RAM BILAS SINGH & ORS.

v.

THE STATE OF BIHAR

1962

January, 29.

(S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, and J. R. MUDHOLKAR, JJ.)

Criminal Trial—Unlawful assembly—Acquittal of accused—Conviction of less than five—Legality of—Indian Penal Code, s. 149.

The facts alleged by the prosecution were these :

The first appellant brought with him in a truck to the scene of the occurrence a mob of 40 to 50 persons including the other two appellants and four other persons who were acquitted by the trial court. The first appellant fired a shot from the gun which he was carrying which hit Laldeo Singh on the chest as a result of which he fell down. Thereupon none of the acquitted persons fired from his gun and the shot hit Laldeo Singh again. Thereupon another of the acquitted persons fired a shot at Laldeo Singh which killed him instantaneously. The first appellant fired two shots at one Deva Singh who was hit on his thigh. The other two appellants assaulted Deva Singh with lathis of the seven persons charged, four were acquitted. The appellants were convicted under s. 304 Part II read with s. 149 of the Indian Penal Code by the trial court. On appeal the High Court altered their conviction into one under s. 326 read with s. 149 of the Indian Penal Code but maintained the convictions under s. 147 and s. 426 of the Indian Penal Code. It was contended before the Supreme Court that as there was no appeal before the High Court against the acquittal of the four acquitted persons who were alleged to have constituted the unlawful assembly along with the appellants there could be no finding that there was an unlawful assembly of which appellants were members and therefore, were liable for the acts of other members

1963

Ram Bilas Singh
v.
The State of Bihar

thereof and that an accused person cannot be held liable vicariously for the act of an acquitted person.

Held, that even assuming that the fatal injuries were caused to Laldeo Singh by one of the four acquitted persons, it was not open to the High Court to hold any of the appellants liable for that act by resort to s. 149 of the Indian Penal Code.

Held, further that the legal position deducible from the authorities was (i) that it is competent to a court to come to the conclusion that there was an unlawful assembly of five or more persons, and actually convict less than that number for the offence if (a) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and the evidence led to prove this is accepted by the court; (b) or that the first information report and the evidence shows such to be the case even though the charge does not state so; (c) or that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons provided that in cases (b) and (c) no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.

Harchandra v. *Rex*. I.L.R. (1951) 2 All. 62, approved.

Topandas v. *State of Bombay*, [1955] 2 S.C.R 881, *R.* v. *Plummer*, [1902] 2 K.B. 339, *Bharwad Mepa Dana* v. *State of Bombay*, [1960] 2 S.C.R. 172, *Kartar Singh* v. *State of Punjab*, [1962] 2 S.C.R. 395, *Dalip Singh* v. *State of Punjab*, [1954] S.C.R. 145, *Sunder Singh* v. *State of Punjab* [1962] Supp. 2 S.C.R. 654, *Mohan Singh* v. *State of Punjab*, [1962] Supp. 3 S.C.R. 848, and *Krishna Govind Patil* v. *State of Maharashtra*, [1964] Vol. 1 S.C.R. 678, referred to.

Held, also that the High Court had failed to determine material questions necessary for properly deciding the case, namely that it had not fully examined the evidence to come to a definite conclusion as to whether there was an unlawful assembly or not consisting of persons other than the acquitted persons and that the High Court had also failed to ascertain the particular act committed by any member or members of that assembly in furtherance of the common object as also whether any of the appellants had participated in the said incident.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 73 of 1961.

Appeal by special leave from the judgment and order dated November 3, 1960 of the Patna High Court in Criminal Appeal No. 326 of 1958.

Jai Gopal Sethi, C.L. Sareen and *R. L. Kohli,* for the appellants.

S. P. Varma, and *R. N. Sachthey,* for respondent.

1963. January 29. The Judgment of the Court was delivered by

Mudholkar, J.

