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ADALAT PANDIT &amp; ANR.

A

v.

STATE OF BIHAR

(Criminal Appeal No. 716-717 of 2008)

MAY 14, 2010

B

**[V. S. SIRPURKAR AND DR. MUKUNDKAM SHARMA,  
JJ.]**

*Penal Code, 1860 – ss. 147, 148, 302, 302 r/w s. 34, 109 and 149 – Murder – Enmity between the parties as regard ownership and possession of mango orchard – Quarrel over plucking of mangoes – Eleven accused persons formed unlawful assembly and attacked complainant and his two sons – Gun shots fired at sons, brutally attacked by spears and body dragged to a certain distance resulting in instant death – Conviction of 11 accused u/ss. 147, 148, 302, 302 r/w s. 34, 109 and 149 and s. 27 of Arms Act by trial court – Conviction of 9 accused persons upheld by High Court – On appeal, held: Prosecution failed to prove that A-1, A-5 and A-9 had common intention to commit the murder – Thus, given benefit of doubt and are acquitted – A-2, A-3, A-4, A-6, A-7 and A-10 were members of unlawful assembly – There was active participation by them – A-4 had actually fired guns – Specific overt acts attributed to A4, A-7 and A-10 by all the witnesses – Evidence of eye-witnesses, though were partisan, is to be accepted – Plea of alibi of A 3 and A-10 rightly rejected by courts below – Thus, conviction of A-2, A-3, A-4, A-6, A-7 and A-10 upheld – Arms Act, 1959 – s. 27.*

**According to the prosecution case, there was a fierce enmity between the accused persons and the complainant on account of ownership and possession of the mango orchard. On the fateful day, the accused persons formed an unlawful assembly and committed the murder of SN and his brother PN in pursuance of their**

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A common object. Eleven accused persons went to the mango orchard of the complainant for forcibly plucking mango fruits. When the complainant alongwith his two sons-SN and PN, protested against the act of accused persons in plucking the mangoes, accused persons  
B attacked the three persons using fire arms and spear, resulting in the death of SN and PN. The accused persons were convicted for various offences punishable under ss. 147, 148, 302, 302 rw s 34 as also rw s. 109 and 149 IPC and s. 27 of the Arms Act. A 4 died during the trial itself and A 8 was acquitted by the High Court giving him benefit of the Juvenile Justice Act. Hence these  
C appeals by the nine accused persons.

Allowing the appeals of A-1, A-5 and A-9 and dismissing that of A-2, A-3, A-4, A-6, A-7 and A-10, the  
D Court

HELD: 1.1 After appreciating the evidence of PW-2, PW-4, PW-5, PW-7 and PW-8, the High Court recorded a finding that the genesis of the incident lied only in the  
E fact that when the accused persons insisted on plucking the mangoes, the same was objected to by the complainant and his sons. The High Court is correct in recording the finding that it is on that point of time when the exchange of words took place between the parties that the seeds of the further incident were sown.  
F Ultimately, the High Court recorded the finding that the identity of the accused persons was fully established by the prosecution witnesses and that all the appellants had gone to the place of occurrence alongwith their respective arms as members of an unlawful assembly  
G with a common object of asserting right of harvesting the mango crops in the orchard of the informant and were prepared for meeting any resistance with the help of arms carried by the accused persons and that was the common object behind the firing on the two deceased,  
H who met their instantaneous death. It was on this basis

that the High Court proceeded to convict the accused persons against whom there was specific evidence. [Para 7] [91-G-H; 92-A-D] A

1.2 It cannot be said that A-1, A-5 and A-9 had the intentions to commit the murder and they cannot be said to be the members of the unlawful assembly on account of their mere presence at the place of occurrence and cannot be convicted of the offence u/s. 302/149 IPC. The evidence of the witnesses is seen closely. These three accused persons were undoubtedly referred to and all that has been stated by PW-2 is that A-5 was carrying a *lathi*. The witness has not referred to even A-1 and A-9 having any arms. As regards PW-4, he attributed A-1 and A-5 carrying a *lathi* while A-9 carrying a *bhala* (spear). However, did not refer to any overt act on part of these accused persons or use of the same by them. PW-5 mentioned about A-1 and A-2 having *lathi*. He made a general statement that all other accused persons were holding a *bhala*. However, PW 5 did not refer to any overt act on the part of A-1, A-5 and A-9. PW-6 turned hostile. PW-7 also stated that A-1, A-5 and A-9 were carrying *lathi*. The story is no different in respect of PW-8. His evidence is extremely general. Some of the witnesses did not refer to the exhortation given by the dead accused. At least insofar as the present accused persons are concerned, the role played by A-1, A-5 and A-9 appears to be that of the bystanders. There was a dispute between the parties on account of the possession of the field. Even the court litigation was on between the parties. Therefore, merely because the accused persons went to the field carrying *lathis* and arms, at least till such time when the exchange of words started and the shot was fired, it cannot be said that the whole assembly had become unlawful. The assembly would become unlawful when the dead accused allegedly gave the firing orders to A-4 and who in pursuance of that, fired on SN. Undoubtedly, these A- B  
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A 1, A-5 and A-9 acted as mere mute bystanders, as there is no evidence also that they took part in the exchange of words. Under such circumstances, it would be difficult to attribute a common object to A-1, A-5 and A-9 on account of their presence even if they were armed with *lathis*. There is no evidence about A-5 carrying a spear. Under such circumstances, benefit of doubt must go to these three accused persons. They would be entitled to acquittal as the prosecution failed to prove that they had a common intention to commit murder. [Para 8] [92-E-H; 93-A-G]

