
Shahid Imran Vs State Of Chhattisgarh

Criminal Appeal No. 64, 71, 171, 229 Of 2003

Court: Chhattisgarh High Court

Date of Decision: April 25, 2023

Acts Referred:

Code Of Criminal Procedure, 1973 " Section 313, 374(2), 428#Indian Penal Code, 1860 " Section 140, 141, 143, 146, 147, 148, 149, 158, 160, 302, 304, 307, 324, 390, 391, 392, 393, 394, 395, 396, 397, 398

Hon'ble Judges: Narendra Kumar Vyas, J

Bench: Single Bench

Advocate: Y.C. Sharma, Soni Mishra, Renu Kochar, Indira Tripathi, Himanshu Kumar Sharma

Final Decision: Partly Allowed

Judgement

Conviction,,Sentence,

U/s 148 of IPC,;,"R.I. for 1 year and fine of Rs. 500/- in default of

payment of fine, further R.I. for 2 months.",

U/s 307/149 of IPC,;,"R.I. for 7 years and fine of Rs. 5000/- in default of

payment of fine, further R.I. for 6 months.",

U/s 324/140 of IPC,;,"R.I. for 1 year and fine of Rs. 500/- in default of

payment of fine, further R.I. for 2 months.",

U/s 395/397 of IPC,;,"R.I. for 7 years and fine of Rs. 5000/- in default of

payment of fine, further R.I. for 6 months.

(All the sentences to run concurrently)",

relied upon by the trial Court to hold the appellants guilty for the offence and it cannot be foundation for conviction. It has been further contended that,,

the judgment of conviction passed by the learned trial Court suffers from illegality and irregularity which warrants interference by this Court. Learned,,

counsel for the appellants in support of their submission have relied upon the case reported in 2013 (3) CGLJ 625, 2010 (2) SCC 229 & 2012 (1)",,,

CGLJ 157 and would pray for quashing the judgment of conviction passed by the trial Court.,,,

10. On the other hand, learned State counsel would submit that the prosecution has proved the case beyond reasonable doubt, therefore, the finding",,,

arrived at by the trial Court convicting the appellants for commission of offence as stated above, is legal, justify and does not warrant any interference",,,

by this Court and would pray for dismissal of the appellants.,,,

11. I have heard learned counsel for the parties and perused the documents placed on record with utmost satisfaction.,,,

12. From perusal of records, the point to be determined by this Court is whether conviction of the appellants for the offence under Section 307, 148,",,

149, 395 & 397 of IPC is legal and justify or not.",,

13. The prosecution has examined constable- Parmanand Bhoi (PW-1) who has stated in his examination-in-chief at paragraphs 6 to 8 & 19 and in,,

cross-examination at paragraph 29 & 30 has stated as under:-,,

14. Constable- Yogendra Singh (PW-2) has stated in his examination-in-chief at paragraphs 3 to 8 and in cross-examination at paragraphs 16, 23, 26,",,

27, 30, 31 has held as under:-",,,

15. These witnesses were sent for medical examination to Dr. P. Balkishore (PW-6), who has given the medical report. As per his report, the injuries",,,

sustained by Yogendra Singh are as under:-,,

(i) Stab wound 2.5x1.5 cm. on right side of stomach.,,,

(ii) Stab wound 2.5x1.5 cm. left side of stomach.,,,

(iii) Stab wound 2.5x1.5 cm. on 9th & 10th ribs over chest.,,,

(iv) Incised wound 4x1.5 cm. deep to bone on left side of parietal region over head.,,,

(v) Incised wound 7.5x5 cm. on left side of face.,,,

16. This witness has examined the knife and stated as under:-,,

17. He has stated at paragraph 4 that the accused have assaulted injuries from knife only.,,,

18. The prosecution has examined Dr. S.R. Surendra (PW-7) who examined constable- Parmanand Bhoi and as per his report, the injuries sustained",,,

by Paramanand Bho are as under:-,,

(i) Swelling 3x2 cm. over upper side of nose.,,,

(ii) Redness on left eye.,,,

(iii) Incised wound 1x0.25x0.25 cm. on upper side of stomach.,,,

(v) Incised wound 2x1 cm. over back side of head.,,,

19. Both the doctors were cross-examined, but nothing was brought on record to rebut the gravity of the injuries sustained by the complainant. The",,,

prosecution has examined Md. Iqbal (PW-5) and Jamil Khan (PW-12), who have narrated the incident which took place on 13.03.2000, but the said",,,

witnesses were subsequently declared hostile by the prosecution as they have denied the involvement of the appellants in the crime in question," ,,,

therefore, the prosecution has cross-examined them." ,,,

20. The prosecution has examined the injured persons, who have clearly deposed that they have been assaulted by the appellants as detailed in" ,,,

foregoing paragraphs. Considering the facts that the statement of the injured persons is vital evidence wherein they have clearly explained the incident,,,

and there was no effective cross-examination to disbelieve the occurrence of incident and involvement of the appellants.,,,