MUDHOLKAR, J.—This is an appeal by special leave from a judgment of the High Court of Patna altering the conviction of the appellants under s. 304, Part II read with s. 149 of the Indian Penal Code into convictions under s. 326 read with s. 149, I.P.C. but maintaining the sentences and affirming the convictions under s. 147 and s. 426, I.P.C. as well as the sentences awarded in respect of those offences.

The prosecution case was that there was a dispute between Ram Bilas Singh of Shahpore and his two sons Ram Naresh Singh and Dinesh Singh on the one hand (appellants before us) and Deva Singh (P. W. 2) and his brothers on the other with respect to a *Dochara* in a village Dihara. On April 22, 1957, at about 9.00 a.m. while Deva Singh, along with his brother Laldeo Singh, the deceased and two other persons Dhunmun Singh (P. W. 4) and Dasain Hajam were sitting in the *Dochara* the appellant No. 1 Ram Bilas Singh arrived there in a truck with a mob of 40 to 50 persons which included the other two appellants before us, besides four other persons who were acquitted by the trial court. Ram Bilas Singh is said to have fired from the gun which he was carrying which hit Laldeo Singh on the chest as a result of which he fell down, but got up later.

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

Thereupon Ramdeo Singh (acquitted by the trial court) fired from his gun and the shot hit Laldeo Singh on the chest and he fell down again. After that, Ram Bilas Singh Gumasta of Dihara (acquitted by the trial court) fired a second shot from his gun hitting Laldeo Singh on the abdomen and killing him instantaneously. The appellant Ram Bilas Singh is further said to have fired two shots at Deva Singh hitting him on his right thigh. Appellants Ram Naresh Singh and Dinesh Singh are said to have assaulted Deva Singh with lathis as a result of which he fell down and thereafter the mob proceeded to dismantle the *Dochara* by demolishing its mud pillars, as a result of which its thatched roof fell down. Having achieved their object, the mob is said to have left the place, taking away along with them a *palang*, a bamboo cot, two quilts, one lantern and one *garansa*.

The incident attracted a number of villagers to the spot including Jagdish Singh, Bhagwat Singh (since dead) and Ajodhya Singh. After report was lodged of the incident, the police arrived on the spot, held the panchnama (inquest) on the body of Lal Deo Singh and followed the usual procedure. A search was made for the seven accused persons, including the appellants, but it took some time to find them out and arrest them. Eventually, they were placed before a magistrate who committed them for trial for offences under s. 148, s. 302 read with s. 149 and s. 426, I.P.C., the appellant Ram Bilas Singh, Ramdeo Singh and Ram Bilas Singh Gumasta of Dihara were specifically charged with offences under s. 302, I.P.C. for having committed the murder of Laldeo Singh. Ram Bilas Singh was further charged under s. 307 of the Indian Penal Code for attempt to commit the murder of Deva Singh while Ram Naresh Singh and Dinesh Singh (appellants 2 and 3) were further charged with offences under s. 323, I.P.C. for assaulting Dhunmun Singh (P. W. 4). The court of

Session acquitted both Ram Bilas Singh as well as Ramdeo Singh of the offence under s. 302, I.P.C. and also acquitted all the seven accused persons of the offence under s. 302 read with s. 149, I.P.C. It, however, convicted the three appellants before us under s. 304, second part, read with s. 149 of the I.P.C. and under ss. 147 and 426, I.P.C. but acquitted the appellants 2 and 3 of the offence under s. 323, I.P.C.

Briefly stated, the defence of the three appellants was that the appellant Ram Bilas Singh was in possession of the *dochara,* that it was Laldeo Singh and Deva Singh who threatened to dismantle the *dochara* and, therefore, they marched there on the date of the incident at the head of a mob consisting of 15 or 20 persons carrying with them various weapons. During the incident, Laldeo Singh and Deva Singh are said to have flourished their *farsis* and *gandasas* while some other members of their party are said to have used their lathis and spears as a result of which four persons on the side of the appellants received injuries. In the meantime, in self-defence, one Ram Lakhan Singh (since deceased) fired a shot from his gun and ran away. This shot is said to have hit Laldeo Singh and also Deva Singh. After being injured in this manner, Laldeo Singh is said to have dropped down dead and then the mob dispersed.