1.3 A-2 and A-6 had only dragged the body of PN. That would certainly amount to the active participation of these two accused persons. Their continuance even after the firing in doing overt act of dragging the body from the field would certainly make them the part of the unlawful assembly, which had the common object of eliminating SN and PN. The part played by these two accused persons of dragging the body of PN is clearly referred to by the witnesses. Thus, it cannot be said that A-2 and A-6 would also be entitled to be acquitted for the same reasons as A-1, A-5 and A-9 have been acquitted for. They were the members of the unlawful assembly. Similar is the case as regards A-4 who had actually fired the guns, A-7 and A-10. The evidence is against them as accepted by both the Courts below. They were certainly the members of the unlawful assembly and specific overt acts have been attributed to them by almost all the witnesses. As regards A-4, all the witnesses are unanimous that he was the one who had fired. [Paras 9 and 10] [94-A-F]

1.4 A-7 and A-10 took active part in assaulting PN while the body of PN was dragged by A-2 and A-6. The witnesses specifically attributed the overt acts regarding assaulting of PN to these accused persons. The evidence led on behalf of the prosecution in respect of these

accused persons, which has been accepted by both the Courts below is satisfactory and there is no reason to disbelieve the witnesses who have attributed specific overt acts as regards the assault on PN to these accused persons. Insofar as A-10 is concerned, the plea was that of *alibi*, which plea has been rejected by the trial court and the High Court. Very heavy reliance was placed on the evidence of DW-20, DW-21, DW-22, DW-25 and DW-26 for his alibi. The plea of alibi by A-10 cannot be accepted and has to be disbelieved as has been done by the trial court and the appellate Court. The evidence of the prosecution witnesses, more particularly the eye-witnesses, who had specifically attributed an active role to this accused person is accepted. The appeals of A-7 and A-10 are dismissed holding that they were members of the unlawful assembly. Therefore, the judgments of the trial court and the appellate court convicting A-7 and A-10 with the aid of s. 149 IPC is upheld. [Para 11] [94-G-H; 95-A-B; 96-A-C]

1.5 A-3 was mentioned practically by all the witnesses. All the eye-witnesses referred to the specific overt act of A 3 of following SN and hitting him with spear on his back. PW-2 is very specific in his evidence insofar as the said act of the accused was concerned. Some cross-examination was directed to suggest that A-3 would have no reason or motive to take part in the assault. However, the main claim in the evidence of PW-2 regarding the overt act remained unshaken. Similar is the story of PW-4. The cross-examination of PW-4 is also of no consequence insofar as the main incident is concerned. PW-5 also repeated the same story without any substantial challenge to this version in the cross-examination. A typical suggestion was given to all the witnesses as if A-3 had issued a warrant for lagan (tax) on these witnesses. PW-7 also repeated the same story and there is very little or no cross-examination on the

A main incident. In the cross-examination of PW 7 itself, the  
same stereotyped suggestion was given that A-3 had  
issued a lagaan against the father of PW 7, thereby  
suggesting an enmity. PW-8 is the only exception, who  
though referred to the presence of A-3 duly armed, did  
B not refer to the overt act of A-3 of piercing SN with a  
spear. Much importance will not be attached to the  
evidence of PW 8 in view of the evidence of the other eye-  
witnesses. The evidence of the eye-witnesses in respect  
C of the spear injuries on SN and PN is further  
corroborated by the medical evidence inasmuch as both  
SN and PN had suffered penetrating wounds and incised  
wounds in addition to the wounds caused by pellets. The  
Post Mortem Report was prepared by Dr. S (dead) as  
proved by Dr. J, who has proved all the injuries which are  
D to be found in the Post Mortem Report. Therefore, there  
is very little scope for the argument that A-3 was not a  
part of the unlawful assembly and had not caused the  
wound to SN with spear after he was fired at. It cannot  
be said that A-3 was not concerned and has been falsely  
E implicated. [Para 12] [96-D-H; 97-A-E]

1.6 The witnesses-PW 14, DW 1 to 5, RS, DW 7 to 11,  
DW 16 and DW 17 were all interested witnesses since  
they were the colleagues of A-3. The distance between  
the spot where the incident took place and the place  
F where the accused A-3 claimed to have been present is  
extremely short. Admittedly, it is 3 or 4 kilometers. When  
all the witnesses claimed that the work of levy began  
from 6 O' clock in the morning, it is a very difficult claim  
to be accepted. In the first place, there is nothing proved  
G by way of documentary evidence to show that the levy  
of wheat was to be collected at the house of DW-7 or that  
the levy was proposed to be held at village DP on that  
day. It cannot be said that there would be no  
documentary evidence, particularly if it was an exercise  
H of levy. There is bound to be some records somewhere.

The receipts, which have been filed by the witnesses are not impressing because there is nothing on those receipts as to when they were actually prepared. In fact, the evidence of PW-14 could not be demolished when he said that he had reached the place where the levy work was going on and it was at about 1 O' clock that A-3 arrived there alongwith others. The trial court thoroughly discussed this evidence and held it not to be reliable. In view of the very short distance of 4 kilometers between the two places i.e. the place of incident M and the village DP, the evidence appears to be extremely doubtful. The evidence of DW-1, Deputy Superintendent of Police is not impressing as nothing would turn open the so-called report prepared by him in view of the direct evidence led by the prosecution. The trial court and the appellate court were right in rejecting the defence of alibi. [Para 16] [100-D-H; 101-A-B]

1.7 In the instant case, the evidence of the eye-witnesses, though they were somewhat partisan, was liable to be accepted, excepting against the three accused persons A-1, A-5 and A-9. Hence they are acquitted. [Para 17] [102-B-C]