21. It is well settled position of law that the evidence of an injured eye-witness is to be appreciated and due weightage has to be given as held by,,,

Hon'ble the Supreme Court in the case of Balu Sudam Khalde & another Vs. State of Maharashtra 2023 SCC OnLine SC 355, wherein it has" ,,,

been held at paragraphs 26, 27 & 28 as under:-" ,,,

"26. When the evidence of an injured eye-witness is to be appreciated, the under noted legal principles enunciated by the Courts are required to be" ,,,

kept in mind:,,,

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his,,,

deposition.,,,

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and" ,,,

falsely implicate the accused.,,,

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly." ,,,

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.,,,

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or" ,,,

embellishment should be discarded from the evidence of injured, but not the whole evidence." ,,,

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory,,,

with passage of time should be discarded.,,,

27. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is" ,,,

possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to,,,

by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations," ,,,

circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit,,,

the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of" ,,,

the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea",,,

or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it",,,

will also have to be taken into account while assessing the value of the prosecution evidence.,,,

28. Keeping the aforesaid principles of law in mind, this Court looked into the evidence of all the three important witnesses as stated hereinabove. The",,,

evidence of all the eyewitnesses is consistent and there is no good reason for us to disbelieve the ocular version as narrated by the three,,,

eyewitnesses. The Trial Court as well as the High Court looked into the oral evidence of all the eyewitnesses referred to above closely and have,,,

recorded a concurrent finding that they are reliable witnesses.Ã¢â¬â¢,,,

22. Now this Court has to examine whether the injuries sustained by the appellants are sufficient for causing death to the victims. To determine this,,

issue, this Court has to consider the evidence of injured person Yogendra Singh, who was examined by Dr. P. Balkishore (PW-6) and Dr. K.H.",,,

Ramesh (PW-16), who has done operation of injured Yogendra Singh and has given opinion that the injuries sustained by the victim are grievous in",,,

nature and if it is not operated in time then the injured may be expired. Parmanand Bhoi was examined by Dr. S.R. Surendra. who has given opinion,,,

that the injuries sustained by the Parmanand Bhoi was simple in nature and if there are no such injuries then he will be recovered within seven days. It,,

is well settled position of law that for conviction of the appellants under Section 307 of IPC, the injury as well as the other factors such as weapon",,,

used, nature of injury caused on the vital part of the body, has also to be considered. In the present case, there is common intention of the appellants to",,,

snatch liquor, which was seized by the police while performing their statutory duty, length of knife, which has been used to commit the offence and the",,,

injury sustained by Yogendra Singh, supported by medical opinion, who has operated the victim, it is proved beyond doubt that the offence committed",,,

by the appellants falls within the ambit of commission of offence under Section 307 of IPC. HonÃ¢â¬â¢ble the Supreme Court in the case of Sadakat,,,

Kotwar & another Vs. The State of Jharkhand AIR SCW (2021) 5747, wherein it has been held at paragraph 4, 4.1 & 5 as under:-",,,

Ã¢â¬â¢4. In the case of Mahesh Balmiki vs. State of M.P., (2000) 1 SCC 319 in paragraph 9 it is held as under: Ã¢â¬â¢9 there is no principle that in all",,,

cases of a single blow Section 302 Indian Penal Code is not attracted. A single blow may, in some cases, entail conviction Under Section 302 Indian",,,