The defence of the appellants that they were in possession of the *dochara* and that Laldeo Singh and Deva Singh were the aggressors has been rejected by both the courts below and Mr. Sethi who appears for the appellants has not even sought to controvert the finding on that point. His contention, however, is that the appellants having been acquitted of the offence under s. 302 read with s. 149, I. P. C. and appellant No. 1 having been acquitted of the offences under s. 302 and s. 307, I.P.C. none of them could

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

be convicted under s. 326 read with s. 149, I.P.C. Learned counsel points out that the clear case of the prosecution in the charge sheet was against seven named persons i.e., the three appellants before us, Ram Bilas Singh Gumasta of Dihara, Sudarshan Singh son of Ram Bilas Singh Gumasta, Ramdeo Singh and Sakal Singh sons of Raghoo Singh and contends that out of these, four persons having been acquitted, the remaining three persons could not be said to have been members of an unlawful assembly and, therefore, they could neither be convicted under s. 147, I.P.C. nor could they be convicted of any other offences with the aid of s. 149, I.P.C. All that it was competent for the court to do was to convict each of them for their individual acts and no more. Learned counsel further contends that without setting aside the acquittal of the four alleged associates of the appellants, there could be no finding to the effect that there was an unlawful assembly of which the appellants were members and were, therefore, liable for the acts of other members thereof. Further, it was urged by learned counsel that an accused person cannot be held liable vicariously for the act of an acquitted person and, therefore, even assuming that the fatal injuries were caused to Laldeo Singh by one of the four acquitted persons, it was not open to the High Court to hold any of the appellants liable for that act with the aid of s. 149, I.P.C.

Learned counsel relied upon a passage in the judgment of Agarwala J., in *Harchanda* v. *Rex* (1) which reads thus :

> "Now in a criminal case the burden of proof is always on the prosecution. It is for the prosecution to establish the responsibility of the accused for the crime alleged. Having regard to the fact that there is no appeal against the acquittal of the other five accused before us, and having regard to the fact that we cannot

(1) I.L.R. (1951) 2 All. 62, 73.

interfere with the finding of the learned Sessions Judge, so far as it concerns those accused, we cannot hold that either Durga Das or Sukhbir was responsible for inflicting the incised wounds: and since it was not the prosecution case that there was some unknown person along with the accused, who was also holding a sharp-edged weapon, we cannot ascribe the infliction of the incised wounds to some such unknown person. The result of the prosecution evidence, taken with the findings of the learned Sessions Judge, is that the prosecution is unable to explain the infliction of the incised wounds. In my opinion, in such a case the accused cannot be held constructively liable for the infliction of those wounds."

There is no doubt that the High Court has observed in its judgment under appeal that Laldeo Singh was killed as a result of one of the shots fired at him by Ram Bilas Singh Gumasta who was acquitted by the court of Session. We may quote the observations made by it in this regard. They are :

"It seems, as I shall show hereafter, the trial court was greatly prepossessed in favour of Ram Bilas Singh of Dihara, and therefore it ruled out without disbelieving the evidence, the possibility of Laldeo Singh having been killed by the third shot fired by Rambilas Singh of Dihara. It is admitted that the two Rambilas Singh and Ramdeo Singh have each held a licensed gun . .....These guns and the empty cartridge..... ..... which had been found by P.W. 21 at the place of occurrence were examined by the Fire Arms Expert . ..... The trial court has explained away this very strong piece of evidence of unimpeachable character, supporting the version of the witnesses

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

that Rambilas Singh of Dihara had fired one shot from his gun, on a very flimsy ground."

