



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 372 OF 2016**

1. Hanuman S/o Dattarao Karkar  
Age: 34 years, Occu.: Labour
2. Meenabai W/o Hanuman Karkar  
Age: 28 years, Occu.: Labour
3. Sojarbai W/o Dattarao Karkar  
Age: 59 years, Occu.: Labour
4. Dattarao W/o Tukaram Karkar  
Age: 69 years, Occu.: Labour
5. Digambar S/o Dattarao Karkar  
Age: 29 years, Occu.: Labour

All R/o Thadi Ukkadgaon,  
Tq.Sonpeth, Dist.Parbhani.

... Appellants  
[Org. Accused]

**VERSUS**

State of Maharashtra  
Through Police Inspector,  
Police Station, Sonpeth,  
Tq. Sonpeth, Dist. Parbhani

... Respondent

**WITH  
CRIMINAL APPEAL NO. 600 OF 2023**

Digamber S/o Dattarao Karkar  
Age: 36 years, Occu.: Nil,  
R/o. (at present Visapur open  
District Prison)  
Thadi Ukkadain,  
Tq. Sonpet, Dist. Parbhani.

... Appellant

VERSUS

State of Maharashtra  
Through Police Inspector,  
Sonpeth Police Station,  
Tq. Sonpeth, Dist. Parbhani

..Respondent

.....

Mr. Mahesh P. Kale, Advocate for Appellant Nos.1 to 4 in Criminal  
Appeal No.372/2016

Mrs. Sharda P. Chate, Advocate for Appellant in Criminal Appeal  
No.600/2023 [appointed]

Mr. A. V. Deshmukh, APP for Respondent-State in both appeals.

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**CORAM : SMT. VIBHA KANKANWADI AND  
ABHAY S. WAGHWASE, JJ.**

**RESERVED ON : 20 July, 2023**

**PRONOUNCED ON : 28 July, 2023**

**JUDGMENT [ABHAY S. WAGHWASE, J.] :**

1. Getting dissatisfied by the judgment and order of conviction passed by learned Additional Sessions Judge, Gangakhed in Sessions Trial No. 7 of 2012 dated 12.05.2016, for the offence punishable under Sections 144, 148, 302 r/w 149 of the Indian Penal Code [IPC], all five appellants have preferred the instant appeal praying to quash and set aside the said judgment.

2. On the request of original accused no.5, a separate Advocate i.e. Advocate Mrs. Sharda P. Chate has been appointed to represent his cause by filing separate appeal. Since both appeals are arising out of the one and the same judgment and order of conviction, both are decided by this common judgment.

### **FACTS LEADING TO TRIAL**

3. Informant PW1 Devidas had a dispute with accused nos. 1, 4 and 5 over the field taken by him for cultivation. Deceased Sudhakar, who was brother of informant, was helping him in cultivating the field. There used to be quarrel between deceased and accused on that count. On the morning of 19.08.2011 at 9.00 a.m., there was quarrel between deceased Sudhakar and accused nos.1 to 5. Informant intervened and brought his brother Sudhakar to the house. Thereafter, informant went to the field. At 12.30 p.m., informant received a phone call from PW2 Ganesh informing about quarrel again taking place between deceased and accused in front of house of one Bhaskar and so informant rushed home. According to him, he saw accused Dattarao, who was armed with sickle, and accused no.5 Digambar, who was armed with knife, were assaulting deceased. When wife of deceased, namely, Ashabai intervened, accused no. 2 Meenabai and accused no.3 Sojarbai indulged in scuffle with her. In

the assault, deceased Sudhakar succumbed at the spot and therefore, informant summoned police and thereafter lodged report Exhibit 43 which was made the basis of registration of crime against accused persons.