*Satbir Singh & Ors. Vs. State of Uttar Pradesh 2009 (13) SCC 790; Maranadu & Anr. Vs. State by Inspector of Police, Tamil Nadu 2008 (16) SCC 529; Masalti Vs. State of U.P. AIR 1965 SC 202; Yunis alias Kariya Vs. State of M.P. 2003 (1) SCC 425; Ramesh & Anr. Vs. State of Uttar Pradesh etc. etc. 2009 (15) SCC 513; Akhtar & Ors. Vs. State of Uttaranchal 2009 (13) SCC 722; Ram Dular Rai & Ors. Vs. State of Bihar 2003 (12) SCC 352; Munshi Prasad & Ors. Vs. State of Bihar 2002 (1) SCC 351- referred to.*

#### Case Law Reference:

2009 (13) SCC 790	Referred to.	Para 17	
2008 (16) SCC 529	Referred to.	Para 17	H

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A	AIR 1965 SC 202	Referred to.	Para 17
	2003 (1) SCC 425	Referred to.	Para 17
	2009 (15) SCC 513	Referred to.	Para 17
B	2009 (13) SCC 722	Referred to.	Para 17
	2003 (12) SCC 352	Referred to.	Para 17
	2002 (1) SCC 351	Referred to.	Para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

C Nos. 716-717 of 2008.

From the judgment and order dated 14.11.2007 of the High Court of judicature at Patna in Criminal Appeal No. 296 and 344 of 2001.

D WITH

Crl. A. Nos. 119-122 of 2009

Crl. A. No. 833 of 2008 and

E Crl. A. No. 1907 of 2009.

F Nagendra Rai, S.B. Sanyal, Shantanu Sagar, Smarhar Singh, Abhishek Singh, T. Mahipal, Braj K. Mishra, Abhishek Yadav, Aparna Jha, Tanushree Sinha, M.P. Jha, Ram Ekbal Roy Harshavardhan Jha, Bhattacharjee and Kumud Lata Das (for Gopal Singh) for the appearing parties.

The Judgment of the Court was delivered by

G **V.S. SIRPURKAR, J.** 1. This judgment will dispose of Criminal Appeal Nos. 716-717 of 2008, Criminal Appeal Nos. 119-122 of 2009, Criminal Appeal No. 833 of 2008 and Criminal Appeal No. 1907 of 2009. All these appeals are against the common judgment passed by the High Court, whereby the appeals filed by the appellants herein came to be

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dismissed. Initially, as many as 10 accused persons came to be tried for the offences punishable under Sections 147, 148, 302, 302 read with Section 34 as also read with Sections 109 and 149 of the Indian Penal Code ("IPC" for short hereinafter) and Section 27 of the Arms Act. The prosecution alleged that on the fateful day, i.e. 5.7.1973, at about 7 a.m., the accused persons formed an unlawful assembly and committed the murder of one Shambhu Nath Singh and his brother Prabhu Nath Singh, both deceased persons, in pursuance of their common object. The First Information Report (FIR) was lodged by one Bajinath Singh and it was alleged therein that one Thakur Ojha (A-4), Patiram Ojha (now dead), Akhilesh Ojha (A-5), Jitendra Singh (A-6), Raj Nath Singh (A-7), Gorakh Nath Singh (A-3), Keshav Singh (A-9), Bachcha Singh (A-8), Adalat Pandit (A-10), Thakur Singh (A-1) and Ram Pravesh Singh (A-2) went to his Mango orchard standing on Plot No. 4905, situated in Mauza – Mohammadpur, P.S. Gorkha, Distt. Saran, which was situated at a distance of about three furlong from village for forcibly plucking mango fruits.

2. It was further stated by Bajinath Singh that he alongwith his two sons namely Shambhu Nath Singh and Prabhu Nath Singh went to his orchard and protested against the act of the accused persons in plucking the mangoes. It was stated that Pati Ram Ojha (the dead accused) ordered Thakur Ojha (A-4) to attack on those three persons, on which Thakur Ojha (A-4) fired two shots aiming at Shambhu Nath Singh, who was injured due to fire and tried to run away towards his house, but fell on the ground at some distance in the nearby orchard of one Arjun Singh. It was then contended that Gorakh Nath Singh (A-3) went after him and gave spear blow on the back of Shambhu Nath Singh while Shambhu Nath Singh was still lying on the ground. In the meantime, Thakur Ojha (A-4) again fired two shots on the elder son of Bajinath namely Prabhu Nath Singh, who also fell on the ground in the orchard of Arjun Singh. After he fell down, Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10) rushed to Prabhu Nath Singh and indiscriminately

A assaulted him by means of spear and his body was dragged  
by Raj Nath Singh (A-7) and Ram Pravesh Singh (A-2). It was  
further stated in the FIR that on seeing this, Baijnath Singh  
asked himself to be killed; however, Patiram Ojha (dead  
accused) said that it was useless to cause the death of an old  
B person like him and that he should better be left to flee. It was  
suggested that one Laxman Singh (PW-8), Arjun Singh,  
Bhrigunath Singh (PW-7), Ram Prasad Singh (PW-4) and  
others were present on the spot and had seen the entire  
C incident. There was a fierce enmity between the two sides  
though they were related to each other, on account of ownership  
and possession of the said orchard and a civil dispute was  
pending in the Court of 3rd Additional District Judge, Saran.

