Reserved on:07.04.2026
Delivered on: 24.04.2026

2026:AHC:91865

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 1158 of 1989

Ram Palat and another

…..Appellant(s)

Versus

State

…..Respondent(s)

Counsel for Appellant(s)	:	Pardeep Narayan Pandey, Ramanand Pandey
Counsel for Respondent(s)	:	G.A.

Court No. - 75

A.F.R.

HON'BLE SAMIT GOPAL, J.

1. This appeal was initially preferred by Ram Palat/appellant no. 1 and Bigranchhu/appellant no. 2 against the judgment and order dated 3.5.1989 passed by Vth Additional Sessions Judge, Basti in Session Trial No. 418 of 1986, State of U.P. vs. Ram Palat and 6 others, by which the accused/appellants have been convicted and sentenced for the offences under Sections 323/149 I.P.C. to six months rigorous imprisonment and a fine of Rs.500.00 each and in default of payment of fine, they have been directed to undergo further one month imprisonment.

2. During pendency of this appeal the appellant no. 1/Ram Palat died and thus vide order dated 13.09.2022 passed by a co-ordinate Bench of this Court his appeal stood abated. The same thus survived only for the appellant no. 2/Bigranchhu.

3. The case in the present matter was committed to the Court of Sessions for accused Ram Palat,cv Paras Nath, Raja Ram, Suresh, Bigranchoo, Mata Badal and Bigrail @ Janardan under Sections 147, 307/149 and 379 I.P.C. During pendency of trial, accused Raja Ram died

and thus his trial stood abated (stated in para-2 of the impugned judgement and order).

4. Ram Palat, Paras Nath, Suresh, Bigranchoo, Mata Badal and Bigrail @ Janardan were tried wherein Paras Nath, Suresh, Mata Badal, Bigrail @ Janardan were acquitted of the charges levelled against them for offences under Sections 147, 307/149, 379 I.P.C. The accused Ram Palat and Bigranchoo were also charged for offences under Sections 147, 307/149, 379 I.P.C. and were acquitted of the said charges but were convicted for the offence under Sections 323/149 I.P.C. and sentenced therein as stated above.

5. An application dated 13.3.1987 was given by Ramdas Upadhyay to S.H.O. Police Station Kotwali, District Basti of which Kapil Muni Pandey was the scribe, alleging therein that his son Raghuvansh Upadhyay was Manager of Dayanand Vidyalay Malviya Road, Basti. He had a plot of land in Gidhi (Jigna), near petrol pump and besides his land, the land of Ram Palat was situated. With regards to dispute between him and Ram Palat regarding boundary of the land, his son Raghuvansh Upadhyay on 13.3.1986 at about 07.00 a.m. went to the land wherein on seeing the informant and his son, the accused armed with lathi and danda reached there and with an intention to murder his son on the exhortation of Ram Palat that “how could he dare to purchase the land besides his land and he may be murdered”, all the accused armed with lathi and danda assaulted him. The informant tried to save his son. The accused also assaulted the informant. On shouts by the informant and his son, Ramchandar, Virendra Bahadur Pandey, Hasnain and many other people reached there and saw the incident. Raghuvansh Upadhyay his son received serious injuries on his head, hands and legs and he also received injury. The accused have snatched and taken away a Reiko wrist watch, one gold ring of 8 ana, one silver ring with stone of 6 ana, Rs.735.00 kept in the pocket, one rexine bag containing papers of the land and papers of motorcycle, driving license, from the place one sofaset of bamboo, one big dari, two buckets have been taken away by

them. His report be lodged and action be taken. The said application is marked as Ext. Ka-1 to the records.

6. On the basis of the said application a First Information Report was lodged on 13.03.1986 at about 8.30 a.m. as Case Crime No. 115 of 1986, under Section 395 I.P.C., Police Station- Kotwali, District Basti. The Chik F.I.R. is Ext. Ka-3 to the records.