4. The appellants came to be arrested and the matter was investigated by PW13 Police Inspector Waghmare. The accused persons were duly chargesheeted after which learned trial Judge framed charges and recorded evidence adduced by prosecution. Defence also adduced evidence of three witnesses. Thereafter, on hearing both sides and appreciating the oral and documentary evidence adduced by the parties, learned trial Judge reached to the finding that prosecution has established the charges and thereby convicted the present appellants as spelt out in the operative part of the judgment.

Exception has been taken to the above judgment on various grounds spelt out in the appeal memo.

#### **RIVAL SUBMISSIONS**

5. Mr. Kale, learned Advocate for the appellants in Criminal Appeal No. 372 of 2016 as well as appointed Advocate Mrs. Chate for the appellant in Criminal Appeal No. 600 of 2023 would point out

that there is no convincing, cogent evidence about enmity or assault. According to them, though prosecution claims that there is direct eye witness account, there are material omissions, contradictions and inconsistencies in the testimonies of the so called direct eye witnesses and therefore, prosecution evidence was untrustworthy of credence. They pointed out that it is doubtful whether so called direct eye witnesses were present at all at the scene of occurrence. According to them, there is no independent witness, rather only related witnesses are examined by prosecution and therefore, story of prosecution cannot be accepted as proved. They took us through the testimonies of all witnesses, more particularly of informant Devidas [PW1], Ganesh [PW2], Babruwan [PW3], Ashabai [PW4] and child witness Sunil [PW5] and would submit that the answers given by them during cross render the case of prosecution doubtful. That, none of the eye witnesses are lending support to each other and therefore, it is their submission that, conclusion arrived at by learned trial court is illegal.

6. Learned Advocate Mr. Kale would would further submit that even taking the case of prosecution and the evidence adduced as it is, it is doubtful whether appellant nos. 1, 2 and 3, to whom no overt act is attributed, could at all be held guilty. For all above reasons, both Advocates pray that appeals deserve to be allowed.

7. Per contra, learned APP would also take us through the evidence of informant Devidas [PW1], wife of deceased Ashabai [PW4], Ganesh [PW2] and Babruwan [PW3] and would submit that they are all residents of the same village and they had rushed to the scene of occurrence and had narrated whatever they saw. According to learned APP, motive is cogently proved and there is no serious dispute about it in spite of witnesses being cross-examined at length. According to learned APP, the incident had taken place in broad day light of afternoon on the road. Roles played by each of the accused are clearly spelt out and in view of the charge under Section 149 of IPC, it is his submission that, presence of all accused, when not disputed, itself is sufficient to rope in and implicate and convict all of them. Canvassing in favour of the judgment and order of conviction, learned APP would submit that there is no merit in the case so as to disturb the findings and consequently, he prays for dismissal of the appeals.

8. Hear, there is charge under Section 302 r/w 149 of IPC along with Sections 144 and 148 of IPC. On re-analyzing and re-appreciating the available evidence, it is emerging that to substantiate the charges, prosecution has examined as many as 14 witnesses those can be categorized as under:

**Eye witnesses:**

- PW1** Devidas Laxman Bhujbal [informant]  
**PW2** Ganesh Haribhau Bhujbal  
**PW3** Babruwan Dnyanoba Bhandare  
**PW4** Ashabai Sudhakar Bhujbal (injured)  
**PW5** Sunil Sudhakar Bhujbal (child witness)

**Pancha Witnesses:**

- PW6** Ganpat Dashrath Bhandare, pancha to inquest panchanama Exhibit 59  
**PW7** Hanuman Dnyanoba Avad, pancha to seizure of clothes panchanama Exhibits 63, 64 and 65.  
**PW9** Shyam Shrawan Chavan and  
**PW10** Bhima Chavan are panchas to memorandum of disclosure and seizure panchanama. They have not supported prosecution.

**Police Officials:**

- PW8** Vishwambhar Nivrutti Sodgir, Police Head Constable, carrier of muddemal.  
**PW12** Vishnu Eknathrao Suryawanshi, Police Head Constable, who register crime on the basis of report Exhibit 43 lodged by PW1 informant Devidas.  
**PW13** Kundankumar Waghmare, Police Inspector is the Investigating Officer.