Then the High Court observed that the evidence of the ballistic expert was disregarded by the Court of Session on flimsy grounds. The point, however, is that the High Court has come to the conclusion that the shot which resulted in the death of Laldeo Singh was fired by an acquitted person. If the view taken by the Allahabad High Court is correct, then it would follow that it was not open to the High Court before which the acquittal of Rambilas Singh Gumasta was not challenged, to reassess the evidence with regard to him and hold that it was he who had caused the death of Laldeo Singh.

We will deal with the decision of the Allahabad High Court presently, but we must refer to certain decisions of this court to which reference was made during arguments.

In *Topandas* v. *The State of Bombay* (1), this court has held that where four named individuals were charged with having committed an offence of criminal conspiracy under s. 120-B, I.P.C. and three out of those four were acquitted of that charge, the fourth accused could not be held guilty of the offence of criminal conspiracy. In support of this view, this court has relied upon a passage in Archbald's Criminal Pleading, Evidence and Practice (33rd edn. p. 201, paragraph 361) which reads thus :

> "Where several prisoners are included in the same indictment, the jury may find one guilty and acquit the others, and vice versa. But if several are indicated for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment and proved, that they committed the riot together with some other person not tried upon that

(1) [1955] 2 S.C.R. 881.

indictment. 2 Hawk c. 47 s. 8. And, if upon an indictment for a conspiracy, the jury acquit all the prisoners but one, they must acquit that one also, unless it is charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment."

This court has also quoted with approval a passage from the judgment in *R.* v. *Plummer* (1), which is one of the decisions on which the above passage is founded.

In *Bharwad Mepa Dana* v. *State of Bombay* (2), this court had to consider the correctness of the conviction of three persons under s. 302 read with s. 149 I.P.C. when one other person who had been convicted by the Sessions Judge of a similar offence had been acquitted by the High Court. It may be mentioned that originally twelve persons were named in the charge and it was alleged that they had formed an unlawful assembly with the common object of murdering certain persons. Seven of them were acquitted by the Sessions Judge and only five were convicted under s. 302 read with s. 149, I.P.C. The High Court, while acquitting one of the five persons, convicted by the Sessions Judge, held that there were ten to thirteen persons in the unlawful assembly though the identity of all the persons except four had not been established, that all these persons had the common object and the common intention of killing the victims and that the killing was done in prosecution of the common object of the unlawful assembly and in furtherance of the common intention of all. Upon these facts, this court held that the appellants before it were rightly convicted under s. 302 read with s. 149, I.P.C., and that there was nothing in law which prevented the High Court from finding that the unlawful assembly consisted of the four convicted persons and some unidentified persons, who,

(1) [1902] 2 K.B. 339. (2) [1960] 2 S.C.R. 172, 181.

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

together numbered more than five. This court further observed :

> ".....it is unnecessary in the present case to embark on a discussion as to the legal effect of the acquittal of nine of the accused persons, except to state that we may proceed on the footing that the acquittal was good for all purposes and none of those nine persons can now be held to have participated in the crime so that the remaining four persons may be held guilty under s. 149 Indian Penal Code."

It is on the above observations that reliance has been placed by Mr. Sethi. He contends that the High Court was wrong in observing that Laldeo Singh was killed as a result of a shot fired at him by Ram Bilas Singh Gumasta and that he has escaped the charge of murder as he was acquitted by the Sessions Judge.

Then, there is the decision of this court in *Kartar Singh* v. *State of Punjab* (1), where this court has held that if the trial court can legally find that the actual number of members in the assailants party was more than five, that party will in law constitute an unlawful assembly even though ultimately three of the accused persons are convicted. It has further held that it is only when the number of the alleged assailants is definite and all of them are named and the number of persons found to have taken part in the incident is less than five, it cannot be held that they formed an unlawful assembly. Then this court observed :

> "The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named, excludes the possibility of other persons to be in the appellant's party and especially when there be no occasion to think that the witnesses naming all

(1) [1962] 2 S.C.R. 395, 399.

the accused could have committed mistakes in recognising them."