7. Raghuvansh Upadhyay was medically examined on 13.03.1986 at 09.00 a.m. by Dr. A.K. Srivastava, Medical Officer of District Hospital, Basti and was found to have received 8 injuries which are as under:-

" 1. Lacerated wound 4 cm x 1.5 cm x bone deep on the left side forehead 5cm above medial end of left eyebrow with traumatic swelling 10cm x 9cm on the middle of the forehead including front of head 3cm above the root of nose. Margins are irregular, bleeding present. Kept U.O. Adv. X-ray.

2. Lacerated wound 4cm x 1.5 cm x muscle deep on the right palm in between thumb and index finger, margins are irregular, bleeding present. Kept U.O. Adv. X-ray.

3. Contused swelling 15cm x all around the lower front of left forearm including front of wrist joint 18 cm below elbow joint. Kept U.O. Adv. X-ray. Red in colour.

4. Lacerated wound 1-1/2 cm x 1.5 cm skin deep on the palmer aspect on left palm 1cm above the root of index finger, margins are irregular, bleeding present.

5. Abraded contusion 4-1/2 cm x 3 cm on the front of left upper arm 2cm above elbow joint, read in colour.

6. Contusion 11cm x 3 cm on the outer aspect of right thigh 28cm above knee joint, red in colour.

7. Contusion 13cm x 2cm on the outer aspect of left thigh 18 cm above knee joint, red in colour.

8. Traumatic swelling 8cm x 7cm on the dorsum of left foot 4cm in front of ankle joint."

The doctor opined the injuries to be simple except for injury no. 1 to 3 which were kept under observation till X-ray. They were opined to be caused by hard and blunt object and duration was fresh. The injury report is Ext. Ka-2 to the records.

8. Site plan of the place of occurrence was prepared on 13.03.1986 the same is Ext. Ka-6 to the records.

9. One kurta and payjama and one jacket (sadri) of Raghuvansh Upadhyay stated to be blood stained, were taken into possession by the police on 29.03.1986. The recovery memo is Ext. Ka-9 to the records.

10. X-ray examination of Raghuvansh Upadhyay was done on 14.3.1986 and X-ray report was prepared by Dr. G.N. Prasad, Radiologist, District Hospital, Basti, who did not find any fracture on the right forearm but found a chip fracture of second metacarpal of left hand. Skull was not found to have received any fracture. Parts of body x – rayed were skull, left hand and right forearm. The said X-ray report is Ext. Ka-11 to the records.

11. Investigation concluded and a charge sheet no.85, dated 7.5.1986 was submitted under Sections 147, 325, 308, 379 I.P.C. against Ram Palat, Paras Nath, Raja Ram, Suresh, Bigranchoo, Mata Bada, Bigrail @ Janardan. The same is Ext. Ka-10 to the records.

12. Vide order dated 17.10.1987 the Special Judge, Basti, framed charge against all the seven accused under Sections 147, 307/149, 379 I.P.C. The accused were read and explained about the charge who pleaded not guilty and claimed to be tried.

13. The trial in the matter started in which Ramdas, the first informant was examined as P.W.-1, Raghuvansh Upadhyay the injured was examined as P.W.-2, Hasnain an alleged eye witness and driver of P.W.-1 and P.W.-2, was examined as P.W.-3, Dr. A.K. Srivastava, Medical Officer, who conducted medical examination of Raghuvansh, was examined as P.W.-4, Kapil Dev Singh Head Constable who transcribed the Chik F.I.R. and prepared corresponding G.D. was examined as P.W.-5, Shrinath Sub-Inspector the Investigating Officer of the matter was examined as P.W.-6 who concluded it and filed a charge sheet.

14. The accused in the statement recorded under Section 313 Cr.P.C. denied the prosecution case and stated the prosecution case to be false. They stated of their implication in the matter due to conspiracy. The situation of the plot of the informant and the accused was admitted by them. It is stated that the informant had got forged sale deed executed for a public pond besides which the land of the accused is situated and thus with the police the present false case has been lodged. They stated that the accused received injuries by falling on the ground and not by assault. In defense documents were filed. No defense evidence was led.

15. The trial court finding implication of the four accused as stated above to be false acquitted them of charges levelled against them and further acquitted the accused/appellants also for the charges framed against them but convicted them as aforesaid. The present appeal thus has been filed before this Court.