**PW14** Digambar Baddu Rathod, A.S.I., who conducted inquest panchanama Exhibit 59

**Medico legal expert:**

**PW11** Dr. Siddheshwar Halge, autopsy doctor. He identified postmortem report authored by him to be at Exhibit 77 and also the injury certificate issued by him in respect of injuries suffered by PW4 Ashabai to be at Exhibit 78.

**Defence Witnesses:**

**DW1** Chandrakant Tukaram Bhandare, agriculturist, in whose field accused no.1 Hanuman was stated to be working.

**DW2** Angad Dnyanoba Karkar, in whose field accused no.3 Sojarbai was claimed to be working.

**DW3** Prabhakar Dukare, who claimed that accused no.2 Meenabai was working in his field.

9. Taking into account the case of prosecution and the claim that there is direct evidence, evidence of PW1 informant Devidas, PW2 Ganesh, PW3 Baburao, PW4 Ashabai (injured) and PW5 Sunil (child witness) assumes significance. However, in the light of charge, first we are required to get satisfied that prosecution has demonstrated that death of Sudhakar was homicidal one.



10. To find out answer, we need to visit the evidence of **PW11** Dr. Halge, autopsy doctor. In his evidence at Exhibit 76, he has narrated the injuries noticed by him on **external examination** which are as under:

**External injuries as mentioned in column no.17 :**

- 1] Incised wound over occipital area, measuring 2" x 1" x 1", it was deep upto bone. It was curved shaped injury. It is of grievous nature.
- 2] Incised wound – over posterior aspect of neck over medullary region, measuring 1" x 1/2" bone deep & brain matter. It was curved shaped injury. It was of grievous nature.
- 3] Incised wound at base of neck in between two scapula, measuring 1" x 1/2" bone deep. It was of grievous nature.

All injuries were below each other from injury no.1 to injury no.3.

- 4] Incised wound on left scapula at medial upper end, measuring 1" x 1/2" deep to bone.
- 5] Incised wound over left scapula at acromian process measuring 2" x 1" deep to bone.

- 6] Contusion and lacerated wound on both knees approximate size 1" x 1/2".

Injury nos.4, 5 and 6 were simple in nature.

All above injuries were ante mortem.

**Internal injuries :**

Doctor found hatoma in bleeding within brain matter. It was found on opening the scalp. It was corresponding to injury No.1 & 2 mentioned in column no.17. He also found fracture of occipital bone at upper side of the scalp.

In the opinion of autopsy doctor, death of Sudhakar was due to "cardiac respiratory failure due to hemorrhagic shock due to head injury and other associated injuries". He clarified that injury nos. 1 to 3 are sufficient in the ordinary course of nature to cause death and they are possible by hard and sharp weapon like knife, sickle, chopper etc.. He was confronted with Articles A and B upon which he stated that injuries are possible by the said weapons.

In cross, he has answered that injury nos. 1 and 2 are curved shape and possible by curved edged weapon like *katti*. He answered that occipital bone is hard bone and its fracture is possible due to assault with force. He answered that injury nos. 4 and 5 were on the left shoulder of deceased and that, medullary region means the region between occipute and the base of neck.

11. In the light of above opinion of medico legal expert, we too are convinced that death of Sudhakar is due to “cardiac respiratory failure due to hemorrhagic shock due to head injury and other associated injuries” and hence it is nothing but homicidal one.