3. The FIR was recorded by A.S.I. Abdul Malik of Garkha  
Police Station and the investigation ensued. The Investigating  
D Officer arrested the dead accused Patiram Ojha, Thakur Ojha  
(A-4), Jitendra Singh (A-6), Raj Nath Singh (A-7), Keshav Singh  
(A-9), Bachcha Singh (A-8), Thakur Singh (A-1) and Ram  
Pravesh Singh (A-2) from the house of Raj Nath Singh (A-7).  
The Investigating Officer effected the search of the house and  
E recovered a double barrel gun kept on the cot under the bed.  
Two spears were also recovered during the investigation, the  
blades of which were stained with blood. The seizures were  
effected and arrests were made. In the meantime, one  
Shantruhan Singh (PW-15), the Officer-in-charge, Garkha  
F Police Station reached the spot and took charge of the  
investigation from A.S.I. Abdul Malik. He carried out the further  
investigation; effected Seizure Memo and Spot Panchnama etc.  
and recorded the statement of the witnesses. On 21.9.1974,  
he made over the charge of investigation to one S.D. Ghos,  
G who made over the investigation to one Madhav Kant and it was  
Madhav Kant who submitted the chargesheet against, in all, 11  
accused persons (including the dead accused Patiram Ojha).  
The accused persons were committed to Sessions Court. The  
Sessions Court framed the charges. The accused having  
H abjured the guilt, the trial proceeded and after the trial was over,

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the accused persons came to be convicted for the various offences i.e. offences punishable under Sections 147, 148, 302, 302 read with Section 34 as also read with Sections 109 and 149 IPC and Section 27 of the Arms Act. Patiram Ojha (the dead accused) was not convicted as he died during the trial itself. Out of all these accused persons, Thakur Singh (A-1) and Ram Pravesh Singh (A-2) were held guilty by the Sessions Court for the offence punishable under Section 147 while the remaining 8 accused persons were held guilty under Section 148 IPC. Thakur Ojha (A-4) and Gorakh Nath Singh (A-3) were convicted for the substantive offence under Section 302 IPC for committing the murder of Shambhu Nath Singh while Thakur Ojha (A-4), Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10) were convicted for the offence punishable under Section 302 IPC for causing the death of Prabhu Nath Singh. The remaining 5 accused persons namely Akhilesh Ojha (A-5), Jitendra Singh (A-6), Keshav Singh (A-9), Ram Pravesh Singh (A-2) and Thakur Singh (A-1) were booked under Section 302 read with Section 149 IPC. Separate appeals were filed by these accused persons before the High Court. While the appeals of the other accused persons were dismissed, the appeal filed on behalf of Bachcha Singh (A-8) was allowed, giving him the benefit of the provisions of Juvenile Justice Act. The other appeals were dismissed and that is how 9 accused persons have come up before us in the present appeals.

4. It is significant to note that Gorakh Nath Singh (A-3) had raised a plea of alibi and examined as many as 11 defence witnesses in support of that plea. That plea was of course rejected by the Trial Court. There were some defence witnesses examined on behalf of Adalat Pandit (A-10) also, raising the plea of alibi even in his case. But even that contention was rejected by the Trial Court. The other accused persons had merely made a plea of denial and their defence was also rejected. The High Court has taken stock of evidence of all the witnesses in great details. In fact, the evidence of practically

A each witness of the prosecution as well as the defence was examined.

B 5. Shri Nagendra Rai, Learned Senior Counsel has appeared for the appellants Thakur Singh (A-1), Ram Pravesh Singh (A-2), Akhilesh Ojha (A-5), Jitendra Singh (A-6) and Keshav Singh (A-9) in Criminal Appeal Nos. 119-122 of 2009 and addressed on various aspects of the matter. Similarly, Shri S.B. Sanyal, Learned Senior Counsel has appeared for the appellant Gorakh Nath Singh (A-3) in Criminal Appeal No. 833 of 2008 and addressed on various aspects, while Shri M.P. C Jha, Shri Ram Ekbal Roy, Shri Harshvardhan Jha and Shri Bhattacharjee, Learned Counsel (acted as Amicus Curiae) addressed on behalf of other appellants/accused persons, namely Thakur Ojha (A-4), Raj Nath Singh (A-7) and Adalat Pandit (A-10). Ms. Kumud Lata Das and Shri Gopal Singh, D Learned Counsel have appeared for the State in all the cases and supported the conviction of the accused persons. We will, therefore, consider the matter as per the appeals.

E 6. Shri Nagendra Rai, learned Senior Counsel, who represented the appellants Thakur Singh (A-1), Ram Pravesh Singh (A-2), Akhilesh Ojha (A-5), Jitendra Singh (A-6) and Keshav Singh (A-9) in Criminal Appeal Nos. 119-122 of 2009, addressed firstly on behalf of Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). The learned Senior Counsel was F at pains to point out that no witness has attributed any overt act to any of these accused persons and that they were mere mute bystanders. Shri Rai invited our attention to the evidence of the eye-witnesses, they being Sukeshwar Singh (PW-2), Ram Prasad Singh (PW-4), Badrinath Singh (PW-5), Bhrigunath Singh (PW-7) and Laxman Singh (PW-8). He was G at pains to point out that the High Court has specifically referred to each of these witnesses individually considering their evidence who were almost unanimous that they saw eleven accused persons when they came to the orchard of the informant (Baijnath Singh). The witnesses stated that Baijnath H

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Singh alongwith his two sons Shambhu Nath Singh and Prabhu Nath Singh had come a little later in the said orchard and the accused persons who wanted to pluck the mangoes, were stopped from doing so by Baijnath and in that the exchange of hot words took place. The witnesses claimed that thereafter, on the orders of Patiram Ojha (the dead accused), Thakur Ojha (A-4) fired two shots with his gun hitting Shambunath Singh who ran towards the West and fell down in the orchard of Arjun Singh. Thereafter, he was assaulted by Gorakh Nath Singh (A-3) on the back with a spear. When Prabhu Nath Singh ran towards Shambhu Nath Singh, Thakur Ojha (A-4) again fired two shots on Prabhu Nath Singh and he also fell down in the orchard of Arjun Singh, whereafter, he was assaulted by Raj Nath Singh (A-7), Bachcha Singh (A-8) and Adalat Pandit (A-10). It is to be seen that beyond this version, nothing more has come in the evidence. It is further to be seen that the witnesses Ram Prasad Singh (PW-4), Badrinath Singh (PW-5), Bhrigunath Singh (PW-7) and Laxman Singh (PW-8) had seen the occurrence. The witnesses then saw the accused persons running away from the spot towards the house of Raj Nath Singh (A-7). Almost same story was repeated by Ram Prasad Singh (PW-4) who claimed that he was present, as he had to cut bamboos from the place which was near the orchard of the informant Baijnath Singh. He also admitted about the litigation between the parties. There was omission about Thakur Ojha (A-4) having ordered for dragging the dead body to the orchard of the informant.

