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large area of land thus constituted and on account of getting a compact block for themselves, is inadequate. Therefore, assuming that Art. 31 (2) applies as it was before the Fourth Amendment, it cannot be said that the compensation which the tenure-holders will get under s. 29-B is inadequate in the circumstances. This ground of attack also therefore fails.

There is no force in this petition and it is hereby dismissed with costs.

Petition dismissed.

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December 18.

MIZAJI AND ANOTHER

v.

THE STATE OF U.P.

(JAFER IMAM, S. K. DAS and J. L. KAPUR, JJ.)

Murder—Unlawful Assembly—Common object to take forcible possession—Killing by one—Liability of others—Sentence—Indian Penal Code, 1860, (XLV of 1860) ss. 149 and 302.

Early one morning the five appellants, Tej Singh armed with a spear, his son Mizaji armed with a pistol which he carried in the folds of his *dhoti*, his nephew Subedar, his cousin Machal and his servant Maiku armed with lathis went to take forcible possession of a field which was in the cultivatory possession of Rameshwar and others. While Tej Singh stood guard, Maiku started ploughing and overturning the *jowar* that had been sown in one portion of the field and the others started cutting the sugarcane which stood in another portion. When Rameshwar and others arrived they protested to Tej Singh, whereupon all the accused gathered near Tej Singh and asked the complainants to go away otherwise they would be finished. On their refusal to go, Tej Singh asked Mizaji to fire at them and Mizaji shot Rameshwar dead. The Courts below found that the common object of the unlawful assembly was to take forcible possession of the field and to meet every eventuality even to the extent of causing death if interfered with. It accordingly convicted the appellants under s. 302 read with s. 149, Indian Penal Code, and sentenced Mizaji to death and the others to imprisonment for life. The appellants contended that the other appellants could not have the knowledge that Mizaji carried a pistol in the folds

of his *dhoti*, that the murder was not committed in prosecution of the common object to take forcible possession nor did the other appellants know that murder was likely to be committed in furtherance of the common object.

Held, that the appellants had been rightly convicted and sentenced under s. 302 read with s. 149, Indian Penal Code. The extent to which the members of the unlawful assembly were prepared to go in prosecution of the common object, is indicated by the weapons carried by them and their conduct. The circumstances show that the appellants must have known that Mizaji was carrying a pistol. The appellants were prepared to take forcible possession at any cost and the murder was immediately connected with the common object. Under the first part of s. 149 the offence committed in prosecution of the common object must be one which was committed with a view to accomplish the common object and must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed was not in direct prosecution of the common object of the assembly, it would yet fall under s. 149 if it could be shown that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen.

Queen v. *Sabid Ali*, (1873) 20 W.R. 5 Cr., *Chikkarange Gowde* v. *State of Mysore*, A.I.R. (1956) S.C. 731, referred to.

The fact that the appellants went to take possession in the absence of the complainants did not show that the common object was not to take forcible possession as proceedings were going on between the parties in the Revenue Court for possession over the field and the appellants had gone armed with lethal weapons prepared to overcome the opposition which they knew they would meet.

Mizaji was rightly given the sentence of death. He shared the common object of the unlawful assembly and carried the pistol from his house to use it in prosecution of the object and did use it. The fact that he used the pistol at the instance of his father was not a mitigating circumstance.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 81 and 82 of 1958.

Appeals by special leave from the judgment and order dated February 28, 1958, of the Allahabad High Court in Criminal Appeal No. 1809 of 1957 and Referred No. 138 of 1957 arising out of the judgment and order dated November 28, 1957, of the Court of Sessions at Farrukhabad in Sessions Trial No. 61 of 1957.

Jai Gopal Sethi and *B. C. Misra*, for the appellants.