12. Having answered above question of manner and mode of death, we are to see whether prosecution has further discharged its burden of proving that appellants herein to be the authors of the injuries on the person of deceased Sudhakar. As stated above, prosecution has come with a case of direct evidence. Therefore, it would be desirable to give sum and substance of the prosecution witnesses, who are said to be direct eye witnesses, which is as under:

13. **PW1** Devidas Bhujbal [informant] has stated that there was dispute between him and accused nos. 1, 4 and 5 with regard to the

field purchased by him. He stated that an incident took place on 19.08.2011 at 9.00 a.m. regarding quarrel between deceased and accused nos. 1 to 5 in front of shop of one Bhagwan Chandwade. He claims that Sudhakar was being abused saying that why field of Marotrao was purchased. Witness claims that he brought his deceased brother to the house and thereafter, he along with his wife, niece and son, went to the field. Around 12.30, he got phone call from PW2 Ganesh informing about quarrel again taking place in front of house of Bhaskar and therefore he claims to have rushed there. He has narrated that accused no.4 Dattarao was holding sickle and accused no.5 Digambar was holding knife. Accused no.1 Hanuman had caught hold of hands of deceased Sudhakar from behind and accused Dattarao assaulted deceased by sickle on the rear side of his neck, whereas accused Digambar assaulted him by means of knife also on the rear side of neck. When Ashabai intervened, accused nos. 2 and 3, i.e. Meenabai and Sojarbai, scuffled with her. Witness stated that he has seen the occurrence from a distance of 10 feet. Accused fled. Witness further named the persons who have witnessed the incident. According to him, Sudhakar died on the spot and so he passed the information to the police and then lodged report.

14. PW2 Ganesh at Exhibit 46 deposed that he knows accused and informant. According to him, Marotrao Katkar had given land for cultivation to the informant. There was dispute regarding the field and there were quarrels on that count. According to him, on 19.08.2011 at about 12.30 p.m. when he returned home from the field, at that time, quarrel was going on in front of house of Bhaskar between Sudhakar on one side and all accused on the other. Witness stated that he therefore made phone call to informant Devidas about quarrel. He stated that accused no.4 Dattarao had a sickle in his hand. Accused no.5 Digambar assaulted deceased Sudhakar on the rear side of head with knife and accused no.1 Hanuman had caught hold of hands of deceased from behind. Deceased fell down due to assault. Wife of deceased and son of deceased also were present there. Accused nos. 2 and 3 gave slaps and fist blows to Ashabai. Accused no.4 Dattarao assaulted Sudhakar with koyta on the back of his neck and thereafter accused persons fled away.

15. **PW3** Babruwan gave evidence that he knew accused and that there was dispute between Marotrao and Devidas in respect of the field. There was dispute between informant Devidas and accused no.4 Dattarao in respect of the same field. Regarding incident, his testimony is that incident took place at 12.30 noon on the road in

front of door of Bhaskar. He claims to have witnessed the incident while he was proceeding towards the house of one Shridhar Karkar. According to him, accused no.4 Dattarao and accused no.5 Digambar were abusing deceased Sudhakar, whereas accused no.2 Meenabai and accused no.3 Sojarbai were abusing Ashabai. Accused no.4 Dattarao dealt a blow of sickle on the shoulder of deceased Sudhakar and accused no.5 Digambar dealt a knife blow on his neck. Accused no.1 Hanuman had caught hold the hands of deceased. Accused no. 2 Meenabai and accused no.3 Sojarbai had scuffled with Ashabai. Due to assault, Sudhakar died.

This witness stated that Ganesh, Devidas and he himself witnessed the incident. He identified accused.

16. **PW4** Ashabai, wife of deceased gave evidence that the incident took place around 12.30 p.m. to 1.00 p.m. in front of the house of Bhaskar. According to her, accused were saying to deceased Sudhakar as to why he was helping informant in respect of the field of Maroti and they were harassing them. According to her, the incident of verbal quarrel took place in the morning between accused no.4 Dattarao and her deceased husband and therefore, Devidas brought her husband home. Thereafter, her husband went out and again

accused persons abused him on his way and quarrel took place. Therefore, she claims that she along with her son, namely, Sunil went there. Accused no.4 Dattarao dealt a blow of sickle on the shoulder of her husband and accused no.5 Digambar assaulted him on the back of his neck with knife. Accused no.1 Hanuman caught hold the hands of her husband and while she was going towards her deceased husband Sudhakar, at that time accused no. 2 Meenabai and accused no.3 Sojarbai caught hold of her and beat her. Thereafter accused persons fled with weapons. She stated that two to four persons came there and they were Babruwan, Ganesh and Devidas. Her husband was referred to the hospital. She identified articles knife and sickle as well as the accused.