Penal Code, in some cases Under Section 304 Indian Penal Code and in some other cases Under Section 326 Indian Penal Code. The question with",,,

regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the",,,

vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are",,,

all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant,,,

case, the deceased was disabled from saving himself because he was held by the associates of the Appellant who inflicted though a single yet a fatal",,,

blow of the description noted above. These facts clearly establish that the Appellant had the intention to kill the deceased. In any event, he can safely",,,

be attributed the knowledge that the knife -blow given by him was so imminently dangerous that it must in all probability cause death or such bodily,,,

injury as is likely to cause death.Ã¢â¬â¸",,,

4.1 It is not the case of the accused that the offence occurred out of a sudden quarrel. It also does not appear that the blow was stuck in the heat of,,,

the moment. On the contrary, considering the depositions of PW7 and PW8 the accused persons pushed and took the husband of PW7 out of the",,,

house and thereafter the accused caused the injuries on PW7 and PW8 and stabbed dagger. Thus, deadly weapons have been used and the injuries",,,

are found to be grievous in nature. As the deadly weapon has been used causing the injury near the chest and stomach which can be said to be on,,,

vital part of the body, the appellants have been rightly convicted for the offence under Section 307 read with Section 34 of the IPC. As observed and",,,

held by this Court in catena of decisions nobody can enter into the mind of the accused and his intention has to be ascertained from the weapon used",,,

part of the body chosen for assault and the nature of the injury caused. Considering the case on hand on the aforesaid principles, when the deadly",,,

weapon Ã¢â¬â¸" dagger has been used, there was a stab injury on the stomach and near the chest which can be said to be on the vital part of the body and",,,

the nature of injuries caused, it is rightly held that the appellants have committed the offence under Section 307 IPC.",,,

5. We are in complete agreement with the view taken by the learned Trial Court as well as the High Court. Now so far as the reliance placed upon,,,

the decision of this Court in Jai Narain Mishra and Ors. Vs. State of Bihar, (1971) 3 SCC 762 is concerned, on facts such decision shall not be",,,

applicable more particularly considering the subsequent decisions as well as the weapon used, nature of injuries caused on the vital part of the body.Ã¢â¬â¸",,,

23. Learned trial Court after appreciating the entire evidence and material placed on record has recorded its finding at paragraph 38 with regard to,,,

commission of offence under Section 307 of IPC. This Court after appreciation of evidence material on record and considering the law on the subject",,,

can very well reach to conclusion that the prosecution has proved the case beyond reasonable doubt that the complainant Paramanand Bhoi (PW-1),,,

and Yogendra Singh (PW-2) have been caused injuries by the accused and injuries sustained by Yogendra Singh (PW-2), are serious in nature",,,

therefore, the appellants have rightly been convicted under Section 307 of IPC. With regard to commission of offence under Section 324 of IPC, the",,,

learned trial Court has recorded its finding that the offence under Section 324 of IPC is made out, this finding is with regard to the injuries sustained by",,,

Parmanand Bhoi, which neither suffers from perversity nor illegality, therefore, the offence under Section 324 of IPC has rightly been made out",,,

against the appellants and the findings and conviction of the appellants for commission of offence under Section 324 of IPC, deserves to be upheld and",,,

accordingly, it is upheld.",,,

24. Now this Court has to determine whether the offence under Sections 148 & 149 of IPC is made out or not. For better understanding, it is",,,

expedient for this Court to extract Sections 141, 148 & 149 of IPC, which read as under:-",,,

Section 141- Unlawful assembly. "An assembly of five or more persons is designated an "unlawful assembly", if the common object of",,,

the persons composing that assembly is",,,

(First) "To overawe by criminal force, or show of criminal force, 1[the Central or any State Government or Parliament or the Legislature of any",,,

State], or any public servant in the exercise of the lawful power of such public servant; or",,,

(Second) "To resist the execution of any law, or of any legal process; or",,,

(Third) "To commit any mischief or criminal trespass, or other offence; or",,,

(Fourth) "By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any",,,

person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce",,,

any right or supposed right; or",,,

(Fifth) "By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what",,,

he is legally entitled to do. Explanation. "An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.",,,

Section 148- Rioting, armed with deadly weapon. "Whoever is guilty of rioting, being armed with a deadly weapon or with anything which",,,

used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three",,,

years, or with fine, or with both.",,,

Section 149- Every member of unlawful assembly guilty of offence committed in prosecution of common object. "If an offence is",,,

committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly",,,

knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the",,,

same assembly, is guilty of that offence.",,,

25. To determine whether the offence under Sections 148 & 149 of IPC is made out or not this Court has extracted the relevant paragraphs of the",,,