G. C. Mathur, and *C. P. Lal* for the respondent.

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1958. December 18. The Judgment of the Court was delivered by

KAPUR, J.—These are two appeals which arise out of the same judgment and order of the High Court at Allahabad and involve a common question of law. Appellants Tej Singh and Mizaji are father and son, Subedar is a nephew of Tej Singh, Machal is Tej Singh's cousin and Maiku was a servant of Tej Singh. They were all convicted under s. 302 read with s. 149 of the Indian Penal Code and except Mizaji who was sentenced to death, they were all sentenced to imprisonment for life. They were also convicted of the offence of rioting and because Tej Singh and Mizaji were armed with a spear and a pistol respectively, they were convicted under s. 148 of the Indian Penal Code and sentenced to three years' rigorous imprisonment and the rest who were armed with lathis were convicted under s. 147 of the Indian Penal Code and sentenced to two years' rigorous imprisonment. All the sentences were to run concurrently but Mizaji's term of imprisonment was to come to an end after "he is hanged". Against this order of conviction the appellants took an appeal to the High Court and both their convictions and sentences were confirmed.

The offence for which the appellants were convicted was committed on July 27, 1957, at about sunrise and the facts leading to the occurrence were that field no. 1096 known as Sukhna field was recorded in the revenue papers in the name of Banwari who was recorded as in possession as tenant-in-chief. Sometime in 1949 he mortgaged this plot of land to one Lakhan Singh. In 1952 this field was shown as being under the cultivation of Rameshwar, the deceased and four others persons, Ram Sarup who was the uncle of Rameshwar, Jailal his brother, Sita Ram and Saddon. The record does not show as to the title under which these persons were holding possession. The mortgage was redeemed sometime in 1953. The defence plea was that in the years 1954, 1955, 1956 possession was shown as that of Banwari. But if there were any such entries, they were corrected in 1956 and possession was shown in the revenue papers as that of

Rameshwar, and four others abovenamed. These entries showing cultivating possession of the deceased and four others were continued in 1957. On April 18, 1957, Banwari sold the field No. 1096 to Tej Singh appellant who made an application for mutation in his favour but this was opposed by the deceased and four other persons whose names were shown as being in possession. In the early hours of July 27, 1957, the five appellants came armed as above stated. Mizaji's pistol is stated to have been in the fold (phent) of his *dhoti*. A plough and plank known as *patela* and bullocks were also brought. The disputed field had three portions, in one sugarcane crop was growing, in the other Jowar had been sown and the rest had not been cultivated. Maiku started ploughing the Jowar field and overturned the Jowar sown therein while Tej Singh with his spear kept watch. Bateshwar P. W. 7 seeing what was happening gave information of this to Ram Sarup who accompanied by Rameshwar, Jailal and Israel came to the Sukhna field but unarmed. Ram Sarup inquired of Tej Singh as to why he was damaging his field and Tej Singh replied that he had purchased the field and therefore would do " what he was doing " which led to an altercation. Thereupon, the four persons cutting the sugarcane crop i. e. Mizaji, Subedar, Machal and Maiku came to the place where Tej Singh was and upon the instigation of Tej Singh, Mizaji took out the pistol and fired which hit Rameshwar, who fell down and died ½ hour later. The accused, after Rameshwar fell down, fled from the place. Ram Sarup, Jailal and Israel then went to the police station Nawabgunj and Ram Sarup there made the first information report at about 7-30 a. m., in which all the five accused were named. When the police searched for the accused they could not be found and proceedings were taken under ss. 87 and 88 of the Code of Criminal Procedure, but before any process was issued Subedar, Tej Singh and Machal and Maiku appeared in court on August 3, 1957, and Mizaji on August 14, 1957, and they were taken into custody.