16. P.W.-1 Ramdas is the first informant of the present matter. He states that his land is situated in Gidhi near petrol pump besides which the land of Ram Palat, Paras Nath and others is situated. There is a dispute between them with regards to boundary of the land. On the day of the incident at about 7.00 a.m. Lekhpal and others were called for measurements for which he and his son Raghuvansh and driver Hasnain were waiting for the said officers. The disputed land is surrounded by wall on three sides. On that day for the officers he had arranged a sofa-

set, one dari, buckets etc. at the field. Ram Palat and Paras Nath have their house and hotel on one side of the land which is situated at a distance of about 10-12 kathha. When they reached the land, Ram Palat and his son Raja Ram, Paras Nath, Bigranchoo came there and immediately Ram Palat exhorted as to how they could purchase the land besides his land, after which they ran to assault Raghuvansh. They then ran towards the basti. After running about 2-4 kathha, Mata Badal, Suresh and Janardan came from the front and surrounded them and assaulted them with lathi and danda. His son was being assaulted. He ran to save him on which the accused caught hold of him and assaulted him with 2 fist blows and told him to keep away or else he would also be assaulted. His driver was also there. On shouts by him and his driver, Ramchandar and many other people of the village came there and saw the accused assaulting. During assault on his son, Bigranchoo took away his two rings (one gold and one silver), wrist watch, a bag containing papers of vehicle, money from the pocket of jacket and papers of land. From the disputed land they took away a sofa-set, dari, bucket, lota etc. When the accused ran away, then Kapil Muni came there to whom the informant stated about the incident and got an application written on which he signed and gave it to the police for lodging a report, the same was proved by him as Ext. Ka-1 to the records. His son was medically examined but since he did not receive any visible physical injury, he was not medically examined.

17. P.W.-2 Raghuvansh Upadhyay is the injured of the matter. He states that he had purchased land besides the land of Ram Palat in the name of his wife Smt. Girja Devi and sister Smt. Kamal Upadhyay. The land was occupied by Ram Palat and others and thus he was getting wall constructed around it. The accused stated that their land falls in the said area and had stopped construction of wall. On 09.03.1986 Ram Palat and others had broken the wall. Its report was given at the Police Station Kotwali. He had requested Lekhpal and Circle Officer to get the land measured and they had stated to come on 13.03.1986 for it. On 10.1.1986 he got an order on the basis of the sale deed for getting the

land measured. The same is being filed by him. On the day of incident at about 7.00 a.m. he was waiting for Lekhpal and other officers along with his father and driver Hasnain. At the said land a bucket, sofa-set, dari etc. were arranged for officers. In the meantime, the accused Ram Palat, Paras Nath, Raja Ram and Bigranchoo reached there and Ram Palat exhorted as to how they could dare to purchase the land besides his land and they ran to assault him on which he ran towards Kotwali, Basti. After running about 30-35 steps the accused Mata Badal, Bigrail @ Janardan and Suresh armed with lathi and danda came from the hotel of Ram Palat and surrounded him and assaulted him. In the meantime, the other accused came from behind and assaulted him with lathi and danda. His father ran to save him who was also assaulted with fist blows. Hasnain, Virendra Bahadur Pandey and many other persons had come there and saw the incident and intervened. Bigranchoo took away his rings, wrist watch, bag and money. They also took away the items kept in the field. He received many injuries. Kapil Muni came there who transcribed the application on the dictation of his father which was given at the police station. He was taken by the police for medical examination. He remained admitted in the hospital for about 5-6 days. He is filing papers of sale deed of the land.

18. P.W.-3 Hasnain is the driver of P.W.1 and P.W.2 and an alleged eye witness. He states of being present at the place of occurrence and states of the incident as that of P.W.-1 and P.W.-2.

19. P.W.-4 A.K. Srivastava is Medical Officer of District Hospital, Basti. He medically examined Raghuvansh Upadhyay and prepared the injury report, the details of which have already been stated above. He proves the said injury report as Ext. Ka-2 to the records. He states that the injuries could have been caused on 13.03.1986 at about 07.00 a.m. In his cross-examination he states that except for the injury no. 1 all other injuries were on non-vital parts of the body. The injury no. 1 was kept under observation and referred for X-ray but he does not know any further regarding it.