FIR (Ex. P/16), which reads as under:-",,,

26. The prosecution has also examined the complainants who have deposed the involvement of the appellants and their presence in the place of",,,

occurrence. The evidence of the complainant has already been referred to by this Court in foregoing paragraph. From perusal of the evidence, which",,,

has already quoted above, it is quite vivid that the appellants who are more than five, have constituted an unlawful assembly and have committed riot",,,

and were armed with deadly weapon and with a common object of snatching the liquor which was seized by the police while performing their official",,,

duty, thus, the basic ingredients for commission of offence, has been proved by the prosecution to bring home the guilt of the appellants for",,,

commission of offence under Sections 148 & 149 of IPC. Hon'ble the Supreme Court in Vinubhai Ranchhodbhai Patel Vs. Rajivbhai Dudabhai Patel",,,

& others (2018) 7 SCC 743, has held at paragraphs 24 to 35 as under:-",,,

“24. To understand the true scope and amplitude of Section 149 IPC it is necessary to examine the scheme of Chapter VIII (Sections 141 to 160)",,,

of the IPC which is titled “Of the offences against the public tranquility”. Sections 141 to 158 deal with offences committed collectively by a",,,

group of 5 or more individuals",,,

25. Section 141 IPC declares an assembly of five or more persons to be an “unlawful assembly” if the common object of such assembly is to",,,

achieve any one of the five objects enumerated in the said section.⁹ One of the enumerated objects is to commit any offence.¹⁰ “The words falling",,,

under section 141, clause third “or other offence” cannot be restricted to mean only minor offences of trespass or mischief. These words cover",,,

all offences falling under any of the provisions of the Indian Penal Code or any other law.”¹¹ The mere assembly of 5 or more persons with such",,,

legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 of the IPC. It is not necessary that any",,,

overt act is required to be committed by such an assembly to be punished under Section 143",,,

26. If force or violence is used by an unlawful assembly or any member thereof in prosecution of the common objective of such assembly, every",,,

member of such assembly is declared under Section 146 to be guilty of the offence of rioting punishable with two years imprisonment under Section",,,

147. To constitute the offence of rioting under Section 146, the use of force or violence need not necessarily result in the achievement of the common",,,

⁹ See Yeshwant & Others v. State of Maharashtra, (1972) 3 SCC 639 ¹⁰ Section 40 “offence” - Except in the Chapters and sections mentioned",,,

in clauses 2 and 3 of this section, the word “offence” denotes a thing made punishable by this Code. ¹¹Manga alias Man Singh Vs. State of",,,

Uttarakhand (2013) 7 SCC 629 ¹² See Dalip Singh and Ors. Vs. State of Punjab , AIR 1953 SC 364. object.¹³ In other words, the employment of",,,

force or violence need not result in the commission of a crime or the achievement of any one of the five enumerated common objects under Section",,,

141",,,

27. Section 148 declares that rioting armed with deadly weapons is a distinct offence punishable with the longer period of imprisonment (three years)",,,

There is a distinction between the offences under 146 and 148. To constitute an offence under Section 146, the members of the assembly need not carry weapons. But to constitute an offence under Section 148, a person must be a member of an unlawful assembly, such as,

assembly is also guilty of the offence of rioting under Section 146 and the person charged with an offence under Section 148 must also be armed with,

a deadly weapon...

28. Section 149 propounds a vicarious liability in two contingencies by declaring that (i) if a member of an unlawful assembly commits an offence in,

prosecution of the common object of that assembly, then every member of such unlawful assembly is guilty of the offence committed by the other",

members 13 See Sundar Singh Vs. State, AIR 1955 All 232 (FB) 14 See Sabir v. Queen Empress, (1894) ILR 22 Cal 276; In re Choitano Ranto and",

Others, AIR 1916 Mad 788 15 See Shambu Nath Singh Vs. State of Bihar, AIR 1960 SC 725 of the unlawful assembly and (ii) even in cases where",

all the members of the unlawful assembly do not share the same common object to commit a particular offence, if they had the knowledge of the fact",

that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object.,,

29. The scope of Section 149 IPC was enunciated by this Court in Masalti:,,

"The crucial question to determine in such a case 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 by section 141. While determining this question, it becomes relevant to consider whether",

the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without,,

intending to entertain the common object of the assembly. It is in that context that the observations made by this court in the case of Baladin assume,,

significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown",

that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact,"

section 149 makes it clear that 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, and that emphatically brings out the principle that the",

punishment prescribed by section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed,,

by every member of the unlawful assembly.