The prosecution relied upon the evidence of the eyewitnesses and also of Bateshwar who carried the

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information to the party of complainant as to the coming of Tej Singh and others. The defence of the accused was a total denial of having participated in the occurence and as a matter of fact suggested that Rameshwar was killed in a dacoity which took place at the house of Ram Sarup. The learned Sessions Judge accepted the story of the prosecution and found Ram Sarup to be in possession of the field; he also found that the appellants formed an unlawful assembly "the common object of which was to take forcible possession of the field and to meet every eventuality even to the extent of causing death if they are interfered with in their taking possession of the field" and it was in prosecution of the common object of that assembly that Mizaji had fired the pistol and therefore all were guilty of the offence of rioting and of the offence under s. 302 read with s. 149, Indian Penal Code. The High Court on appeal held that the appellants were members of an unlawful assembly and had gone to the Sukhna field with the object of taking forcible possession and

"there is also no doubt that the accused had gone there fully prepared to meet any eventuality even to commit murder if it was necessary for the accomplishment of their common object of obtaining possession over the field. There is also no doubt that considering the various weapons with which the accused had gone armed they must have known that there was likelihood of a murder being committed in prosecution of their common object".

The High Court also found that all the appellants had gone together to take forcible possession and were armed with different weapons and taking their relationship into consideration it was unlikely that they did not know that Mizaji was armed with a pistol and even if the common object of the assembly was not to commit the murder of Rameshwar or any other member of the party of the complainants "there can be no doubt that the accused fully knew, considering the nature of weapons with which they were armed, namely, pistol and lathis, that murder was likely to be committed in their attempt to take forcible possession over the disputed land". The High Court further

found that the accused had gone prepared if necessary to commit the murder in prosecution of their common object of taking forcible possession. They accepted the testimony of Matadin and Hansram who stated that all the accused had asked Ram Sarup and his companions to go away, otherwise they would finish all of them and when they resisted Mizaji accused fired the pistol at them and thus in view of the nature of the weapons with which they had gone to the disputed piece of land, " they knew that murder was likely to be committed in prosecution of their object ". Another finding given by the High Court was that the appellants wanted to forcibly dispossess the complainants and with that object in view they went to the disputed field to take forcible possession and that the complainant's party on coming to know of it went to the field and resisted. Mizaji fired the pistol and thus caused the death of Rameshwar. The High Court also held :—

" We are also of the opinion that the act of the accused was premeditated and well-designed and that the accused considering the circumstances of the case and the weapons with which they were armed, knew that murder was likely to be committed in accomplishment of their common object."

For the appellants it was contended that the High Court was not justified in drawing the inference that other members of the party of the appellants had knowledge of the existence of the pistol. There is no doubt that on the evidence the father Tej Singh must have known that the son, Mizaji, had a pistol. And in the circumstances of this case the High Court cannot be said to have erroneously inferred as to the knowledge of the rest as to the possession of pistol by Mizaji.

The question for decision is as to what was the common object of the unlawful assembly and whether the offence of murder was committed in prosecution of the common object or was such an offence as the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. It was argued on behalf of the appellants that the

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common object was to take forcible possession and that murder was committed neither in prosecution of the common object of the unlawful assembly nor was it such as the members of that assembly knew to be likely to be committed. That the common object of the unlawful assembly was to take forcible possession of the Sukhana field cannot be doubted. Can it be said in the circumstances of this case that in prosecution of the common object the members of the unlawful assembly were prepared to go to the extent of committing murder or they knew that it was likely to be committed? One of the members of the assembly Tej Singh was armed with a spear. His son Mizaji was armed with a pistol and others were carrying lathis. The extent to which the members of the unlawful assembly were prepared to go is indicated by the weapons carried by the appellants and by their conduct, their collecting where Tej Singh was and also the language they used at the time towards the complainant's party. The High Court has found that the appellants "had gone prepared to commit murder if necessary in the prosecution of their common object of taking forcible possession of the land", which it based on the testimony of Matadin and Hansraj who deposed that when the complainant's party arrived and objected to what the appellants were doing they (the appellants) "collected at once" and asked Ram Sarup and his companions to go away otherwise they would finish all of them and when the latter refused to go away, the pistol was fired. That finding would indicate the extent to which the appellants were prepared to go in the prosecution of their common object which was to take forcible possession of the Sukhana field. The High Court also found that in any event the case fell under the second part of s. 149, Indian Penal Code in view of the weapons with which the members of the unlawful assembly were armed and their conduct which showed the extent to which they were prepared to go to accomplish their common object.

