

* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 20.04.2009

Judgment delivered on: 24.04.2009

+ **Crl. Appeal No.439/2008**

VED PRAKASH & ANR. Appellants
Through : Mr. Sandeep Sethi, Sr. Advocate with
Mr. Anurag Jain, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.479/2008

NIRANJAN LAL Appellant
Through : Mr. F.Haq, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.480/2008

HIRA LAL @ TONI Appellant
Through : Mr. F.Haq, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

Crl. Appeal No.540/2008

HARI OM & ANR. Appellants
Through : Mr. Sandeep Garg, Advocate for
Mr. Jagdish Dhawan, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

PRADEEP NANDRAJOG, J.

1. 11 accused namely: (i)Hira Lal @ Toni , (ii)Niranjan Lal, (iii)Shishpal all sons of Yaad Ram, (iv)Rakesh, (v)Bhupender, (vi)Hari Om all sons of Ramesh Chand, (vii)Ved Prakash, (viii)Dharmender, (ix)Kanchan Singh all sons of Shankar Lal, (x)Umaro S/o Munna Lal and (xi)Bal Kishan @ Bale were sent for trial and were charged as under:-

“Firstly that on 13.8.95, at about 5:30 PM, at Main road, Pahari Dheeraj, near Om Sweet, Gali Barna, within the jurisdiction of Police Station Sadar Bazar, you all, in prosecution of your common object of assaulting Ram Swaroop, Hem Raj and Rajesh etc., were the members of unlawful assembly and were armed with deadly weapons, which were likely to cause death and thereby committed an offence punishable under Sec.148 r/w Sec. 149 of the IPC and within my cognizance.

Secondly, that on the abovesaid date, time and place, you all, in prosecution of your common object of assaulting Ram Swaroop etc., caused the death of Hem Raj and thereby committed the offence of murder punishable under Sec. 302 r/w Sec. 149 of the IPC and within my cognizance.

Thirdly, that on the abovesaid date, time and place, you all, in prosecution of your common object of

assaulting Ram Swaroop etc., caused dangerous injury to Rajesh with sharp object with such intention or knowledge and under such circumstances that if by that act you had caused the death of Rajesh, you would have been guilty of an offence of murder and thereby committed an offence punishable under Sec.307 r/w Sec.149 of the IPC and within my cognizance.”

2. Bal Kishan @ Bale expired during trial and hence the proceedings abated against him.

3. Vide impugned judgment dated 24.4.2008, accused Hira Lal, Niranjana Lal, Hari Om, Kanchan Singh, Bhupender, Ved Prakash, Rakesh and Dharmender have been convicted. Umrao and Shishpal have been acquitted.

4. Noting at the end of the trial that Kanchan Singh and Bhupender were juvenile, the learned Trial Judge has passed an order that a duplicate set of entire proceedings be prepared and placed before the Juvenile Justice Board so that appropriate order on sentence may be passed against said two accused. Qua the remaining 6 i.e. Hira Lal, Niranjana Lal, Hari Om, Ved Prakash, Rakesh and Dharmender, holding that since it was proved that they had committed offences punishable under Section 302/149 IPC and Section 307/149 IPC, it has been held that the said accused need not be convicted for the lesser offence i.e. the offence punishable under Section 148 IPC.

5. Vide order on sentence dated 25.4.2008, all six have been sentenced to undergo imprisonment for life and pay a fine

of Rs.10,000/- each; in default of payment of fine to undergo simple imprisonment for 4 months for the offence punishable under Section 302/149 IPC. They have been directed to undergo imprisonment for 10 years and pay a fine of Rs.10,000/- each; in default of payment of fine to undergo simple imprisonment for 4 months for the offence punishable under Section 307/149 IPC. Needless to state, the sentences have been directed to run concurrently.

6. The said 6 accused have filed the aforementioned 4 appeals. Ved Prakash and Dharmender have filed a joint appeal. Hari Om and Rakesh have filed a joint appeal. Niranjana and Hira Lal have filed individual appeals.

