceeded to attack the appellant – After reaching the spot of the incident, they attacked the appellant and caused injuries to others who came to his rescue – Common object to commit an offence can be inferred from the weapons used* E *and the violent manner of the attack – Thus, it is clear that accused formed an unlawful assembly.*

*s. 302 r/w s.149 – Unlawful assembly when cannot be attributed with common object of murder – Held: Common object to commit a murder cannot be inferred only on the basis that the* F *weapons carried by the accused were dangerous – Though, the accused persons formed an unlawful assembly but the background in which the attack was made does not show that there was a common object of a murder amongst the accused – A-1 was infuriated on being questioned by the appellant regarding the damage to the electric pole near his house and along with the other accused* G *intended to teach a lesson to the appellant – Nothing on record to suggest any previous enmity between the parties – Thus, no knowledge about the likelihood of an offence of murder being committed can be attributed to the members of the unlawful assembly – Therefore, accused cannot be convicted under s.302 with the aid*

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*of s.149 IPC – However, the common object of the unlawful assembly to attack the appellant and others is proved – Considering the manner of the attack and deadly weapons used, accused held guilty of offence u/s. 326 r/w 149 IPC – However, on facts sentence limited to the period undergone.*

*ss.302 and 326 r/w s.149 – Accused persons formed unlawful assembly – Murder committed by one member, others convicted for offence u/s.326 r/w 149 – Propriety of – Held: Even if it is established that offence u/s. 302 was committed by one member of an unlawful assembly, a finding of commission of offence u/s. 326 r/w s.149 can be recorded against other members of the assembly.*

*s.302 r/w s.149 – Conviction under, of accused persons, set aside by High Court* inter alia *holding that there was a cross case by the accused against complainant – Held: s.149 IPC does not become inapplicable in all situations where there is a cross case by the accused – High Court ought to have taken note of the acquittal of the complainant and others in the said cross case – Recording a finding of acquittal without re-appreciation of evidence by the High Court resulted in flagrant miscarriage of justice.*

**Partly allowing the appeal, the Court**

**HELD: 1. 1 The oral testimonies of PW1 to PW6, who were injured witnesses are consistent. The manner in which the incident occurred, the weapons used by the accused and the nature of the injuries caused by the accused were stated clearly therein. The situs of the incident is admitted to be near the house of the Appellant. There is no denial of the incident by the accused. [Para 13] [776-B-D]**

**1.2 On a careful examination of the totality of the facts and circumstances of the case, it is clear that accused formed an unlawful assembly. Armed with weapons like axe, iron pipes and spear, they proceeded to attack the Appellant who rebuked the first Respondent in the morning. After reaching the spot of the incident, they attacked the Appellant and caused injuries to others who came to his rescue. The common object to commit an offence can be inferred from the weapons used and the violent manner of the attack. [Para 13] [776-E-F]**

A 1.3 The accused formed into an unlawful assembly to commit an offence, however, the background in which the attack was made by the accused does not show that there was a common object of a murder amongst the accused. Accused No.1 was infuriated on being questioned by the Appellant regarding the damage to the electric pole near his house. Accused No.1 along with the other accused intended to show their superiority and teach a lesson to the Appellant. There is nothing on record to suggest any previous enmity between the parties. Common object to commit a murder cannot be inferred only on the basis that the weapons carried by the accused were dangerous. The facts of the case would indicate that no knowledge about the likelihood of an offence of murder being committed can be attributed to the members of the unlawful assembly, barring A-10 who was convicted under Section 302, IPC and did not file any appeal against his conviction and sentence. [Para 13] [776-F-H; 777-A-B]

D 1.4 However, the common object of the unlawful assembly to attack the Appellant and others is proved. Considering the manner of the attack and the deadly weapons used, the accused are guilty of offence under Section 326 read with 149 IPC. The accused have already undergone a sentence of seven and a half years. Considering the fact that the incident occurred in the year 1998 and that there is no complaint from either side about any further violence since then, the sentence can be limited to the period undergone. [Para 14] [777-C-E]

2. It is no more *res integra* that a finding of the commission of the offence under Section 326 read with Section 149 can be recorded against members of an unlawful assembly even if it is established that the offence under Section 302 was committed by one member of such assembly. [Para 15] [777-F]

*Shambhu Nath Singh and Ors. v. State of Bihar* AIR 1960 SC 725 – relied on.