30. It can be seen from the above, Sections 141, 146 and 148 create distinct offences. Section 149 only creates a vicarious

16 Masalti v. State of U.P.,",

AIR 1965 SC 202. liability. However, Sections 146, 148 and 149 contain certain legislative declarations based on the doctrine of vicarious liability. The",

doctrine is well known in civil law especially in the branch of torts, but is applied very sparingly in criminal law only when there is a clear legislative",,,

command. To be liable for punishment under any one of the provisions, the fundamental requirement is the existence of an unlawful assembly as",,,

defined under Section 141 made punishable under Section 143 IPC.,,,

31. The concept of an unlawful assembly as can be seen from Section 141 has two elements;,,,

(i) The assembly should consist of at least five persons; and,,,

(ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.,,,

32. For recording a conclusion, that a person is (i) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under",,,

Section 149 for some other offence, it must first be proved that such person is a member of an "unlawful assembly" consisting of not less than",,,

five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is",,,

whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.,,,

33. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of",,,

the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the",,,

gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in",,,

our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting",,,

in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who",,,

had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that the injuries inflicted by such members are relatively less",,,

serious and non fatal.,,,

34. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly",,,

should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence",,,

by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his",,,

death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not",,,

have the knowledge of the fact that the offence of murder is likely to be committed.,,,

35. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of",,,

such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with",,,

deadly weapons like axes and fire arms and attack another person or group of persons, any member of the attacking group would have to be a moron",,,

in intelligence if he did not know murder would be a likely consequence.Ã¢â¬â¸,,,

27. HonÃ¢â¬â¸ble the Supreme Court in Surendra Singh Vs. State of Rajasthan & another 2023 LiveLaw (SC) 318, has held at paragraph 10.1 & 10.2",,,

as under:-,,,

Ã¢â¬â¸10.1 In view of the above facts and circumstances of the case the High Court has seriously erred in observing that no case is made out to invoke,,,

Section 149 IPC.,,,

10.2 Now once the respondent Ã¢â¬â¸" accused was found to be member of the unlawful assembly of more than five persons and he actually participated,,,

in commission of the offence may be the fatal blow might have been given by the another accused, in the present case Bhupendra Singh, still with the",,,

aid of Section 149 IPC, Respondent Accused can be convicted for the offence under Section 302 IPC with the aid of Section 149 IPC. The case" ,,,

would certainly fall within first part of Section 149 IPC. As per first part of Section 149 IPC if an offence is committed by any member of unlawful,,,

assembly in prosecution of the common object of that assembly, every person who, at the time of that offence, is a member of the same assembly, is",,,

guilty of that offence. In the case of Mizaji and Anr. (supra), this Court had occasion to consider Section 149 of the IPC and the distinction between",,,

two parts of Section 149 IPC. It is observed and held as under:,,,

Ã¢â¬â¸"This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. -" ,,,

The first part of the section means that the offence committed in 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 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 s. 149 if it can be",,,

held that the offence was such as the members knew was likely to be committed. The expression I know' does not mean 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 must be aware of that likelihood and would be guilty",,,

under the second part 'of s.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 be 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's case (1) 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 s.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 s. 149 as explained above",,,

or it was an offence such as the members of the assembly know to be likely to be committed in prosecution of the common object and falls within the",,,

second part. 10.3 Now so far as the reliance placed upon the decision of this Court in the case of Roy Fernandes (supra), relied upon on behalf of",,,

the respondent "accused is concerned, on facts the said decision shall not be applicable. In the said decision this Court had considered the second",,,

part of Section 149 IPC. This Court did not consider the first part of Section 149 IPC and the distinction between the first part and the second part of",,,

Section 149 which has been considered by this Court in the case of Mizaji and Anr. (supra).",,,

28. From perusal of the records as well as the law laid down by Hon'ble the Supreme Court, it is evident that the prosecution has proved the case",,,

beyond reasonable doubt that the appellants are members of unlawful assembly, involved in roiting armed with deadly weapon and have committed the",,,

offence with common object. Thus, the finding recorded by the learned trial Court for commission of offence by the appellants under Section 148 &",,,

149 of IPC, are legal, justify and does not warrant any interference by this Court.",,,

29. Now this Court has to examine whether the conviction of the appellants under Section 395/397 of IPC is legal and justify. For better",,,

understanding, it is expedient for this Court to extract Sections 391, 395 & 397 of IPC, which read as under:-",,,