In support of the above conclusion, reliance was placed by this court upon the decision of this court in *Dalip Singh* v. *State of Punjab* (1).

In *Sunder Singh* v. *State of Punjab* (2), also this court has considered the effect of the acquittal of some persons of the offence under s. 302 read with s. 149, I.P.C. on the conviction of the remaining persons who numbered less than five. In dealing with this matter it has observed :

> "Cases sometimes arise where persons are charged with being members of an unlawful assembly and other charges are framed against them in respect of offence committed by such an unlawful assembly. In such cases; if the names of persons constituting the unlawful assembly are specifically and clearly recited in the charge and it is not suggested that any other persons known or unknown also were members of the unlawful assembly, it may be that if one or more persons specifically charged are acquitted, that may introduce a serious infirmity in the charge in respect of the others against whom the prosecution case may be proved. It is in this class of cases, for instance, that the principle laid down in the case of *Plummer* may have some relevance. If out of the six persons charged under s. 149 of the Indian Penal Code along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking."

Upon the facts of the case before it, this court held that the principle set out in *Plummer's case* (3),

(1) [1954] S.C.R. 145. (2) [1962] Supp. 2 S.C.R. 654. 663.
(3) [1902] 2 K.B. 339.

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

and which has been accepted by this court in *Topan Das's case* (1), did not apply to the case before it. This court then proceeded to consider the powers of the court of appeal under s. 423 (1) (a) of the Criminal Procedure Code and observed that if in dealing with a case before it, it became necessary for the High Court to deal indirectly or incidentally with the case against the acquitted accused, it could well do so and there is no legal bar to such a course. Upon the view we are taking it is unnecessary to express any opinion as to whether the interpretation placed in this case upon the ambit of the powers under s. 423, Cr. P. C. is consistent with the principle in *Plummer's case* (2).

Finally, there is the decision of this court in *Mohan Singh* v. *The State of Punjab* (3), where a similar question arose for consideration. There, this court, after pointing out that where five or more persons are shown to have formed an unlawful assembly, the mere fact that less than that number are actually tried for the offence committed by the assembly and convicted of that offence would not necessarily render their conviction illegal, because other persons may not have been available for trial or may not be properly identified or for some other reason. This court has observed :

> ".....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 s. 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

(1) [1955] 2 S.C.R. 881. (2) [1902] 2 K.B. 339.
(3) [1962] Supp. 3 S.C.R. 848, 858.

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 s. 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 s. 149 because on the evidence the court of fact is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five."

The decisions of this court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is to the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of s. 149, I. P. C. provided it comes to the conclusion that five or more persons participated in the incident. Again, it is clear from these decisions that when a person has been acquitted of an offence, his acquittal will be good for all purposes when the incident in connection with which he was implicated comes up for consideration before

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

the High Court in appeal by a person or persons who were tried along with him and convicted of some offence with the aid of s. 149, I. P. C. *Sunder Singh's case* (1), has carved out an exception to this rule to the effect that the High Court can, under s. 423, Cr. P. C. consider incidentally the question whether the acquitted person was a member of the unlawful assembly for the purpose of determining the case of the appellants before it. As already pointed out it is not necessary in this case to say whether such an exception can be recognised consistently with the principle in *Plummer's case* (2), which has so far been uniformly accepted by this court.

We have had occasion to consider recently in *Krishna Govind Patil* v. *The State of Maharashtra* (3), the effect of the acquittal of persons who were tried along with the persons convicted of an offence under s. 302 read with s. 34. One of us (Subba Rao, J.) speaking for the court, has observed :

> "It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under s. 302 read with s. 34 of the Indian Penal Code, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of s. 34 on different situations.
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> (i) A, B, C and D are charged under s. 302, read with s. 34 of the Indian Penal Code,

(1) [1962] Supp. 2 S.C.R. 654, 663. (2) [1902] 2 K B. 339.
(3) [1964] Vol. 1 S.C.R. 678.

for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) A, B, C and D and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

(3) A, B, C and D are charged under the said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others, have jointly committed the offence.