G 3. The High Court found that the conviction of the accused under section 302 read with 149 IPC cannot be upheld as there was neither an unlawful assembly nor a common object to cause death. The High Court miserably failed to consider the facts and circumstances of the case before coming to such conclusion.

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**Section 149 IPC does not become inapplicable in all situations where there is a cross case by the accused. The High Court ought to have taken note of the acquittal of the Appellant and others in the said cross case. Recording a finding of acquittal without reappreciation of evidence by the Appellate Court would result in flagrant miscarriage of justice and that is exactly what happened in this case.[Paras 16, 17] [777-G-H; 778-A-B]**

*Mizaji and Another v. State of U.P.* **[1959] 1 SCR 940;** *Lalaji v State of Uttar Pradesh* **(1989) 1 SCC 437: [1989] 1 SCR 130 – relied on.**

*Avtar Singh v. State of Haryana* **(2012) 9 SCC 432 : [2012] 10 SCR 790;** *Roy Fernandes v. State of Goa* **(2012) 3 SCC 221 : [2012] 1 SCR 477;** *Lokeman Shah v. State of W.B.* **(2001) 5 SCC 235: [2001] 2 SCR 1095 – referred to.**

*Queen v. Sabid Ali* **(1873) 20 W.R. 5 Cr. – referred to.**

**Case Law Reference**

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|---|---|---|
| **(1873) 20 W.R. 5 Cr.** | **referred to** | **Para 10** |
| **[1959] 1 SCR 940** | **relied on** | **Para 11** |
| **[2012] 10 SCR 790** | **referred to** | **Para 11** |
| **[2012] 1 SCR 477** | **referred to** | **Para 11** |
| **[2001] 2 SCR 1095** | **referred to** | **Para 11** |
| **[1989] 1 SCR 130** | **relied on** | **Para 12** |
| **AIR 1960 SC 725** | **relied on** | **Para 15** |

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2339 of 2010.

From the Judgment and Order dated 29.07.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 880 of 2003.

Ms. Meenakshi Arora, Sr. Adv., Mohit D. Ram, Ms. Monisha Handa, Advs. for the Appellant.

H. P. Raval, Sr. Adv., Anirudh Sharma, Anando Mukherjee,

A Ms. Divya Anand, Nipun Saxena, Abhaid Parikh, Ms. Hemantika Wahi, Ms. Jesal Wahi, Advs.for the Respondents.

The Judgment of the Court was delivered by

**L. NAGESWARA RAO, J.** 1. By a Judgment dated 24.06.2003, the Second Fast Track Judge, Amreli convicted Accused Nos.1 to 14 who are Respondents 1 to 14 herein for committing an offence under Section 302 read with Sections 149/34 IPC and sentenced them to life imprisonment and a penalty of Rs.5,000/- in default of which they shall undergo six months further imprisonment. The Accused were also found guilty for the offences under Sections 324 and 325 read with 149/34 IPC for which they were sentenced to six months rigorous imprisonment and fine of Rs.1000/- in default of which they shall undergo two months imprisonment. Accused Nos.1, 2 and 10 were directed to pay Rs.10,000/- each as compensation to the heirs of the deceased Unadbhai Desurbhai under Section 357 of the Criminal Procedure Code, 1973. The remaining accused were directed to jointly pay Rs.20,000/-as compensation to the heirs.

2. Accused Nos.1 to 14 filed an Appeal before the High Court of Gujarat at Ahmedabad challenging their convictions and sentences. The High Court allowed the appeal partly by acquitting Accused Nos.1 and 2 of the charge under Section 302 read with Section 34/149 IPC. The convictions and sentences under Section 324 and 325 read with Section 34/149 IPC in respect of Accused Nos.1, 2 and 3 were maintained. The convictions and sentences of Accused No. 3 to 9 and 11 to 14 under Section 302 read with Section 34/149 IPC and 324 and 325 read with Section 34/149 IPC were set aside. The conviction of Accused No.10 under Section 302 read with Section 149/34 was converted to a conviction for the offence under Section 302 IPC *simpliciter* and he was sentenced to undergo rigorous imprisonment for life. The Complainant has filed this Appeal aggrieved by the judgment of the High Court.