"Section 391-Dacoity. "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons",,,

conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every",,,

person so committing, attempting or aiding, is said to commit "dacoity."",,,

Section 395- Punishment for dacoity. "Whoever commits dacoity shall be punished with 1[imprisonment for life], or with rigorous imprisonment for",,,

a term which may extend to ten years, and shall also be liable to fine.",,,

Section 397- Robbery, or dacoity, with attempt to cause death or grievous hurt. "If, at the time of committing robbery or dacoity, the offender uses",,,

any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which",,,

such offender shall be punished shall not be less than seven years.",,,

30. Learned trial Court while convicting the appellants for commission of offence under Section 395 read with Section 397 of IPC has recorded its,,

finding at paragraph 42 of the judgment and recorded its finding that the injured persons have clearly deposed about involvement of the appellants in,,

crime in question, thus, they have committed offence under Section 395/397 of IPC and have forcibly taken carton of liquor from custody of the",,,

complainants who were public servants, therefore, the offence under Section 395/397 of IPC has been made out. Section 395/397 of IPC has come up",,,

for consideration before Hon'ble the Supreme Court in Ganesan Vs. State represented by Station House Officer AIR 2021 SC 5643, wherein it",,,

has been held at paragraphs 12.3 to 12.7, 15 & 16 as under:-",,,

"12.3 As per Section 390 IPC, for 'robbery' there is either theft or extortion. When in the committing of the theft, or in committing the theft",,,

or in carrying away or attempting to carry away property obtained by the theft, the offender, voluntarily causes or attempts to cause to any person",,,

death or hurt or wrongful restraint or fear of instant death or of instant hurt, or of instant wrongful restraint the theft can be said to be 'robbery'".,,

In similar situation the 'extortion' can be said to have committed 'robbery'. As per explanation to Section 390 IPC the offender is said to,,

be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.",,,

Section 391 IPC defines 'dacoity'. When five or more persons conjointly commit or attempt to commit a robbery, the accused can be said to",,,

have committed the 'dacoity'. As per Section 392 IPC whoever commits robbery shall be punished with rigorous imprisonment for a term,,

which may extend to ten years and shall also be liable to fine. However, if the robbery is committed on the highway between sunset and sunrise, the",,,

imprisonment may be extended to fourteen years. As per Section 393 IPC even an attempt to commit robbery is punishable with rigorous,,

imprisonment for a term which may extend to seven years with fine. As per Section 394 IPC if any person, in committing or in attempting to commit",,,

robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be",,,

punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. Section,,

395 IPC provides for punishment for 'dacoity'. Whoever commits dacoity shall be punished with imprisonment for life or with rigorous,,

imprisonment for a term which may extend to ten years and shall also be liable to fine.,,,

In case of dacoity with murder if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity",,,

every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years",,,

with fine. As per Section 397 IPC if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to",,,

any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less" ,,,

than seven years. Similarly, if, at the time of committing robbery or dacoity the offender is armed with any deadly weapon, the imprisonment with" ,,,

which such offender shall be punished shall not be less than seven years.,,,

12.4 On conjoint reading of the aforesaid provisions, commission of $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{r}\text{o}\text{b}\text{b}\text{e}\text{r}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ is sine qua non. The $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ can be said to be an" ,,,

exaggerated version of robbery. If five or more persons conjointly commit or attempt to commit robbery it can be said to be committing the" ,,,

$\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$. Therefore, the only difference between the $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{r}\text{o}\text{b}\text{b}\text{e}\text{r}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ and the $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ would be the number of persons involved in" ,,,

conjointly committing or attempt to commit a $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{r}\text{o}\text{b}\text{b}\text{e}\text{r}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$. The punishment for $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ and $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{r}\text{o}\text{b}\text{b}\text{e}\text{r}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ would be the same except that" ,,,

in the case of $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ the punishment can be with imprisonment for life. However, in the case of $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}$ with murder $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ the punishment" ,,,

can be with death also. However, in a case where the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause" ,,,

death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. Learned Counsel" ,,,

appearing on behalf of the appellants have rightly submitted that to bring the case within Section 397 IPC, the offender who uses any deadly weapon" ,,,

or causes grievous hurt to any person shall be liable for minimum punishment under Section 397 IPC. Section 392 and Section 390 IPC are couched in" ,,,

different words. In Sections 390, 394, 397 and 398 IPC the word used is $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{o}\text{f}\text{f}\text{e}\text{n}\text{d}\text{e}\text{r}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$. Therefore, for the purpose of Sections 390, 391, 392" ,,,