7. The process of the law commenced when DD No.11 Ex.PW-27/A was recorded on 13.8.1995 at 5:40 PM by the duty officer PS Sadar Bazar that a message has been received from the police control room that a fight had taken place in gali Barna, Pahari Dheeraj, Sadar Bazar. SI Kanwal Singh PW-27, accompanied by Const.Rishi Prakash PW-14, left for the spot and learnt that two injured persons had been removed to Hindu Rao Hospital and one had been removed to Ram Manohar Lohia Hospital. SI Narender Singh PW-32 and HC Dhyan Singh PW-21 also reached the spot soon after. HC Dhyan Singh was left at the spot to guard the same. Inspector Kanwal Singh, SI Narender Singh and Const.Rishi Prakash left for Hindu Rao Hospital and

found Rajesh and Ram Swaroop admitted in the hospital; both having injuries. Whereas Rajesh was unfit for statement, Ram Swaroop was fit for statement and accordingly, SI Narender Singh PW-32, recorded the statement Ex.PW-4/A of Ram Swaroop, in which it was stated as under:-

“Statement of Ram Swaroop, S/o Lila Ram, R/o House No.4161, Gali Barna, Sadar Bazar, Delhi aged 24 years.

I reside with my family at the above mentioned address and sell betel leaves for a living. Yesterday evening Bobby had spoken ill of our sister-in-law for which our father had scolded them but no police report was lodged. Today, in the evening at about 5:30 PM I and my brother Hem Raj had fetched a TSR of Rajesh to drop our sister at her in-laws' house. We were standing near Om Sweets Shop while our sister along with the other women in the family was coming towards the auto when Toni, Bobby, Dharmender, Kanchan, Rakesh, Hari Om, Niranjana and Bhupender who are known to me as they reside in my colony came there one by one and Toni exhorted the others and said '*inhe maro, ye bachkar na jaane paye, inke pita ne kal hamari bejatti ki hai*'. Thereafter Niranjana and Hari Om caught hold of Hem Raj and Hira Lal stabbed him in the stomach. When I tried to move forward Toni hit me on my head from the rear end of the knife and Hari Om caught hold of me while Rakesh started hitting me with a hockey stick on my head and waist. Hari Om had hit me with an iron chain. Kanchan and Bhupender caught hold of TSR driver Rajesh while Bobby and Dharmender stabbed him in the waist and Rakesh hit him on the head and waist with a hockey stick. Hari Om hit Rajesh with the chain. That all the above mentioned accused persons ran away when I raised a hue and cry. All the accused persons entered into a conspiracy to make this life threatening attack on us. The incident was witnessed by many people who were standing there at the road. Let legal action be taken against the accused persons. We were brought to the hospital by a PCR Van. My statement has been read over to me and is correct.”

8. SI Naresh Kumar made an endorsement, Ex.PW-32/A, on the aforesaid statement of Ram Swaroop and handed over the same to Const.Mukesh Kumar PW-30 at 8:45 PM (a fact recorded in the endorsement Ex.PW-32/A) who took the same to the police station, where based on the statement, an FIR was registered.

9. At the hospital, the blood stained clothes of Rajesh were handed over by the doctor to SI Narender Singh who seized the same vide seizure memo Ex.PW-17/A.

10. Thereafter, SI Kanwal Singh and SI Narender Kumar went to Ram Manohar Lohia Hospital where they learnt that Hemraj was admitted in an injured condition and was unfit to make a statement. They collected the MLC Ex.PW-5/A of Hemraj. The doctor at Ram Manohar Lohia Hospital handed over the blood stained clothes of Hemraj to them, which they seized vide seizure memo Ex.PW-13/A.

11. Accused Kanchan and Bhupender were arrested the same day from Tikona Park, Idgah, Sadar Bazar at the instance of Jitender Kumar PW-22. On 14.8.1995, acting on a tip from an informer, accused Niranjan and Hari Om were arrested in the presence of Jitender Kumar from near the stairs at Sadar Bazar Railway Station and a cycle chain was recovered from the right side pocket of the pant of accused Hari Om, which was seized

vide seizure memo Ex.PW-27/F.