3. The FIR was recorded on 24.03.1998 by the Sub-Inspector of Police, Rajula on a complaint made by the Appellant herein. According to the Complainant, an electrical light pole near his house was broken down by the tractor of Accused No.1 on 23.03.1998. The Complainant cautioned Accused No.1 to drive the tractor carefully. Accused No.1 took offence and informed the Complainant that he would come back at 06:00 PM to settle the matter. At 06:00 PM, Accused Nos.1 to 14, armed

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with axe, iron pipe and spear came on a tractor to the Complainant's house. Jagabhai Bhayabhai was hit by the tractor due to which he sustained injury on his legs. The other accused attacked the Complainant, his brother Unabhai Desurbhai, Jaga Bhaya and Bayabhai. Bhagwan Bhikha (Accused No.7) gave a blow with an iron T pipe on the left eyebrow of the complainant. Bhima Degan (Accused No. 3) inflicted an injury by spear on the left side of the complainant's stomach. Bhagabhai Rambhai, Rambhai Bhayabhai, Lakhman Sumara and Raningbhai Tapubhai came to the spot and they were also attacked by Accused No.1 to 14. Unadbhai Desurbhai, Bhikabhai Desurbhai, Bhaga Ram and Lakhman Sumara sustained injuries on their heads. The Complainant and the other injured persons shouted for help and the accused seeing the villagers fled from the spot. The injured were taken for treatment in an ambulance of Gujarat Peeparu Port Ltd. Unadbhai Desurbhai died on 26.03.1998 while undergoing treatment. The accused were charged under Section 147, 148, 504, 506(2), 323, 324, 325, 326, 302 read with 34/149 IPC and 135 of the Bombay Police Act.

4. In the trial, the prosecution examined 21 witnesses and relied upon several documents. Seven eye-witnesses including the Complainant were examined. To prove the injuries PWs 14, 15, 16 and 17 were examined. Dr. Popatbhai Bhaliya (PW17) was the Medical Officer, Community Health Centre, Rajula on 24.03.98. He examined the Complainant, the deceased Unadbhai Desurbhai and other injured persons. He proved the medical certificates given by him regarding the injuries. Dr. Hemangbhai Vasavdawas who treated the deceased was examined as PW15. He stated that the cause of death was due to haemorrhage caused in the head by a solid blunt object. PW14 Dr. Govindbhai Parmar, conducted the post mortem of the dead body of Unadbhai Desurbhai. Dr. Madhukant (PW16) was examined to speak about the injuries caused to Rainingbhai Tapu (PW5). Relying upon the ocular testimonies which were corroborated by the medical evidence, the Trial Court held that the accused formed an unlawful assembly and attacked the Complainant and others. The right to private defence set up by the accused was rejected by the Trial Court. On a detailed consideration of the material on record, the Trial Court found all the Accused guilty of having committed the offence under Section 302 read with 149/34 IPC for the death of Unadbhai Desurbhai. The Accused were also found guilty of causing injuries to the others and were convicted under Section 324 and 325 read with 149/34 IPC.

A 5. The High Court held that the offence under Section 302 read with 149/34 IPC was not made out on the ground that there was a cross case and that the Accused neither formed an unlawful assembly nor was there previous concert to cause death. The High Court held that there was one injury on the head of the deceased Unadbhai Desurbhai and Accused Nos.1, 2 and 10 were alleged to have caused the injury. B As that injury on the head can be attributed to Accused No.10, he was convicted under Section 302 IPC. The High Court held that Accused No.1 and 2 cannot be held responsible for the said injury and acquitted them of the offence under Section 302 read with 149/34 IPC. The remaining accused were also acquitted for the offence under Section C 302 read with 149/34 IPC. The conviction and sentence under Section 324, 325 read with 149/34 IPC were maintained.