17. **PW5** Sunil was minor and therefore he was allowed to depose without administering oath. In his evidence he stated that deceased was his father. Pointing to accused he stated that they committed murder of his father in the incident which took place four years ago. According to him, there was some incident in the morning but he was not present at that time. He further stated that during afternoon hours his father was going out from the house around 12.30 to 1.00 p.m. That time accused nos. 4 and 5 threatened his father and beat him. He claimed that at such time he was playing in the courtyard in

front of the house of Prakash Chandwade. He stated that accused no.5 Digambar assaulted his father by means of knife on the back of the head and accused no.4 Dattarao assaulted by means of sickle on the back of his father. According to him, accused no.1 Hanuman had caught hold the hands of his father from behind and when his mother tried to separate his father, at that time accused nos. 2 and 3 scuffled with his mother, as a result of which she fell down. His uncle Devidas was at a distance. Learned trial court has taken note of the demeanor of the child witness by noting that the child was weeping. According to this child witness, Ganesh and Babruwan were standing in front of his house. He identified accused. He stated that accused fled away with knife and sickle. He also identified articles knife and chopper.

18. The other witnesses who are also examined by prosecution are **PW6** Ganpat, pancha to inquest panchanama; **PW7** Hanuman Avad, pancha to panchanama of seizure of clothes; **PW8** PHC Sodgir, carrier of muddemal; **PW9** Shyam and **PW10** Bhima, panchas to memorandum of disclosure at the instance of accused nos. 4 and 5 and seizure panchanama, but they have not supported prosecution; **PW11** Dr. Halge, autopsy doctor; **PW12** PHC Suryawanshi and **PW13** PI Waghmare are police official and Investigating Officer respectively and they have deposed about the steps taken by them during



investigation and **PW14** ASI Rathod who conducted inquest panchanama.

19. In the light of the points raised before us by learned counsel for the appellants, we have minutely and carefully examined and scrutinized the entire cross-examination of the above direct witnesses. It is revealed that there is extensive cross even on the issues of which there is no dispute and which are of not much significance. Therefore, we only propose to deal with the relevant cross i.e. on the point of dispute, quarrel and assault. Much cross is devoted on relations, history and geography of the scene of occurrence. Therefore we propose to ignore the same, as there is ocular account.

20. On carefully sifting the substantive evidence, more particularly the questions, answers and the suggestions given to the above direct eye witnesses, it is emerging that the aspect of dispute on account of the field has remained unshaken. Evidence of informant [PW1 Devidas], wife of deceased [PW4 Ashabai], Ganesh [PW2] and Babruwan [PW3] also reflects the background of dispute coming on record. Even the manner of suggestions put to the witnesses clearly indicates that the occurrence and presence of accused is not seriously disputed. On the contrary, the very questions and suggestions posed

to these witnesses clearly show that occurrence is not rendered doubtful. Informant Devidas [PW1] has categorically states that prior to the incident of assault, there was quarrel in the morning at 9.00 a.m.. His testimony to that extent is corroborated by none other than the wife of deceased i.e. Ashabai [PW4]. The very child witness has in his chief stated that there was quarrel but he very candidly answered in his chief itself that he was not present when the quarrel took place in the morning. Therefore, from the testimony of informant, wife of deceased and the child witness, the incident of quarrel at around 9.00 a.m. has been cogently brought on record.