7. Badrinath Singh (PW-5) also claimed that he had accompanied Ram Prasad Singh (PW-4) for cutting bamboos and he has also given almost the same version. Bhrigunath Singh (PW-7) and Laxman Singh (PW-8) also have repeated the same story but without attributing any overt act to the aforementioned three accused persons, namely, Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). After appreciating the evidence of these witnesses, the High Court recorded a finding in Para 20 of its judgment that the genesis

A of the incident lied only in the fact that when the accused persons insisted on plucking the mangoes, the same was objected to by the complainant and his sons. The High Court, undoubtedly, is correct in recording the finding that it is on that point of time when the exchange of words took place between  
 B the parties that the seeds of the further incident were sown. Ultimately, the High Court recorded the finding that the identity of the accused persons was fully established by the prosecution witnesses and that all the appellants had gone to the place of occurrence alongwith their respective arms as  
 C members of an unlawful assembly with a common object of asserting right of harvesting the mango crops in the orchard of the informant and were prepared for meeting any resistance with the help of arms carried by the accused persons and that was the common object behind the firing on the two deceased,  
 D who met their instantaneous death. It was on this basis that the High Court proceeded to convict the accused persons against whom there was specific evidence.

8. In our opinion, at least insofar as the aforementioned three accused persons, namely Thakur Singh (A-1), Akhilesh  
 E Ojha (A-5) and Keshav Singh (A-9) are concerned, it cannot be said that they had the intentions to commit the murder and they cannot be said to be the members of the unlawful assembly on account of their mere presence at the place of occurrence and cannot be convicted of the offence under Section 302 read  
 F with Section 149 IPC. We have closely seen the evidence of the witnesses. These three accused persons were undoubtedly referred to and all that has been stated by Sukeshwar Singh (PW-2) is that Akhilesh Ojha (A-5) was carrying a lathi. The witness has not referred to even Thakur Singh (A-1) and  
 G Keshav Singh (A-9) having any arms. As regards Ram Prasad Singh (PW-4), he has attributed Thakur Singh (A-1) and Akhilesh Ojha (A-5) carrying a lathi while Keshav Singh (A-9) carrying a bhala (spear). However, he has not referred to any overt act on part of these accused persons or use of the same  
 H by them. Badrinath Singh (PW-5) has mentioned about Thakur

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Singh (A-1) and Ram Pravesh Singh (A-2) having lathi. He has made a general statement that all other accused persons were holding a bhala. However, this witness also has not referred to any overt act on the part of the above accused persons, namely Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9). As regards Ram Lakhnan Singh (PW-6), he has turned hostile. Bharginath Singh (PW-7) has also stated that these three accused persons were carrying lathi. The story is no different in respect of Laxman Singh (PW-8). His evidence is extremely general. Some of the witnesses have also not referred to the exhortation given by Patiram Ojha (the dead accused). At least insofar as the present accused persons are concerned, the role played by these three accused persons, namely Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) appears to be that of the bystanders. There was a dispute between the parties on account of the possession of the field. Even the Court litigation was on between the parties. Therefore, merely because the accused persons went to the field carrying lathis and arms, at least till such time when the exchange of words started and the shot was fired, it cannot be said that the whole assembly had become unlawful. The assembly would become unlawful when Patiram Ojha (the dead accused) allegedly gave the firing orders to Thakur Ojha (A-4) and who in pursuance of that, fired on Shambhu Nath Singh. Undoubtedly, these three accused persons [Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9)] acted as mere mute bystanders, as there is no evidence also that they took part in the exchange of words. Under such circumstances, it would be difficult to attribute a common object to these accused persons on account of their presence even if they were armed with lathis. There is no evidence about Akhilesh Ojha (A-5) carrying a spear. Under such circumstances, benefit of doubt must go to these three accused persons. They would be entitled to acquittal as the prosecution has failed to prove that they had a common intention to commit murder.

9. Insofar as the rest of the accused persons are

A concerned, Shri Nagendra Rai, learned Senior Counsel insisted that admittedly Ram Pravesh Singh (A-2) and Jitendra Singh (A-6) had only dragged the body of Prabhu Nath Singh. That would certainly amount to the active participation of these two accused persons. Their continuance even after the firing  
 B in doing overt act of dragging the body from the field would certainly make them the part of the unlawful assembly, which had the common object of eliminating Shambhu Nath Singh and Prabhu Nath Singh. The part played by these two accused persons of dragging the body of Prabhu Nath Singh is clearly  
 C referred to by the witnesses. We, therefore, reject the contention raised by Shri Rai, learned Senior Counsel that these two accused persons would also be entitled to be acquitted for the same reasons as we have acquitted Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) for. The appeals  
 D of these two accused persons would be liable to be dismissed as we are satisfied on the point that they were the members of the unlawful assembly.