6. Lakshmanbhai Bhaikhabhai, Accused No.10 did not prefer any appeal against his conviction and sentence. We are informed that he has served his sentence. We are also informed that during the pendency of D the appeal before the High Court, Accused Nos.4, 6 and 9 have died against whom the Appeal abates.

7. Ms.Meenakshi Arora, learned Senior Counsel, appearing for the Appellant submitted that the High Court committed a serious error in acquitting the Accused under Section 302 read with 149 IPC in the facts E and circumstances of the case. She submitted that the judgment of the High Court was cryptic and reasons given for the acquittal of the Accused are unsustainable. The finding of the High Court that there was no previous concert to cause death and there was no unlawful assembly is without reference to the facts of the case.

F 8. Mr. Harin Rawal, learned Senior Counsel, appearing for the Accused submitted that the prosecution suppressed the true facts. He contended that the Complainant's party were the aggressors in the fight that took place on 24.03.1998. He brought to our notice that Crime No.I 35 of 1998 was lodged at 08:30 pm on 24.03.1998 at Rajula Police Station by Accused No.2. The complaint preferred by the Appellant was lodged G 15 minutes after their complaint. He took us through the record to show that there were injuries received by the Accused due to the attack by the Complainant's party. He further submitted that the lights of the tractor were broken, its silencer was bent and its steering wheel was damaged. He highlighted the discrepancy on the question of who was driving the

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tractor. He referred to the evidence to show that Prakash Manubhai was the driver who was injured. A

9. Whether the High Court was right in acquitting the accused under Section 302 read with 149 IPC is the question that falls for our consideration in this case. The essential ingredients and the width and amplitude of Section 149 as well as its applicability to the facts of the case have to be examined. It would be relevant to refer to Section 149 IPC which is as under: B

> "**149. Every member of unlawful assembly guilty of offence commit- ted in prosecution of common object.**—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." C D

10. A Full Bench of the Calcutta High Court analysed Section 149 IPC in the year 1873 in ***Queen v. Sabid Ali***[1]. Phear, J., speaking for the majority, held as under:

> " It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly while the assembly is existing, *i.e.*, while the members are engaged in the prosecution of a common object, is attributed by Section 149 to every other member. The Section describes the offence which is to be so attributed, under two alternative forms, *viz.*, it must be either – E F
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> *1st*. – An offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly.
>
> *2nd*. – An offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.
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> Now, inasmuch as the continuance of the unlawful assembly is by the definition of Section 141 made conterminous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these G

[1] (1873) 20 W.R. 5 Cr. | (1873) 11 Beng. L.R. 347 (FB). H

A two passages respectively. Also the mere fact that the Legislature thought fit to express the *second* alternative appears to show very distinctly that it did not intend the words "in prosecution" which are found in the *first* to be equivalent "during the prosecution"; for if they were then the second alternative would have clearly been unnecessary. And a comparison with this passage of the language which is used in Section 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation for life, if *any one* of their number act *the time of committing* of burglary causes death, &c., strongly bears out this view. I am of opinion that an offence, in order to fall within the first of the above alternatives, i.e., in order to be committed *in the prosecution* of the common object must be immediately connected with that common object by virtue of the nature of the object: for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents, and in that case death resulting from injury caused would be homicide committed in prosecution of the common object.

And an offence will fall within the second alternative if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by nature of the object itself.

It seems thus, on a little consideration, to be apparent that the two alternatives of Section 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that in every trial of prisoners on a charge framed under the provisions of Section 149 of Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during, so to speak, the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object, as I have endeavoured to explain the meaning of those words in the first part of the Section; and, if not, whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object."