20. P.W.-5 Kapil Dev Singh is the Head Constable. He states of transcribing the Chik F.I.R. on the basis of written report given at the Police Station and also prepared the corresponding G.D. He proves the same as Ext. Ka-3 and Ext. Ka-4 respectively.

21. P.W.-6 Srinath, Sub-Inspector, is the Investigating Officer of the matter. He took up investigation and sent Raghuvansh Upadhyay for medical examination. He prepared site plan, recorded statements of the witnesses, took the clothes of the injured Raghuvansh Upadhyay in his possession and then filed a charge sheet against 7 accused which is Ext. Ka-10 to the records.

22. Heard Sri Pradeep Narayan Pandey, learned counsel for the appellant no. 2-Bighanchoo, Sri Ajay Singh, learned A.G.A.-I for the State and perused the records. The trial court records have been received, which are tagged with the present appeal which have also been perused.

23. Learned counsel for the appellant no. 2/Bigranchoo submitted as under:-

(A) The appellant has been falsely implicated in the present case.

(B) The appellants although were charged for offences under Sections 147, 307/149 and 379 I.P.C. but they were acquitted of the said charges and instead convicted for offence under Section 323/149 I.P.C.

(C) 04 other accused namely Paras Nath, Suresh, Mata Badal and Bigrail@Janardan who were also tried with the appellants for the charges under Sections 147, 307/149, 379 I.P.C, were acquitted of the said charges levelled against them.

(D) Acquittal of the said four accused and also of the accused-appellants for offences under Sections 147, 307/149, 379 I.P.C. is not under challenge and the same has attained finality.

(E) The present appeal has been preferred against conviction and sentence of the appellants for offence under Section 323/149 I.P.C.

(F) Conviction of the accused-appellants with the aid of Section 149 I.P.C. is totally illegal inasmuch as unlawful assembly must consist of minimum number of five persons for conviction with the aid of Section 149 I.P.C. In the present matter four accused have been acquitted and only two accused-appellants have been convicted under Section 323 I.P.C. with the aid of Section 149 I.P.C. which is illegal and they could not have been convicted with the aid of Section 149 I.P.C. since only two accused have been convicted.

(G) Conviction and sentence is illegal and cannot be sustained since it is with the aid of Section 149 I.P.C. and only two accused have been convicted and sentenced.

(H) The appeal be allowed and conviction and sentence of the surviving accused-appellant no. 2 Bigranchoo be set aside.

24. Learned A.G.A., per contra, opposed the submissions and the appeal and submitted as under:-

(A) The accused-appellants are named in the F.I.R. and also in the evidence as collected during investigation.

(B) One person namely Raghuvansh Upadhyay is an injured of the incident who has received injuries and thus his presence at the place of occurrence cannot be doubted.

(C) The accused are of the same village and previously known persons and thus there was no chance of false implication.

(D) Trial in the matter was of 7 accused out of which one Raja Ram died during pendency of the trial but as a matter of fact there were 7 accused in all and thus implication of Section 149 I.P.C. is proper.

(E) Trial court finding evidence to be beyond reasonable doubt in so far as it relates to the accused-appellants, convicted them and sentenced them as above.

(F) The appellants have been assigned specific role in the matter and even injuries as sustained could not have been false, fabricated or self - sustained injuries and thus conviction and sentence is well founded without any error.

(G) The present appeal is devoid of any merit and deserves to be dismissed.

25. After having heard learned counsels for the parties and perusing the records, the fact that stems out in the matter are that 7 accused were committed to the Court of Sessions for offences under Sections 147, 307/149, 379 I.P.C., out of 7 accused one accused Raja Ram died and thus his trial stood abated. Charges were framed vide order dated 17.10.1987 against 7 accused for offences under Sections 147, 307/149, 379 I.P.C. Thus after death of one accused during trial 6 (six) accused were tried for the said charges. Out of the said 6 accused, 4 accused namely Paras Nath, Suresh, Mata Bada, Bigrail@Janardan were acquitted of the charge levelled against them for offences under Sections 147, 307/149, 379 I.P.C. and two accused namely Ram Palat and Bigranchoo (who were the appellants before this Court) were also acquitted of the charges levelled against them for offences under Sections 147, 307/149, 379 I.P.C. but were convicted for offence under Sections 323/149 I.P.C. and sentenced for it.