21. Now as regards the role attributed to accused No.4 Dattarao and accused No.5 Digambar, it has been consistently stated by the above witnesses that accused Dattarao was armed with sickle and accused Digambar was holding knife. True it is that some witnesses speak about weapon to be sickle or chooper, but that would not affect the story of prosecution as injuries are identified by the autopsy doctor and on examining the seized articles, he has opined about injuries to be possible by the same. It is common knowledge that witnesses, more particularly rustic villagers give different names to articles and therefore, merely on such count, evidence of PW1 Devidas, PW2 Ganesh, PW3 Babruwan, PW4 Ashabai and child

witness PW5 Sunil cannot be rendered doubtful. All above witnesses are found to be lending support to each other on the aspect of accused No.1 Hanuman holding deceased Sudhakar by his hands thereby facilitating assault by accused no.4 Dattarao and accused no.5 Digambar.

22. Informant Devidas [PW1], who was claiming to be at a short distance of around ten feet, has stated about sites of assault. Similarly, Ashabai [PW4], who indulged for separation, has also stated about sites of assault. According to informant Devidas [PW1], accused Dattarao and accused Digambar both assaulted on the rear side of neck. PW2 Ganesh spoke about accused Digambar assaulting Sudhakar on the rear side of head and accused Dattarao assaulting on the back of his neck when accused Hanuman had caught hold of deceased. PW3 Babruwan has given site of assault by accused Dattarao as shoulder and knife blow by accused Digambar on the neck. PW4 Ashabai stated that accused Dattarao dealt blow on the shoulder of her husband and accused Digambar assaulted on the back of his neck. Child witness PW5 Sunil stated that accused Dattarao assaulted on the back of his father and accused Digambar assaulted on the back of head of his father.

23. What is emerging from their evidence is that portion below the head and neck are said to be targeted. Autopsy doctor has clarified during cross that medula region falls between occipital part and neck of a person. Therefore, in our opinion, there is no much difference in the site of injury except PW3 Babruwan stating about assault being made on shoulder. It is to be borne in mind that when a person witnesses assault, it is difficult to take note of particular part of the body. Therefore, merely he giving slightly different location itself will not be sufficient to disbelieve his testimony or testimonies of other witnesses like PW4 Ashabai- wife of deceased and even the minor PW5 Sunil. Death has taken place instantaneously. Appellant Dattarao and Digambar are shown to be armed with sharp edged articles like knife and sickle. Both are deadly weapons. In spite of lengthy cross, aspect of actual role and assault has not been disturbed or shaken.

24. Much emphasis is laid by learned counsel for the appellants on the point of variances and omissions. However, in the testimony of PW1 informant Devidas, omissions are regarding purchase of field from Maroti, accused questioning the said transaction, about Sudhakar being brought to house, about call received from PW2 Ganesh informing regarding quarrel, about assault on deceased on the

rear side of the neck by accused no.4, about witnessing the occurrence from 10 feet. In our opinion such omissions are not at all material.

25. In testimony of PW2 Ganesh, there are omissions about informing police regarding accused no.1 Hanuman catching hold of hand of deceased from behind. Omission is only regarding holding from behind. Further omissions are about marking presence of PW4 Ashabai and her son, about not stating the word “slap” by accused no.2 Meenabai to Ashabai and about accused no.4 Dattarao assaulting on the **back of neck**, about weapon to be curved. Even such omissions are insignificant.

26. In the testimony of PW3 Babruwan, it is pointed out that this witness has not stated about dispute between Devidas and Maroti, about Laxmi residing with Devidas, about incident taking place in front of house of Bhaskar, about not mentioning assault on the shoulder of deceased. Even these omissions are not material one.

27. In fact, the core of the prosecution case about actual assault on deceased by Dattarao and Digambar, on deceased being held by Hanuman, has remained unshaken. All prosecution witnesses are

consistent as regards the actual occurrence is concerned. Roles played by accused appellants are consistently defined by each of the eye witnesses.

28. Learned counsel for the appellants also pointed out that appellant nos. 1, 2 and 3 i.e. Hanuman, Meenabai and Sojarbai are wrongly held guilty. That, no overt act is attributed to them and no injury is caused at their instance. That, according to him, merely by applying Section 149 of IPC, they ought not to have been held guilty.