Counsel for the appellants relied on *Queen* v. *Sabid Ali* (1), and argued that s. 149 was inapplicable. There

(1) (1873) 20 W.R. 5 Cr.

the learned Judges constituting the full bench gave differing opinions as to the interpretation to be put on s. 149, Indian Penal Code. That was a case where the members of an unlawful assembly went to take forcible possession of a piece of land. The view of the majority of the Judges was that finding unexpected opposition by one member of the party of the complainants and also finding that they were being overpowered by him, one of the members of the unlawful assembly whose exact time of joining the unlawful assembly was not proved fired a gun killing one of the occupants of the land who were resisting forcible dispossession. It was also held that the act had not been done with a view to accomplish the common object of driving the complainants out of the land, but it was in consequence of an unexpected counter-attack. Ainslie, J., was of the opinion that the common object of the assembly was not only to forcibly eject the occupants but to do so with show of force and that common object was compounded both of the use of the means and attainment of the end and that it extended to the committing of murder. Phear, J., said that the offence committed must be immediately connected with that common object by virtue of the nature of the object. The members of the unlawful assembly must be prepared and intend to accomplish that object at all costs. The test was, did they intend to attain the common object by means of murder if necessary? If events were of sudden origin, as the majority of the learned Judges held them to be in that case, then the responsibility was entirely personal. In regard to the second part he was of the opinion that for its application it was necessary that members of the assembly must have been aware that it was likely that one of the members of the assembly would do an act which was likely to cause death. Couch, C. J., was of the opinion that firing was not in prosecution of the common object of the assembly and that there was not much difference between the first and the second part of s. 149. He said :—

"At first there does not seem to be much difference between the two parts of the section and I think the

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cases which would be within the first, offences committed in prosecution of the common object, would be, generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part and not within the first."

Jackson, J., held in the circumstances of that case that the assembly did not intend to commit nor knew it likely that murder would be committed. Pontifex, J., interpreted the section to mean that the offence committed must directly flow from the common object or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. In the second part "know" meant to know that some members of the assembly had previous knowledge that murder was likely to be committed.

This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under s. 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty

under the second part of s. 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C. J., in *Sabid Ali's case* (1) that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of s. 149, Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of s. 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

Counsel for the appellants also relied on *Chikkavange Gowde* v. *State of Mysore* (2). In that case there were special circumstances which were sufficient to dispose of it. The charge was a composite one mixing up common intention and common object under ss. 34 and 149, Indian Penal Code and this Court took the view that it really was one under s. 149, Indian Penal Code. The charge did not specify that three of the members had a separate common intention of killing the deceased, different from that of the other members of the unlawful assembly. The High Court held that the common object was merely to chastise the deceased, and it did not hold that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The person who was alleged to have caused the fatal injury was acquitted. This Court held that on the findings

(1) (1873) 20 W. R. 5 Cr. (2) A.I.R. 1956 S.C. 731.

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of the High Court there was no liability under s. 34 and further the charge did not give proper notice nor a reasonable opportunity to those accused to meet that charge. On these findings it was held that conviction under s. 302 read with s. 149 was not justified in law nor a conviction under s. 34.

It was next argued that the appellants went to take possession in the absence of the complainants who were in possession and therefore the common object was not to take forcible possession but to quietly take possession of land which the appellants believed was theirs by right. In the first place there were proceedings in the Revenue Department going on about the land and the complainants were opposing the claim of the appellants and then when people go armed with lethal weapons to take possession of land which is in possession of others, they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accomplish their common object would depend on their conduct as a whole.