10. Similar is the case as regards Thakur Ojha (A-4) who had actually fired the guns, Raj Nath Singh (A-7) and Adalat  
 E Pandit (A-10). The evidence is against them as accepted by both the Courts below. They were certainly the members of the unlawful assembly and specific overt acts have been attributed to them by almost all the witnesses. As regards Thakur Ojha (A-4), all the witnesses are unanimous that he was the one who  
 F had fired. His appeal will, therefore, have to be dismissed.

11. Insofar as Raj Nath Singh (A-7) and Adalat Pandit (A-10) are concerned, they took active part in assaulting Prabhu Nath Singh while the body of Prabhu Nath Singh was dragged  
 G by Ram Pravesh Singh (A-2) and Jitendra Singh (A-6). The witnesses have specifically attributed the overt acts regarding assaulting of Prabhu Nath Singh to these accused persons. We are satisfied with the evidence led on behalf of the prosecution in respect of these accused persons, which has been accepted  
 H by both the Courts below and we have no reason to disbelieve

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the witnesses who have attributed specific overt acts as regards the assault on Prabhu Nath Singh to these accused persons. Insofar as Adalat Pandit (A-10) is concerned, the plea was that of alibi, which plea has been rejected by the Trial Court and the High Court. Very heavy reliance was placed on the evidence of Rajiv Ranjan Shrivastava (DW-20), Praduman Dubey (DW-21), A.B. Prasad (DW-22), Col. Pritam Singh (DW-25) and Col. Amrik Singh (DW-26) for his alibi. Rajiv Ranjan Shrivastava (DW-20) was a handwriting expert for proving the signatures of Adalat Pandit (A-10) over the postal receipt Exhibit-6. His evidence has rightly been disbelieved on the ground that he had prepared his report on the previous evening after taking fees. Praduman Dubey (DW-21) was a Head Clerk in the Sainik Office, Danapur and he proved the leave register of Adalat Pandit (A-10) as Exhibit O. A.B. Prasad (DW-22) was also an employee in the Pay & Accounts Office, Sainik Office, Danapur. He proved the pay book of Adalat Pandit (A-10) as Exhibit P and his acquittance roll as Exhibit Q. It was suggested that Adalat Pandit (A-10) was on leave from 11.6.1973 till 2.7.1973 and that he received the payment on 26.5.1973 as also on 3.7.1973. The High Court has disbelieved this evidence on the ground that the document did not show the date 3.7.1973. Col. Pritam Singh (DW-25) was a commanding officer of 10, Bihar Regiment at the relevant time and he had admitted that he had no personal knowledge regarding actual presence of Adalat Pandit (A-10) on the said date. Similarly, Col. Amrik Singh (DW-26) had claimed that by an order dated 26.1.1973, the leave of Adalat Pandit (A-10) was extended for 14 days from 6.4.1973 to 19.4.1973 because Adalat Pandit (A-10) did not resume his duty on 6.4.1973. The High Court has rejected his evidence and for good reasons. The assertion of Col. Amrik Singh (DW-26) that Adalat Pandit (A-10) was present in the unit on 3.7.1973 was only on the basis of Exhibits P and Q being the pay book and acquittance roll of Adalat Pandit (A-10) respectively. Exhibits P and Q have rightly been disbelieved by the High Court giving good reasons. The High Court has rightly

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A held that Exhibits P and Q were casually maintained by the  
 Havildar and a poor attempt had been made to show that  
 Adalat Pandit (A-10) had reported for duty on 3.7.1973. We are  
 convinced that the plea of alibi by Adalat Pandit (A-10) cannot  
 be accepted and has to be disbelieved as has been done by  
 B the Trial Court and the appellate Court. We would accept the  
 evidence of the prosecution witnesses, more particularly the  
 eye-witnesses, who had specifically attributed an active role to  
 this accused person. The appeals of Raj Nath Singh (A-7) and  
 Adalat Pandit (A-10) will, therefore, have to be dismissed  
 C holding that they were members of the unlawful assembly. We,  
 therefore, confirm the judgments of the Trial Court and the  
 appellate Court convicting Raj Nath Singh (A-7) and Adalat  
 Pandit (A-10) with the aid of Section 149 IPC.

12. That leaves us with the case of Gorakh Nath Singh (A-  
 D 3). It must be appreciated that Gorakh Nath Singh (A-3) has  
 been mentioned practically by all the witnesses. All the eye-  
 witnesses have also referred to the specific overt act of this  
 accused of following Shambhu and hitting him with spear on  
 his back. Sukeshwar Singh (PW-2) is very specific in his  
 E evidence insofar as the said act of the accused was concerned.  
 Some cross-examination was directed to suggest that Gorakh  
 Nath Singh (A-3) would have no reason or motive to take part  
 in the assault. However, the main claim in the evidence of this  
 witness regarding the overt act remained unshaken. Similar is  
 F the story of Ram Prasad Singh (PW-4). The cross-examination  
 of Ram Prasad Singh (PW-4) is also of no consequence  
 insofar as the main incident is concerned. Badrinath Singh  
 (PW-5) also repeated the same story without any substantial  
 challenge to this version in the cross-examination. A typical  
 G suggestion was given to all the witnesses as if Gorakh Nath  
 Singh had issued a warrant for lagan (tax) on these witnesses.  
 Bhrigunath Singh (PW-7) also repeated the same story and  
 there is very little or no cross-examination on the main incident.  
 In the cross-examination of this witness itself, the same  
 H stereotyped suggestion was given that Gorakh Nath had issued