12. Hemraj expired the next day i.e. on 14.8.1995. The duty constable at the hospital informed the local police station of his death, which information was recorded vide DD No.7A. The offence of murder was added in the FIR and the investigation of the case was handed over to Inspector Mahender Singh Malik PW-31. He went to R.M.L.Hospital and seized the dead body of Hemraj and sent the same to Sabzi Mandi mortuary.

13. The post-mortem of the deceased was conducted on 14.8.1995 itself by Dr.L.K.Barua PW-6, at the Sabzi Mandi mortuary. The post-mortem report Ex.PW-6/A records the following injuries on the person of the deceased:-

“One vertically placed midline stitched wound was seen in front of upper and middle abdomen of length 10 inches.

Another stitched wound of length 1-2/3 inch seen four inches above the umbilicus. I have drawn the diagram of the wounds in my original PM report. No other external injury mark was seen on the body.

Internal examination:

The scalp, skull bones were intact and normal. The brain was pale.

Neck structures were intact and normal. All chest organs were normal but pale.

After opening the stitches of the wounds both the injuries were seen to be cleanly cut. The big midline stitched wound was operational, but the small one was the one that was the stab wound. After exploration the abdominal cavity the duodenum of intestine was found to be stitched. The pancreas and the liver were

seen to be stitched. These injuries were seen to be corresponding to the injury placed four inches above the umbilicus. The stomach was empty. All the abdominal organs and viscera was seen smeared with blood clots. The rectum and the urinary bladder were empty.”

14. The cause of death was opined to be the injury on the abdomen which was held to be sufficient to cause death in the ordinary course of nature. A sample blood of the deceased on a gauze was handed over by Dr.L.K.Barua to Inspector Mahender Singh, which was seized by him vide seizure memo Ex.PW-16/A.

15. In the meanwhile on 14.8.1995 the condition of Rajesh improved and his statement under Section 161 Cr.P.C. was recorded by Inspector Mahender Singh Malik.

16. Acting on secret information received on 15.8.1995, SI Mahender Singh Malik went to D-326, Nathu Colony, Nand Nagri, Delhi where 4 accused namely Hira Lal, Rakesh, Ved Prakash @ Bobby and Dharmender were arrested on the pointing out of the secret informer. The statements made by the four, on interrogation, i.e. Ex.PW-31/J, Ex.PW-31/K, Ex.PW-31/L and Ex.PW-31/M respectively, were recorded by SI Mahender Singh Malik. Accused Hira Lal stated that he can lead the police to the place where he had thrown the knife used by him. Thereafter, the accused led SI Mahender Singh to the Ladies Public Lavatory, Basti Ram Lal, Gali Barna, Sadar Bazar, Delhi and produced the knife Ex.P2 from a wall of the lavatory. The same was seized vide

seizure memo Ex.PW-31/N in the presence of two public witnesses namely Raj Kumar and Suresh Kumar. A sketch, Ex.PW-31/O, of the knife was prepared by SI Mahender Singh. Accused Rakesh Kumar disclosed that he can lead the police to the place where he had hidden a hockey stick used by him and thereafter in the presence of the aforementioned two public witnesses led SI Mahender Singh to his room on the first floor of House No. 4305, Gali Dharamshala, Basti Nand Ram, Gali Barna, Sadar Bazar, Delhi from where he got recovered a hockey stick Ex.P3 which was seized vide seizure memo Ex.PW-31/P

17. The remaining accused namely Shishpal, Umrao Singh and Bal Kishan were arrested on 19.9.1995, 1.11.1995 and 3.11.1995 respectively.

18. For record, it may be noted here that the prosecution had not relied upon any recoveries effected pursuant to the disclosure statements made by any other accused, save and except the recoveries effected from Hari Om when he was arrested and the recoveries effected pursuant to the statement made by Rakesh and Hira Lal.

19. The knife recovered pursuant to the disclosure statement of Hira Lal was sent to Dr.L.K.Barua PW-6, for opinion, as to whether the stab injury on Hemraj could be caused by the knife in question. He gave a report Ex.PW-6/C informing that the stab injury noted by him on the person of the deceased could

possibly be caused by the knife Ex.P2.