As regards the third illustration a Court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder under s. 302, read with s. 34 of the Indian Penal Code, though the other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence. In the second illustration, the Court can come to the same conclusion and convict one of the named accused if it is satisfied that no prejudice has been caused to the accused by the defect in the charge. But in the first illustration the Court certainly can convict two or more of the named accused if it accepts the evidence that they acted conjointly in committing the offence. But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted, some other unidentified persons acted

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

conjointly along with one of the named persons? If the Court could do so, it would be making out a new case for the prosecution : it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration."

What has been held in this case would apply also to a case where a person is convicted with the aid of s. 149, Indian Penal Code instead of s. 34. Thus all the decisions of this court to which we have referred make it clear that it is competent to a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it if (a) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; (b) or that the first information report and the evidence shows such to be the case even though the charge does not state so, (c) or that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons provided, in cases (b) and (c), no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.

Now, coming to the Allahabad High Court decision relied upon, it is sufficient to say that the

observations made therein which have been quoted earlier appear to be in consonance with the principle in *Plummer's case* (1), and thus affords support to the argument of learned counsel.

Applying the law as set out above, we must find out whether what the High Court has done in this case is right. In the first place, though it was vaguely stated by some of the witnesses examined in the case that 40 or 50 persons took part in the incident including the 7 persons mentioned in the first information report and the charge sheet, the prosecution case throughout has been that only seven named persons took part in the incident. Even the first information report of Deva Singh (P. W. 2), one of the injured persons, mentions only the seven persons who were placed for trial and no other. There is no suggestion therein that any other persons took part in the incident. The Court of Session, however, without discussing the point and without finding as to how many persons were members thereof, has come to the conclusion that there was an unlawful assembly, the common object of which was to dismantle the *Dochara* and assault Laldeo Singh and Deva Singh. The High Court has proceeded more or less on the assumption that there was an unlawful assembly, only some members of which were put up for trial, four of whom were acquitted and three convicted. It was necessary for the High Court to consider whether the statements of some of the witnesses that the unlawful assembly consisted of many more than seven persons are true or whether they should be rejected in view of the fact that the first information report shows that only seven persons who were named therein, committed the offence. It had also to consider the further question of prejudice by reason of the defect in the charge. Upon the law as stated by this court in *Mohan Singh's case* (2) and in other cases it would have been competent to the High Court to look into the entire evidence in

(1) [1902] 2 K.B. 339. (2) [1962] Supp. 3 S.C.R. 848, 858.

1963

Ram Bilas Singh
v.
The State of Bihar

Mudholkar, J.

the case, oral and documentary, and consider whether there was an unlawful assembly or not. But it has not done so. Had the High Court, come to a reasoned conclusion that there was an unlawful assembly consisting of more than five persons, including the appellants and some other persons who were unidentified and convicted the appellants under s. 147 and, with the aid of s. 149, also of some other offence committed by a member or members of the unlawful assembly other than the acquitted persons the matter would have stood on a different footing. But it has not done so. It is clear from its judgment that the High Court was not satisfied by the manner in which the case had been dealt with by the Court of Session; but then, it should not have stopped there. Instead, it should have fully examined the evidence and come to a definite conclusion as to whether there was an unlawful assembly or not had stated its reasons for coming to such a conclusion. It should then have ascertained the particular acts committed by any member or members of that assembly in furtherance of the common object as also the question whether any of the appellants had participated in the incident. In the light of its findings on these matters the High Court should then have proceeded to consider whether all or any of the appellants could be held liable vicariously for all or any of the acts found to have been committed by the unlawful assembly or any member or members thereof other than those alleged to have been committed by persons whose acquittal has become final. It is a matter of regret that the High Court has failed to determine questions which it was essential for it to determine. We, therefore, set aside that judgment and send back the case to the High Court for deciding it afresh.

Appeal allowed.
Case remanded.