29. Before entertaining above contentions and arguments, it would be fruitful to highlight the settled law on enforceability of Section 149 of IPC. Time and again, this issue has been discussed and dealt in various pronouncements. The *ratio decidendi* is that, Section 149 IPC makes every person who is member of unlawful assembly at the time of committing of the offence, guilty of that offence. It creates constructive or vicarious liability of the members of unlawful assembly for unlawful acts committed pursuant to the common object by any member of such assembly. Such liability can be fastened only to the acts done in pursuance of common object of the unlawful assembly, or to such offences as the members of unlawful assembly knew to be likely to be committed in prosecution of that

object. It is fairly settled that commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test. Once the case of a person falls within the ingredients of Section 149 IPC, the question that he did nothing on his own, would be immaterial, as everybody is considered to be aware of the probable and natural outcome of the acts with which they have formed unlawful assembly. Mere plea 'not being armed' would not absolve a person from liability. Once their gathering has been demonstrated to have indulged in unlawful act, sharing of common intention comes into play.

30. In the case of *Gangadhar Behera v. state of Orissa*; (2002) 8 SCC 381, law on this aspect is spelt out in clear words which is as under:

*“Under Section 149, the emphasis is on common object. Mere presence in an unlawful assembly cannot render a person liable, **unless** there was a common object and he was actuated by that common object and that common object is one of those which are set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is, whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common*

*objects, as specified in Section 141. It cannot be laid down a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an unlawful assembly. It is not necessary under law that in all cases of unlawful assembly, with an unlawful object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incidence on the spot. The plea that definite roles have not been ascribed and therefore Section 149 is not applicable, is declared as untenable.”*

Similar views are echoed in the ruling of **Chanda v. State of U.P.**; (2004) 5 SCC 141 and **Subal Ghorai v. State of W.B.**; (2013) 4 SCC 607.

31. Keeping in mind above legal requirements, we reject such submission and contention for the simple reason that here, appellants are charged by invoking Section 149 of IPC. After the initial instance of quarrel between deceased and Dattarao, subsequently also when



deceased allegedly left house, all five appellants had come there. They are apparently five in number. Some of them were armed. Though Dattarao and Digambar have mounted assault and dealt blows, appellant Hanuman has caught hold of deceased. When Ashabai went to intervene, appellant nos. 2 and 3 i.e. Meenabai and Sojarbai had scuffled with her and thereby had prevented her from attempting to save her husband. Therefore, it is joint effort. Definite roles have been ascribed to each of them reflecting their participation. Their gathering at around 12.30 p.m. was with common object which they have achieved. The main occurrence at noon was a sequel and consequence of quarrel which had taken place at around 9.00 am in the morning and therefore above submissions about conviction of appellant nos. 1, 2 and 3 i.e. Hanuman, Meenabai and Sojarbai, to be illegal, cannot be accepted.

32. No doubt witnesses are near and dear ones but only three out of five. PW2 Ganesh and PW3 Babruwan have categorically stated about they present in the house and witnessing the incident. They have defined the roles of each of the accused and have clearly stated who was holding what. They also seem to be aware of the background of the assault. Therefore, with such impeccable evidence on record, and their testimonies having remained unshaken on the

core of prosecution case about murderous assault, case of prosecution deserves to be accepted as proved.

33. On going through the impugned judgment, it is noticed that learned trial Judge has, on hearing both sides, appreciated both, oral and documentary evidence in correct perspective. The requisite law and legal position has been applied and thereafter, after carefully appreciating the evidence, conclusion of guilt of all the appellants has been drawn. The reasons assigned for accepting the case of prosecution are convincing. No fault can be found in the appreciation of evidence and the impugned judgment. Hence, we proceed to pass the following order:

**ORDER**

- I. Both the appeals are hereby dismissed.
- II. We quantify the fees of the appointed Advocate at Rs.10,000/- to be paid by High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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