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The Calcutta High Court was dealing with a case of riot over a dispute about a piece of land between Fukeer Buksh and Sabid Ali. Tureeboollah, who was a member of Sabid Ali's party of assailants, fired a gun and killed one Samed Ali. The Trial Court held that Tureeboollah was a member of the unlawful assembly of which the others in Sabid Ali's party were also members. It convicted all the accused under Section 302 read with 149 IPC. The High Court held that the conviction under Section 149 was unsustainable. In a concurring opinion, Jackson J. held as follows:

> "It appears to me that the construction of this Section (149), that is, a construction which shall be at once reasonable grammatical, involves two difficulties, or at least two points which call for attentive consideration:-
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> 1st – "The common object,"
>
> 2nd – or "such as the members of that assembly knew to be likely to be committed in prosecution of that object."
>
> It has been proposed to interpret the "common object" in a precise sense so as to indicate the exact extent of violence to which the rioters intended to go, *viz.*, to take possession of the land by force extending, if need be, to wounding and the like.
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> This I think is not the sense in which the words were intended to be understood.
>
> They are not, it seems to me, used in the same sense as "the common intention" in Section 34, which means the intention of all whatever it may have been.
>
> The words here seem to have manifest reference to the defining Section 141, and to point to one of the five objects, which being common to five or more persons assembled together, make their assembly unlawful.
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> For this reason, I think that any attempt to mitigate the rigour of the Section by limiting the construction of the words "common object" must fail, and that any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in Section 141, which is or are brought home to the unlawful assembly to which the prisoner belonged, is an offence within the meaning of the first part of the Section."

A Pontifex, J. agreed with the majority and interpreted the word "knew" in Section 149 in the following terms:

> "To bring the offence of murder as defined by the Code within Section 149, I think it must either necessarily flow from the prosecution of the common object; or it must so probably flow
B from the prosecution of the common object that each member might antecedently except it to happen.
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> The offence of murder as strictly defined by the Code requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed, is to know that some member
C of the assembly has such previous intention or knowledge. The word "knew" used in the second branch of the Section is I think advisedly used, and cannot be made to bear the sense of "might have known." "

D 11. This Court in ***Mizaji and Another v. State of U.P.***[2] observing that various High Courts of India had interpreted Section 149 held that every case has to be decided on its own facts. This court proceeded to deal with Section 149 in detail as under:

> "The first part of the section means that the offence committed in
E prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence
F committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean
G a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly

H [2]1959 (1) SCR 940 at p. 946-949.

must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in *Sabid Ali case* [ (1873) 20 WR 5 Cr] that 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. The distinction between the two parts of Section 149, Indian Penal Code 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 of Section 149 as explained above 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."

***Mizaji's case*** was referred to and relied upon in a long line of decisions of this court. (*See, e.g.*, ***Avtar Singh v. State of Haryana***[3], ***Roy Fernandes v. State of Goa***[4], ***Lokeman Shah v. State of W.B.***[5])

12. Applying the well settled principles laid down by this court we proceed to examine whether the Accused can be convicted for an offence under section 302 with the aid of Section 149 IPC. As per Section 141 IPC an assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is to commit an offence mentioned therein. Guidance is supplied by this Court regarding the requirement of examining the circumstances in which the incident occurred, the weapons used and the conduct of the accused during the course of the incident. In ***Lalaji v State of Uttar Pradesh***[6] this court held that:

[3] (2012) 9 SCC 432 at 27 and 28.
[4] (2012) 3 SCC 221 at 31 and 32.
[5] (2001) 5 SCC 235 at 20 and 21.
[6] (1989) 1 SCC 437 at 8.

A *"The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."*

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13. There is no dispute about the occurrence of the incident near the house of the Appellant at 06:00PM on 24.03.98. The oral testimonies of PW1 to PW6, who were injured witnesses are consistent. The manner in which the incident occurred, the weapons used by the Accused and the nature of the injuries caused by the accused were stated clearly therein. The Doctor who treated the injured were examined and they have proved the medical certificates issued by them. The doctors who treated the deceased Unadbhai Desurbhai were produced before the court to speak about the cause of death. PW14 who conducted the Post Mortem on the body of Unadbhai Desurbhai was also examined. The situs of the incident is admitted to be near the house of the Appellant. There is no denial of the incident by the Accused. The submission of Mr. Raval is that the complainant along with others attacked the Accused and in the resultant free fight, persons from both sides were injured. On a careful examination of the totality of the facts and circumstances of the case, it is clear that Accused formed an unlawful assembly. Armed with weapons like axe, iron pipes and spear, they proceeded to attack the Appellant who rebuked the first Respondent in the morning. After reaching the spot of the incident, they attacked the Appellant and caused injuries to others who came to his rescue. The common object to commit an offence can be inferred from the weapons used and the violent manner of the attack. Having held that the Accused formed into an unlawful assembly to commit an offence, what remains to be decided is whether they can be attributed with the knowledge about murder. One of the members of the unlawful assembly Lakshmanbhai Bhikabhai Vagh (A-10) was convicted and sentenced under section 302 for committing the murder of Unadbhai Desurbhai. The question is whether there was a prior concert by all the members of the unlawful assembly to commit an offence of murder. The background in which the attack was made by the Accused does not show that there was a common object of a murder amongst the accused. Accused No.1 was infuriated on being questioned by the Appellant regarding the damage to the electric pole near his house.