393, 394, 395, 396, 397, 398 IPC only the offender/person who committed robbery and/or voluntarily causes hurt or attempt to commit such robbery" ,,,

and who uses any deadly weapon or causes grievous hurt to any person, or commits to cause death or grievous death any person at the time of" ,,,

committing robbery or dacoity can be punished for the offences under Sections 390, 392, 393, 394, 395 and 397 and 398 IPC. For the aforesaid the" ,,,

accused cannot be convicted on the basis of constructive liability and only the $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{o}\text{f}\text{f}\text{e}\text{n}\text{d}\text{e}\text{r}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ who $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{e}\text{u}\text{s}\text{e}\text{s}$ any deadly weapon.... $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ can be" ,,,

punished. However, so far as Section 391 IPC $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ and Section 396 IPC $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg$ $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\tilde{\text{E}}\text{c}\text{d}\text{a}\text{c}\text{o}\text{i}\text{t}\text{y}$ with murder $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{a}},\text{c}$ is concerned an accused can be" ,,,

convicted on the basis of constructive liability, however the only requirement would be the involvement of five or more persons conjointly committing or" ,,,

attempting to commit a robbery $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg$ dacoity/dacoity with murder" ,,,

12.5. At this stage, the decision of this Court in Shri Phool Kumar (Supra) is required to be referred to. In the aforesaid decision this Court has" ,,,

observed and considered Sections 397 and 398 IPC and on interpretation of the aforesaid provisions, it is observed and held in paragraphs 5 to 7 as" ,,,

under: $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{A}}^5$. Section 392 of the Penal Code provides: $\tilde{\text{A}}\hat{\text{c}}\hat{\text{a}},\neg\hat{\text{A}}$ "Whoever commits robbery shall be punished with rigorous imprisonment for a term which" ,,,

may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the",,,

imprisonment may be extended to fourteen years. The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if,,,

at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous,,,

hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. The term,,,

"offender" in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly",,,

weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another,,,

offender who had not used any deadly weapon. In that view of the matter the use of the gun by one of the culprits whether he was accused Ram Kumar,,,

or somebody else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of",,,

Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of,,,

PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten,,,

or terrorize them. Any other overtact, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender",,,

within the ambit of Section 397 of the Penal Code. Section 398 uses the expression "armed with any deadly weapon" and the minimum,,,

punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This,,,

has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it,,,

attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not",,,

incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the",,,

use of the different words by the Legislature in the two sections viz. "uses" in Section 397 and "is armed" in Section 398. In our judgment the,,,

anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different,,,

expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision,,,

of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of",,,

the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was",,,

not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery. If the deadly weapon is,,,

actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it is clearly used. In the cases of",,,

Chandra Nathv. Emperor[AIR1932 Oudh 103] ;Nagar Singhv. Emperor[AIR 1933 Lah35] and Inder Singhv. Emperor[AIR 1934 Lah 522]some overt,,,

act such as brandishing the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been,,,

held to attract the provisions of Section 397 of the Penal Code.J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of Govind",,,

Dipaji More v. State [AIR 1956Bom 353] that if the knife was used for the purpose of producing such an impression upon the mind of a person that,,,

he would be compelled to part with his property, that would amount to "using the weapon within the meaning of Section 397.In that case also",,,

the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct,,,

view of the law and the restricted meaning given to the word "uses" in the case of Chand Singh [ILR (1970) 2 Punjand Har 108] is not correct.",,,

12.6. The aforesaid view has been subsequently reiterated by this Court in the case of Dilawar Singh (Supra) and in paragraphs 19 to21 it is observed,,,

and held as under:"19.The essential ingredients of Section 397 IPC areas follows:1. The accused committed robbery. 2. While committing robbery,,,

or dacoity (i) the accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person. 3.,,,

"Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the",,,

minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular,,,

accused who uses the deadly weapon or does any of the acts mentioned in the provision. But the other accused are not vicariously liable under that,,,

section for acts of the co-accused.20.As noted by this Court in Phool Kumarv. Delhi Admn. [(1975) 1 SCC 797 : 1975 SCC (Cri) 336 : AIR1975 SC,,,