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a lagaan against the father of this witness, thereby suggesting an enmity. Laxman Singh (PW-8) is the only exception, who though referred to the presence of this accused duly armed, has not referred to the overt act of this accused of piercing Shambhu with a spear. We will not attach much importance to the evidence of this witness in view of the evidence of the other eye-witnesses. It is again to be seen that the evidence of the eye-witnesses in respect of the spear injuries on Shambhu Nath Singh and Prabhu Nath Singh is further corroborated by the medical evidence inasmuch as both Shambhu Nath Singh and Prabhu Nath Singh had suffered penetrating wounds and incised wounds in addition to the wounds caused by pellets. The Post Mortem Report was prepared by Dr. B.M. Srivastava (dead) as proved by Dr. J.C. Brahmo, who has proved all the injuries which are to be found in the Post Mortem Report (Exhibits 5 and 5/1). Therefore, there is very little scope for the argument that Gorakh Nath Singh (A-3) was not a part of the unlawful assembly and had not caused the wound to Shambhu Nath Singh with spear after he was fired at. The argument of Shri S.B. Sanyal, Learned Senior Counsel, appearing on behalf of the appellant/accused Gorakh Nath Singh (A-3) that this accused was not concerned and has been falsely implicated, cannot, therefore, be accepted. Finding this, the learned Senior Counsel heavily relied on the evidence of defence witnesses, who were examined in support of the plea of alibi of this accused as also the evidence of Sultan Ahmad (PW-14).

13. Sultan Ahmad (PW-14) was a Block Development Officer (BDO) of the said area. He deposed that Gorakh Nath Singh was a Gram Sewak in his block and was working in Devariya Panchpariya village Panchayat. Regarding the fateful day, the witness deposed that he went on that day to Devariya to collect levy of wheat crops and reached Devariya at about 1 o' clock in the afternoon. He stated that Gorakh Nath Singh reached after half an hour later when he reached there. He also suggested that there was a Special Planning for levying wheat in those days. The witness suggested that one Umashankar

A was Block Agriculture Officer and he alongwith Gorakh Nath Singh (A-3) and other witnesses like one Kuldeep Singh, Karamchari (DW-8), Ram Sewak, Jan Sewak and Mukhiya and Sarpanch of the Panchyat (DW-7) were levying wheat at that time. Shri Sanyal, learned Senior Counsel, while trying to taking  
 B advantage of the evidence of this witness, also asserted that his claim that Gorakh Nath Singh (A-3) reached there at about 1 o' clock, was not correct. The learned Senior Counsel relied on an omission in that behalf. The learned Senior Counsel also heavily relied on the evidence of Kapil Narayan Sinha (DW-1),  
 C a Deputy Superintendent of Police, who proved the carbon copy of a report which he had prepared in pursuance of the orders passed by the Superintendent of Police. This was on account of an application having been made by Gorakh Nath Singh (A-3), claiming that he was in fact not present at the spot and was  
 D busy in the activity of wheat levy in the other village. The witness also proved the application of Gorakh Nath Singh at Exhibit C. It is to be seen that he had to admit that even after preparing the said so-called report, the Superintendent of Police had ordered to file the chargesheet against Gorakh Nath Singh (A-3).

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14. The other witness relied on by the learned Senior Counsel was Kailash Singh (DW-2), who deposed that the levy was being collected from 6 o' clock in the morning at the door of Mukhiya Ram Barai Singh and the payment of the levied  
 F wheat was being paid after taking its weight there. According to him, other witness namely Ram Sewak Roy was weighing the wheat. According to him, the weight of his wheat was also taken and the receipt for that was written and signed by Gorakh Nath Singh (A-3) and the payment was also made to him after  
 G obtaining his signatures on the receipt. He produced Exhibit D being a receipt written and signed by Gorakh Nath Singh (A-3) on that day. In his cross-examination, however, he was unable to show any notice having been given by BDO to him and had to admit that BDO had never asked for levy to him.  
 H Similar was the evidence of Munshilal Roy (DW-3), who spoke

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about his reaching the spot at about 6 o' clock in the morning to the house of Ram Barai, Mukhiya with wheat of levy. He also spoke that Ram Sewak Roy was weighing the wheat and Gorakh Nath Singh (A-3) was writing on the receipts (Exhibit D-1) for that. He could not produce the notice which was allegedly given to him by the Department for levy. He did not even know how much levy wheat was required to be given by him. The witness also could not show anything to suggest that the levy was being collected from a particular house. He frankly admitted that he never met BDO.

15. To the same effect was the evidence of Ram Pravesh Singh (DW-4), who generally spoke about the levy activity and asserted that it was Gorakh Nath Singh (A-3) who was writing the receipts and was distributing the amounts on that day and that the levy work was started at 6 o' clock in the morning and Gorakh Nath Singh was with the Group of levy since that time. Similar was the evidence of Fulkan Manjhi (DW-5), who was a Chowkidar at Madhupur, P.S. Gorkha, District Saran. He also spoke about the said activity of levy and the fact that Gorakh Nath Singh (A-3) was present writing the receipt and paying money to the farmers. Ram Barai Singh (DW-7) was Mukhiya of Devariya, Panchpariya Gram Pranchayat, who asserted that it was at his door that the special levy collection was going on, which exercise started at 6 o' clock in the morning. The witness further asserted that Gorakh Nath Singh (A-3) was paying the cost of levy wheat after making receipts of that and he had done this work from 6 o' clock in the morning to 11 o' clock in day time on that day. The witness, however, could not produce any documentary evidence to show that the levy work was done at his place. The evidence of Kuldeep Narayan Singh (DW-8) was to the same effect. He was a Karamchari and said that there was a levy going on on 5.7.1973. He also suggested that Gorakh Nath Singh (A-3) was present for the levy and was continuously working from 6 o' clock in the morning till 12 o' clock in the day time on that day. The evidence of Ram Lal Manjhi (DW-9) was to the same effect, so also the evidence of

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A the landlord of Gorakh Nath Singh (A-3), namely Vidya Narayan Singh, who as DW-10 claimed that Gorakh Nath Singh (A-3) had taken room in his house and had gone for the levy work at 5.45 a.m. The evidence of Adya Narayan Singh (DW-11), who was a Panchayat Sewak in the Gorkha Block, was also to the  
 B same effect. He proved a document as Exhibit DF, which was a carbon copy of the slip (receipt), as also Exhibits 3/2 and 3/3 being the registers bearing the signatures of Gorakh Nath Singh (A-3). Ram Nagina Singh (DW-16) and Sona Lal Sah (DW-17) also asserted about the levy. Both the Courts had  
 C chosen to accept the evidence of the eye-witnesses and have rejected the evidence led on behalf of the defence.