26. For the purpose of discussions, it would be relevant to state herein that out of the said two convicted accused, who had preferred appeal before this Court, one of the appellant being Ram Palat (appellant no. 1) died during pendency of this appeal before this Court and thus his appeal stood abated vide order dated 13.09.2022. In so far as acquittal of the accused for charges under Sections 147, 307/34, 379 I.P.C. is concerned,

the same attained finality. Acquittal of 4 accused namely Paras Nath, Suresh, Mata Bada, Bigrail @ Janardan, is not under challenge. Even acquittal of the accused-appellants under the said charges is also not under challenge. The moot question thus which arises before this Court is as to whether only 02 (two) accused can be convicted by a court for an offence with the aid of Section 149 I.P.C. The prosecution case in the present matter is that seven (7) named persons were members of an unlawful assembly out of whom one (1) died during trial and then six (6) persons were tried out of whom four (4) have been acquitted and thus it raises a question as to whether after acquittal of four (4) persons it leaves open to the prosecution to rely upon Section 149 I.P.C. against the appellants (now only one (1) is surviving amongst the two (2)).

27. At this stage it would be relevant to revert back to Section 149 I.P.C. which deals with an offence, if committed by any member of an unlawful assembly in prosecution of common object of that assembly, or that such members of the assembly knew to be likely to be committed in the prosecution of that object wherein every person who at the time of committing of that offence, is a member of the same assembly, is guilty of that offence. Section 149 I.P.C. reads as under:-

> ***"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."*

28. Unlawful assembly as referred to in Section 149 I.P.C. is defined in Section 141 I.P.C. which reads as under:-

*"**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, 11[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."

29. Thus for constituting an unlawful assembly one of the main and important ingredient is that the said assembly should consist of 5 (five) or more persons.

30. The applicability of Section 149 I.P.C. has been discussed and explained by the Apex Court in the following cases:

A. ***Mohan Singh v. State of Punjab,*** **1962 SCC OnLine SC 82 (**a five Judge Bench of the Apex Court):-

> **"8.** The true legal position in regard to the essential ingredients of an offence specified by Section 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such 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. It would thus be noticed that one of the essential ingredients of Section 149 is that the offence must have been committed by any member of an unlawful assembly, and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made Section 141 inapplicable which inevitably leads to the result that Section 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.
>
> **9.** In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the criminal courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and

evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the Court can be convicted under Section 149 though the un-named and un-identified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so

not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and un-identified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the Court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under Section 149 is framed.

10. In this connection, we may refer to three representative decisions of this Court. In Dalip Singh v. State of Punjab, (1953) 2 SCC 36 this Court has held that before Section 149 can be applied, the Court must be satisfied that there were at least five persons sharing the common object. It has also been held that this does not mean that five persons must always be convicted before Section 149 can be applied. If the Judge concludes that five persons were unquestionably

present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good. In that case, this Court took the view that the evidence adduced by the prosecution did not satisfactorily prove the fact that the unlawful assembly was composed of five or more persons, and so, Section 149 was held to be inapplicable. In other words, on facts relevant for the purpose of applying Section 149 this case is similar to the case with which we are concerned in the present appeal.