905] the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender,,,

at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any,,,

deadly weapon. There is distinction between "uses" as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than,,,

merely being armed with deadly weapon.21.In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating,,,

terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be.",,,

[See Ashfaq v. State (Govt. of NCT of Delhi)[(2004) 3 SCC 116 : 2004 SCC (Cri) 687 :AIR 2004 SC 1253].",,,

12.7. Thus, as per the law laid down by this Court in the aforesaid two decisions the term "offender" under Section 397 IPC is confined to the",,,

"offender" who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract Section,,,

397 IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon. Even there is distinction and difference,,,

between Section 397 and Section 398IPC. The word used in Section 397 IPC is "uses any deadly weapon and the word used in Section 398,,,

IPC is "offender is armed with any deadly weapon". Therefore, for the purpose of attracting Section 397IPC the "offender who",,,

"uses any deadly weapon Section 397 IPC shall be attracted.,,,

In light of the above observations and the law laid down by this Court in the aforesaid two decisions the case on behalf of the accused in the present,,,

appeals is required to be considered. Even as per the case of the prosecution and even considering the evidence on record it can be seen that the,,,

present accused A1 and A3 are not alleged to have used any weapon. The allegation of use of any weapon was against Benny and Prabhakaran.,,,

Therefore, in absence of any allegations of use of any deadly weapon by the appellants herein "Accused Nos.1 and 3 Section 397 IPC shall not be",,,

attracted and to that extent the Learned Counsel appearing on behalf of the appellants "accused are right in submitting that they ought not to have,,,

been convicted for the offence punishable under Section 397IPC.,,,

15. Even otherwise there is no difference between Section 391/395and Section 397 IPC so far as sentence/punishment except the difference in case,,,

of Section 397 IPC the punishment shall not be less than seven years. Otherwise, the "robbery" and "dacoity" are sine qua non.",,,

"Dacoity" is nothing but an exaggerated version of "robbery" with a difference in number of accused. Therefore, also even in a case",,,

where the accused is not convicted for the offence under Section 397 IPC, still he can be punished under Section 395 IPC and no prejudice shall be",,,

caused to him as ultimately the prosecution has to prove the "robbery" and "dacoity" either for the offence punishable under Section 395,,,

IPC or under Section 397 IPC. However, to bring the case against the accused under Section 397 IPC, the prosecution has to prove one additional",,,

fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any",,,

person. Therefore,the case is made out under Section 391 IPC read with Section 395IPC. Despite the fact that the courts below convicted the",,,

accused under Section 397 IPC which is held to be unsustainable, in that case also if the case is made out under Section 391 IPC read with",,,

Section395 IPC, still they can be convicted for the offence punishable under Section 391 read with Section 395 IPC even without even altering the",,,

charge. As observed hereinabove in the present case, the learned trial court framed the charge against the accused for the offence under Sections",,,

395 and 397 IPC both.,,,

Name of

Appellant/Appeal No.,"Period of

incarceration

during trial", "Period of

incarceration

period after

conviction", "Total

Days

Shahid Imran

(CRA No. 64 of 2003)", "19.03.2000 to

17.05.2000

(60 days)", "From

06.01.2003 to

11.02.2003

(36 days)", 96 days

Kunwar Singh

(CRA No. 71 of 2003)", "01.04.2000 to

03.06.2000

(64 days)", "From 06.01.2003

to

05.02.2003

(30 days)", 96 days

Bhaskar Rao

(CRA No. 171 of 2003)", "19.03.2000 to

06.01.2003

(1023 days)", "From 06.01.2003

to

07.02.2003

(31 days)", 1054

days

Shakir Ahmad

(CRA No. 229 of 2003)", "27.03.2000 to

06.01.2003

(1015 days)", "06.01.2003 to

21.02.2003

(45 days)", 1060

days

Simap Akhat Qureshi (CRA

No. 229 of 2003)", "17.12.2000 to

06.01.2003

(736 days)", "06.01.2003 to

21.02.2003

(45 days)", "781

days

Bhaskar Patil

(CRA No. 229 of 2003)", "27.03.2000 to

19.08.2000,

18.09.2000 to

06.01.2003

(624 days)", "06.01.2003 to

21.02.2003

(45 days)", "669

days

Dhaniram @ Bhaddu Sahu

(CRA No. 229 of 2003)", "05.06.2000 to

19.06.2000

(15 days)", "06.01.2003 to

21.02.2003

(45 days)", 60 days