16. It is to be noted that these witnesses were all interested witnesses in the sense that they were the colleagues of Gorakh Nath Singh (A-3). Before we venture to appreciate  
 D this evidence, it must be noted that the distance between the spot where the incident took place and the place where the accused Gorakh Nath Singh claimed to have been present is extremely short. Admittedly, it is 3 or 4 kilometers. When all the witnesses claimed that the work of levy began from 6 o' clock  
 E in the morning, it is a very difficult claim to be accepted. In the first place, there is nothing proved by way of documentary evidence to show that the levy of wheat was to be collected at the house of Ram Barai Singh, Mukhiya (DW-7) or that the levy was proposed to be held at village Devariya Panchpariya on  
 F that day. We cannot accept that there would be no documentary evidence, particularly if it was an exercise of levy. There is bound to be some records somewhere. We are not much impressed by the receipts, which have been filed by the witnesses because there is nothing on those receipts as to  
 G when they were actually prepared. In fact, the evidence of Sultan Ahmad (PW-14) could not be demolished when he said that he had reached the place where the levy work was going on and it was at about 1 o' clock that Gorakh Nath Singh (A-3) arrived there alongwith others. The Trial Court thoroughly  
 H discussed this evidence and held it to be not reliable. In view

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of the very short distance of 4 kilometers between the two places i.e. the place of incident Mauza – Mohammadpur and the village Devariya Panchpariya, the evidence appears to be extremely doubtful. We are also not impressed by the evidence of Kapil Narayan Sinha (DW-1), Deputy Superintendent of Police, as nothing would turn open the so-called report prepared by him in view of the direct evidence led by the prosecution. In our opinion, the Trial Court and the appellate Court were right in rejecting the defence of alibi.

17. A few decisions were referred to during the debate, which are as follows:-

(i) *Satbir Singh & Ors. Vs. State of Uttar Pradesh* [2009 (13) SCC 790]. This decision was relied upon to show that the non-examination of the concerned medical officer would affect the prosecution case. This was probably in order to show that the original Doctor (Dr. B.M. Srivastava) who had done the Post Mortem, had expired and the Post Mortem Report had to be proved by another Doctor namely Dr. J.C. Brahmo. We do not find anything wrong with the Report having been proved by the other Doctor.

(ii) *Maranadu & Anr. Vs. State by Inspector of Police, Tamil Nadu* [2008 (16) SCC 529]. This decision is on the question of law under Section 149 IPC. This Court has cautioned against the acceptance of the evidence of the partisan witnesses, particularly in case involving Section 149 IPC. We do not find this case to be of any support to the prosecution. However, while stating the principles of appreciation of evidence, this Court relied on the decision in *Masalti Vs. State of U.P.* [AIR 1965 SC 202], wherein it was observed that:-

“it would be unreasonable to contend that evidence given

A by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan, would invariably lead to failure of justice."

B We are quite convinced in this case that the evidence of the eye-witnesses, though they were somewhat partisan, was liable to be accepted, excepting against the three accused persons who were acquitted. We have given the reasons for acceptance of that evidence and also for the acquittal of three  
C accused persons, who could not be held to be the part of the unlawful assembly.

(iii) *Yunis alias Kariya Vs. State of M.P.* [2003 (1) SCC 425]. This decision was relied upon to suggest that when eight accused persons armed with deadly weapons, attacked the deceased in broad daylight in a marketplace causing his death and the same was witnessed by several persons, three of whom were eye-witnesses and where the testimony of the eye-witnesses was tallying with each other, the oral  
D testimony of the eye-witnesses as well as the medical and other evidence established the commission of crime. In fact, the decision in this case is completely against the defence. This was also a case under Section 149 IPC, which was held  
E to be established on the basis of evidence and for good reasons.  
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(iv) *Ramesh & Anr. Vs. State of Uttar Pradesh etc. etc.* [2009 (15) SCC 513]. This is also a decision by this Court on the appreciation of evidence. In this case also, it was held that the minor contradictions, inconsistencies, exaggerations and embellishments in the testimonies of the eye-witnesses were bound to be there, however, they, by themselves, did not decide the credibility of the witness which has to be  
G tested by the Court.  
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The other decisions referred to are *Akhtar & Ors. Vs. State of Uttaranchal* [2009 (13) SCC 722], *Ram Dular Rai & Ors. Vs. State of Bihar* [2003 (12) SCC 352] and *Munshi Prasad & Ors. Vs. State of Bihar* [2002 (1) SCC 351], which are of no consequence either for the prosecution or the defence. A

18. In the result, the appeals of Thakur Singh (A-1), Akhilesh Ojha (A-5) and Keshav Singh (A-9) are allowed and that of Ram Pravesh Singh (A-2), Gorakh Nath Singh (A-3), Thakur Ojha (A-4), Jitendra Singh (A-6), Raj Nath Singh (A-7) and Adalat Pandit (A-10) are dismissed for the reasons as stated above. The acquitted appellants/accused shall be released forthwith unless required in any other matter. The bail bonds, if any, shall stand cancelled. B  
C

N.J.

Appeals disposed of.

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