11. In Bharwad Mepa Dana v. State of Bombay, (1960) 2 SCR 172 this Court was dealing with a case where twelve named persons were charged with having formed an unlawful assembly with the common object of committing the murder of three persons. At the trial before the Sessions Judge, seven of the named persons were acquitted and five were convicted under Section 302/149 and Section 302/34. On appeal, the High Court acquitted one of the convicted persons but maintained the conviction and sentence passed on the rest. The validity of the said order of conviction and sentence was challenged before this Court on several grounds, one of which was that Section 149 became inapplicable as soon as eight out of the twelve persons named as members of the unlawful assembly were acquitted. In rejecting this argument, this Court referred to the finding recorded by the High Court that the unlawful assembly in question consisted of ten to thirteen persons out of whom only four were identified and not the rest; and held that it was open to the High Court to come to such a finding. The argument which was urged against the validity of such finding was put alternatively in two forms. It was first contended that the prosecution case must be confined to the charge framed against the accused persons and the charge in the Sessions Court referred to twelve named persons as composing the unlawful assembly, and so, as soon as eight of them were acquitted, Section 149 became inapplicable. It was also urged that in coming to the conclusion that the unlawful assembly consisted of ten to thirteen persons, the High Court was making out a case of a new unlawful

assembly and that was not permissible in a criminal trial. Both these arguments were repelled by this Court and it was held that there was no legal bar which prevented the High Court from coming to the conclusion that apart from the persons who were acquitted and excluding them, evidence adduced by the prosecution showed the presence of more than five persons who composed the unlawful assembly. The assembly about the existence of which the High Court has made a finding is not a new assembly but the same assembly as alleged by the prosecution. The only difference is that according to the charge, all the members of the assembly were alleged to be known, whereas on the evidence the High Court has reached the conclusion that the identity of all the members of the assembly has not been established, though the number of the members composing the assembly is definitely found to be five or more. It is on this reasoning that this Court confirmed the conviction of the appellants under Section 302/149. Thus, this decision illustrates how Section 149 can be applied even if two or more of the persons actually charged are acquitted.

12. The same principle has been enunciated by this Court in Kartar Singh v. State of Punjab, AIR 1961 SC 1787. According to this decision, it is only when the number of alleged assailants is definite and all of them are named and the number of persons found to be proved to have taken part in the incident is less than five, that it cannot be held that the assailants' party must have consisted of five or more persons. It is true that having stated this position, this Court has also observed that the fact that certain persons are named in the charge as composing an unlawful assembly, excludes the possibility of other persons to be in the said assembly especially when there is no occasion to think that the witnesses who named all the accused could have committed mistakes in recognising the assailants. It is on this observation that Mr Raghubir Singh relies. We, however, think that it would be unreasonable to read this statement as laying down an unqualified proposition that whenever persons named in the charge are alleged to

constitute an unlawful assembly it is legally not permissible to the prosecution to prove during the trial that persons in addition to those named in the charge also were members of the said assembly. In other words, what this observation intends to suggest is that where persons named in the charge are alleged to compose an unlawful assembly, the Court of facts would be slow to come to the conclusion that persons other than those named in the charge were members of the said assembly. If, however, it appears on evidence that persons not so named in the charge were members of the unlawful assembly, there is no legal bar which prevents the courts from reaching that conclusion. This position can and does arise where some of the persons composing the unlawful assembly are not identified by the witnesses and they are not named. In fact, the decision in the case of Kartar Singh itself shows that this Court rejected the appellants' contention that their conviction under Sections 302 and 307, read with Section 149 was invalid. Therefore, we see no inconsistency between the observations made in this case and the earlier decisions to which we have just referred. The result is that in the circumstances of the present case, the appellants are entitled to contend that Section 149 cannot be invoked against them.**"**

B. ***Subran v. State of Kerala*** **: (1993) 3 SCC 32:-**

"8. Admittedly, none of the accused persons individually had been charged for the substantive offence of murder under Section 302 IPC. In the trial court all the six accused were charge-sheeted for an offence under Section 302 read with Section 149 IPC. Other charges were also framed against the accused but only with the aid of Section 149 IPC. After the acquittal of the two accused, could the High Court convict appellant 1 for the substantive offence under Section 302 IPC (with which he had not been charged) and the appellants 2 to 4 for an offence under Sections 326/149 IPC?

9. Section 141 IPC defines an unlawful assembly to be *an assembly of five or more persons*, where the common object of the persons comprising that assembly is to commit any of

the acts enumerated in the five clauses of that Section. Section 149 IPC reads as under:

"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."

