

**2022 LiveLaw (SC) 22**

**IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
AJAY RASTOGI; ABHAY S. OKA, JJ.**

JANUARY 05, 2022

**CRIMINAL APPEAL NO(S). 30 OF 2022 (Arising out of SLP (Crl.) No. 6530/2018)**  
**MAHENDRA & ANR. *VERSUS* THE STATE OF M.P.**

**Indian Penal Code, 1860; Section 149, 141 - It is an essential condition of an unlawful assembly that its membership must be five or more - 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.**

(Arising out of impugned final judgment and order dated 25-06-2018 in CRLR No. 156/2009 passed by the High Court of M.P at Gwalior)

*For Petitioner(s) Ms. Deeksha Mishra, Adv. Mr. Somesh Chandra Jha, AOR.*

*For Respondent(s) Mr. Veer Vikrant Singh, Dy.AG Mr. Nirmal Kumar Ambastha, Adv. Mr. Pashupati Nath Razdan, AOR Mr. Prakhar Srivastav Adv Ms. Sneh Bairwa Adv.*

**ORDER**

Leave granted.

The present appeal is directed against the judgment dated 25.06.2018 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Crl. Revision No. 156 of 2009 upholding conviction of the appellants for offence under Section 325 read with Section 149 of the IPC and sentence of one year RI and a fine of Rs.500/and in default with imprisonment for one month.

The facts in brief which emanate from the record are that the complainant had lodged a report against the appellants and 18 others on that basis FIR was registered on 27.11.2004 at about 13.00 hours and a chargesheet was submitted against the appellants and 18 other accused persons under Sections 148, 294, 341/149, 325/149 (2 counts), 323/149 (4 counts), 324/149 and 427/149 of IPC. In the report it was stated by the complainant that on 27.11.2004 at about 10.00 a.m. he and his sons had gone to a village in order to lift the engine of a tractor and when they were coming back after lifting the engine in their tractor trolley, on the way 1520 persons who were armed with lathi and axe came there with a common object of eliminating them and started beating his son Bachna with lathi and axe by abusing him with filthy language. They were Mahendra Singh, Roop Singh, Khilan Singh son of Halkai, Bhujbal and 10 to 12 other persons, whose names are not known to him. The Trial Court chargesheeted 20 persons under Sections 148, 294, 341/149, 325/149 (2 counts), 323/149 (4 counts), 324/149 and 427/149 of IPC, which was denied by the accused persons.

The Trial Court by its judgment dated 12.11.2008, on the basis of the evidence recorded, convicted the appellants under Sections 148, 325/149 and 323/149 IPC.

It may be relevant to note that the chargesheet was filed implicating 20 accused persons who faced trial and the learned Trial Court acquitted 17 out of 20 accused persons who faced trial and three accused persons were finally convicted under Sections 148, 325/149 and 323/149 IPC. It may be relevant to note that one of the accused persons who were convicted, namely, Sardar Singh, expired during pendency of criminal revision before the High Court and qua him the revision was dismissed as having abated by order dated 20.04.2011.

The judgment dated 12.11.2008 came to be confirmed on appeal being preferred by the present appellants before the learned 3rd Additional Sessions Judge, Vidisha by judgment dated 24.02.2009 and the criminal revision petition preferred at the instance of the appellants came to be dismissed under the impugned judgment dated 25.06.2018.

Learned counsel for the appellants submits that the chargesheet was originally filed against 20 persons and all of them faced trial and 17 out of 20 accused persons were acquitted by the learned Trial Court by judgment and order dated 12.11.2008 and no further appeal/revision was preferred by the prosecution against the judgment of acquittal passed by the Trial Court against those 17 accused persons who faced trial and 3 out of 20 accused persons were convicted for offence under Sections 148, 325/149 and 323/149 IPC and it is not the case of the prosecution that there were other unnamed/unknown persons who could not be traced/charged other than the persons who faced trial.

Counsel for the appellants submits that ingredients of Section 149 of an unlawful assembly that this membership must be five or more and in the instant case out of 20 accused persons who faced trial, three have been convicted by the learned Trial Court under the judgment dated 12.11.2008 under Sections 148, 325/149 and 323/149 IPC and the essential condition of unlawful assembly is that it must be of five or more persons, as contemplated under Section 141 IPC. Taking assistance thereof, counsel submits that the conviction under the impugned judgment of the appellants under Sections 325 with the aid of Section 149 IPC is unsustainable in law.

Counsel for the respondent, while supporting the judgment impugned submits that 20 persons were chargesheeted who faced trial and thus merely because final conviction was of three accused persons under Sections 325 with the aid of Section 149 IPC, the requirement of Section 141 which contemplates unlawful assembly of five or more persons is being completely meted out and after the matter has been examined by the Court below on merits upholding conviction of the present appellants, it needs no interference by this Court.

We have heard counsel for the parties and with their assistance perused the material placed on record.

The legal position in regard to essential ingredients of an offence referred to in 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 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.

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.

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

It was not the case of the prosecution that there are other unnamed or unidentified persons other than the one who are chargesheeted and faced trial. When the other coaccused 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.

The appellants may be held responsible for the offence, if any, which could be shown to have been committed by them with regard to the participation of others but that was not the case of the prosecution.

In the given facts and circumstances, in our considered view, the conviction of the present appellants under Section 325 with the aid of Section 149 IPC at least could not have been invoked.

That apart, the appellants have also undergone three months of substantive sentence during pendency of trial/appeal before the Courts below.

Consequently, the appeal succeeds and is accordingly allowed. The judgment of the Trial Court dated 12.11.2008 convicting the appellants under Sections 148, 325/149 and 323/149 IPC, which came to be confirmed by the High Court under its revisional jurisdiction in Criminal Revision No.156/2009 is hereby quashed and set aside.

Pending application(s), if any, shall stand disposed of.