The finding of the High Court as we have pointed out was that the appellants had gone with the common object of getting forcible possession of the land. They divided themselves into three parties, Maiku appellant was in the field where jowar was sown and he was ploughing it, Mizaji, Subedar and Machal were in the sugar field and cutting the crop. Tej Singh was keeping watch. When the party of the complainants on being told of what the appellants were doing came, they protested to Tej Singh. Thereupon, all the members of Tej Singh's party gathered at the place where Tej Singh was and asked the complainants "to go away otherwise they would be finished", but they refused to go. Thereupon Tej Singh asked Mizaji to fire at them and Mizaji fired the pistol which he was carrying in the fold of his dhoti as a result of which Rameshwar was injured, fell down and died ½ hour later. It was argued on behalf of the appellants that in these circumstances it cannot be said that the offence was committed in prosecution of the common object of the assembly which was clear from the fact

that the party had divided itself into three parts and only Mizaji used his pistol and the other appellants did not use any weapon and just went away.

Both the Courts below have found that the pistol was fired by Mizaji and thus he was responsible for causing the death of Rameshwar which would be murder and also there is no doubt that Tej Singh would be guilty of abetment of that offence. But the question is whether s. 149 is applicable in this case and would cover the case of all the appellants ? This has to be concluded from the weapons carried and the conduct of the appellants. Two of them were armed one with a spear and the other with a pistol. The rest were armed with lathis. The evidence is that when the complainants' party objected to what the appellants did, they all collected together and used threats towards the complainants' party telling them to go away otherwise they would be finished and this evidence was accepted by the High Court. From this conduct it appears that members of the unlawful assembly were prepared to take forcible possession at any cost and the murder must be held to be immediately connected with the common object and therefore the case falls under s. 149, Indian Penal Code and they are all guilty of murder. This evidence of Hansram and Matadin which relates to a point of time immediately before the firing of the pistol shows that the members of the assembly at least knew that the offence of murder was likely to be committed to accomplish the common object of forcible possession.

It was then contended that Mizaji did not want to fire the pistol and was hesitating to do so till he was asked by his father to fire and therefore penalty of death should not have been imposed on him. Mizaji carried the pistol from his house and was a member of the party which wanted to take forcible possession of the land which was in possession of the other party and about which proceedings were going on before the Revenue Officer. He fully shared the common object of the unlawful assembly and must be taken to have carried the pistol in order to use it in the prosecution of the common object of the assembly and he did use

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it. Merely because a son uses a pistol and causes the death of another at the instance of his father is no mitigating circumstance which the courts would take into consideration.

In our opinion the courts below have rightly imposed the sentence of death on Mizaji. Other appellants being equally guilty under s. 149, Indian Penal Code, have been rightly sentenced to imprisonment for life.

The appeals must therefore be dismissed.

Appeals dismissed.

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December 18.

RAJA BAHADUR K. C. DEO BHANJ

v.

RAGHUNATH MISRA AND OTHERS

(SYED JAFER IMAM, S. K. DAS and J. L. KAPUR, JJ.)

Election—Corrupt Practice—Person in service of Government, obtaining assistance of—Sarpanch of Grama Panchayat in Orissa—Whether such a person—If Sarpanch is a revenue officer or a village accountant—Representation of the People Act, 1951 (43 of 1951), s. 123(7)(f)—Orissa Grama Panchayats Act, 1948 (Orissa XV of 1948).

The appellant was declared elected to the Orissa Legislative Assembly and the first respondent filed an election petition challenging the election, inter alia, on the ground that the appellant had committed the corrupt practice under s. 123(7)(f) Representation of the People Act, 1951, by obtaining the assistance of Sarpanches of certain Grama Panchayats for the furtherance of the prospects of his election. The petition was dismissed by the Election Tribunal but on appeal, was allowed by the High Court and the election was set aside. The High Court held that a Sarpanch was a person in the service of the Government within the meaning of s. 123(7)(f) of the Act.

Held, that a Sarpanch of Grama Panchayat in Orissa was not one of the persons contemplated by s. 123(7)(f) and consequently the appellant was not guilty of any corrupt practice in obtaining assistance of Sarpanches. Two conditions must co-exist before s. 123(7)(f) could apply to a Sarpanch: (i) that he was in the service of the Government, and (ii) that he fell within the class