10. A combined reading of Section 141 and Section 149 IPC (supra) show that an assembly of *less* than five members is *not* an unlawful assembly within the meaning of Section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of Section 149 IPC. The effect of the acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises less than five members is not an *unlawful assembly* within the meaning of Section 141 IPC. The existence of an unlawful assembly is a necessary postulate for invoking Section 149 IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of Section 149 IPC cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under Section 149 IPC. Consequently, the conviction of appellants 2 to 4 for an offence under Sections 326/149 IPC cannot be sustained and the same would be the position with regard to the conviction of all the appellants for other offences with the aid of Section 149 IPC also.

****

14. Coming now to the case of the other three appellants. Since, their conviction for an offence under Section 326 with the aid of Section 149 is not sustainable in law, we set aside their conviction under Sections 326/149 IPC. They

would be responsible for their individual acts. The injuries caused by Rajan and Preman appellants 2 and 3, were with a torch, iron rod and a cycle chain. None of the injuries caused by them according to the post-mortem report were on any vital part of the body, though some of the injuries caused by blunt weapons were grievous in nature. We, therefore, convict each of the two appellants Rajan and Preman, for an offence under Section 325 IPC and sentence them to suffer rigorous imprisonment for two years each.**"**

C. ***Mahendra v. State of M.P. :*** **2022 SCC OnLine SC 1348:-**

"12. It may be noticed that the essential ingredients of Section 149 are that the offence must have been committed by any member of an unlawful assembly, and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. To say in other words, it is an essential condition of an unlawful assembly that its membership must be five or more.

13. At the same time, it may not be necessary that five or more persons necessarily be brought before the Court and convicted. Less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and other numbering in all more than five composed an unlawful assembly, these others being persons not identified and unnamed.

14. However, in the instant case, the persons are specifically named by the complainant and against them, after the investigation, charge-sheet was filed and all the 20 accused persons faced trial.

15. It was not the case of the prosecution that there are other unnamed or unidentified persons other than the one who are charge-sheeted and faced trial. When the other co-accused persons faced trial and have been given benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other persons along

> with the appellant in causing injuries to the victim. In the facts and circumstances, it was as such not permissible to invoke Section 149 IPC.**"**

31. In the present matter although as per the prosecution case at the inception at the time of lodging of the F.I.R. 07 (seven) persons were made accused. Charge sheet was submitted against all the seven persons. During pendency of trial one of the said accused died (however this does not make any difference in the nomenclature of the incident). In the trial four (04) accused were acquitted of the charges levelled against them. Two appellants who had preferred this appeal were also acquitted of the charges levelled against them but were convicted for an offence under Section 323 I.P.C. with the aid of Section 149 I.P.C. This appeal thus has been preferred by them.

The several categories of cases which come before the criminal courts for their decision with regard to the essential ingredients of an offence specified by Section 149 I.P.C. can be listed as under:

A. By any member of an unlawful assembly,

B. It is only where five or more persons constituted an assembly that an unlawful assembly is born,

C. The common object of the persons composing that assembly are satisfied.

D. Five persons or more were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons or more.

E. As soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

F. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them.

G. The other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable.

H. In order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the Court can be convicted under Section 149 though the un-named and un-identified persons are not traced and charged.

I. The prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were

others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.

J. The failure to refer in the charge to other members of the unlawful assembly un-named and un-identified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the Court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified.

32. The acquittal of four accused rendered Section 149 I.P.C. inapplicable in this case as only two accused were convicted.

33. In the present matter since no such situation arose warranting charging of the accused under Section 149 I.P.C. and none of the characters are involved this Court holds that the accused-appellants cannot be convicted with the aid of Section 149 I.P.C. as only two (2) accused were convicted by the trial court. This Court thus finds that the impugned judgement and order is totally illegal and such the same is hereby set aside.

34. The appeal is allowed.

35. The surviving accused-appellant- **Bigranchhu** is acquitted of the charges levelled against him. He is on bail. His bail bond is cancelled and sureties are discharged.

36. Registrar (Compliance) to send a copy of this judgement and order as well as Trial Court Records to the court concerned forthwith for information and necessary action.

(Samit Gopal, J.)

April 24, 2026
Naresh.