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Accused No.1 along with the other accused intended to show their superiority and teach a lesson to the Appellant. There is nothing on record to suggest any previous enmity between the parties. Common object to commit a murder cannot be inferred only on the basis that the weapons carried by the accused were dangerous. The above facts would indicate that no knowledge about the likelihood of an offence of murder being committed can be attributed to the members of the unlawful assembly, barring Lakshmanbhai Bhikabhai Vagh (A-10) who has been convicted under Section 302 IPC.

14. Though the accused cannot be convicted under section 302 with the aid of S. 149 IPC in view of the above findings, they would still be liable for a lesser punishment. The common object of the unlawful assembly to attack the Appellant and others is proved. Considering the manner of the attack and the deadly weapons used, we are of the considered opinion that Accused Valerbhai Deganbhai Vagh (A-1), Unadbhai Deganbhai Vagh (A-2), Bhimabhai Deganbhai Vagh (A-3), Unadbhai Bhagabhai Vagh (A-5), Bhagwanbhai Bhikabhai Vagh (A-7), Bhikabhai Jinabhai Vagh (A-8), Hasurbhai Bhikhabhai Vagh (A-11), Bhanabhai Bhikabhai Vagh (A-12), Patabhai @ Aatabhai Bhikabhai Vagh (A-13) and Bhavabhai Jikarbhai Vagh (A-14) are guilty of offence under Section 326 read with 149 IPC. We are informed that the accused have already undergone a sentence of seven and a half years. Considering the fact that the incident occurred in the year 1998 and that there is no complaint from either side about any further violence since then we opine that the sentence can be limited to the period undergone.

15. It is no more *res integra* that a finding of the commission of the offence under Section 326 read with Section 149 can be recorded against members of an unlawful assembly even if it is established that the offence under Section 302 was committed by one member of such assembly. (*See:* ***Shambhu Nath Singh and Ors v. State of Bihar***[7])

16. The High Court found that the conviction of the accused under section 302 read with 149 IPC cannot be upheld as there was neither an unlawful assembly nor a common object to cause death. The High Court miserably failed to consider the facts and circumstances of the case before coming to such conclusion. Section 149 IPC does not become inapplicable in all situations where there is a cross case by the accused. The High Court ought to have taken note of the acquittal of the Appellant

[7] AIR 1960 SC 725 | 1960 Cri LJ 144 at 6 and 7

A and others in the said cross case on 24.06.2003. The judgment of the High Court was delivered on 29.07.2009 by which date there was no cross case pending against the Appellants. Recording a finding of acquittal without reappreciation of evidence by the Appellate Court would result in flagrant miscarriage of justice and that is exactly what happened in this case.

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17. The Appeal is partly allowed and the Accused Valerbhai Deganbhai Vagh (A-1), Unadbhai Deganbhai Vagh (A-2), Bhimabhai Deganbhai Vagh (A-3), Unadbhai Bhagabhai Vagh (A-5), Bhagwanbhai Bhikabhai Vagh (A-7), Bhikabhai Jinabhai Vagh (A-8), Hasurbhai Bhikhabhai Vagh(A-11), Bhanabhai Bhikabhai Vagh (A-12), Patabhai @ Aatabhai Bhikabhai Vagh (A-13) and Bhavabhai Jikarbhai Vagh (A-14) are convicted under section 326 read with 149 IPC and sentenced to the period undergone.

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Divya Pandey Appeal partly allowed.