20. Rajesh was discharged from the hospital, as recorded in his MLC Ex.PW-9/C after 13 days i.e. on 26.8.1995.

21. On 11.9.1995 the knife Ex.P2, the blood stained clothes of the deceased and the blood sample of the deceased on a gauze, were sent to the FSL Malviya Nagar and the serologist opined, vide report Ex.PX, that human blood of group 'A' was found on the knife and that the blood group of the deceased was 'A'.

22. In the course of investigation, Inspector Mahender Singh Malik PW-31, recorded the statements of Nirmal Kumar PW-2, Chandu Lal PW-11, Kanta Prasad PW-12 and Jitender PW-22. It may be noted that Nirmal Kumar and Jitender are inhabitants of the area and are not related to either Rajesh, the injured TSR driver or Hemraj, the deceased nor to Ram Swaroop the third person who was injured.

23. All the accused persons were charged as aforementioned in para 1 above. Needless to state, the prosecution heavily relied upon eye witness account.

24. PW-1 Rajesh, the injured TSR driver who remained hospitalized for 13 days and whose presence at the spot was not in doubt, being an injured himself, turned hostile. He deposed that deceased Hemraj was his friend and that on 13.8.1995 at 5:30 PM he had parked his TSR at the corner of Gali Barna.

Hemraj requested him to drop his sister to the house of her in-laws. At that time 4-5 boys came and requested him to carry them. He refused. The boys forcibly occupied his TSR. One boy was armed with a knife and two were armed with hockey sticks. He called Hemraj, at which one boy stabbed Hemraj in the abdomen and that even he was given a knife blow and was hit with hockey sticks on his back and on his head. He stated that on receiving blows on his head he became unconscious and that he could not name the boys who had attacked him. He denied that any one out of the 11 accused who were present in Court (when he deposed on 23.7.1999) were present at the place of occurrence on 13.8.1995.

25. Rajesh PW-1 was declared hostile. He was cross examined by the learned APP, but nothing could be elicited from him during cross examination by the learned APP which needs to be noted by us except that he admitted that the accused were residents of the same locality in which he resided. In a nut shell, PW-1 is a completely hostile witness save and except he admits that Hemraj was injured at the spot at 5:30 PM on 13.8.1995 and even he received injuries at the spot at said time and on said day.

26. Nirmal Kumar PW-2 also turned hostile. He deposed that on the day of the occurrence he was on the way to his house and saw a crowd at the corner of Gali Barna and on

inquiry he was told that some boys had quarreled. He deposed that he does not know as to who quarreled and who received injuries. The witness was cross examined by the learned APP, but nothing could be elicited to support the case of the prosecution. In other words, PW-2 is a completely hostile witness.

27. Since extensive submissions were made during arguments in appeal pertaining to the deposition of PW-4 vis-à-vis the deposition of PW-12, in relation to the facts deposed to by them in examination in chief, we note the examination in chief of Ram Swaroop PW-4 in full. We shall likewise do so for Kanta Prasad PW-12. Ram Swaroop PW-4, stated in examination in chief as under:-

“The occurrence of this case took place on 13.8.95. It was a day prior to 13.8.95. Some hot words were exchanged with regard to our bhabhi with Tony etc. and my father had scolded them for it but we had not lodged a report, about it. On 13.8.95 at about 5:30 PM my sister Bhagwanti had to go to her in laws house so we hired a scooter of Raju who resides nearby and I along with my brother Puppy whose name is Hem Raj besides the Raju were standing near the three wheeler parked near Om Sweets at the corner of gali Barna Pahari Dhiraj. It was at that time that all the accused persons who were present in the court today namely Tony, Hari Om, Niranjana, Rakesh, Bobby, Dharmender, Kanchan and Bhupender came there one by one. All these accused persons are known to me since childhood and out of whom accused Tony and Niranjana resides in front of our house. After reaching near us accused Tony asked his companion to beat us as our father had insulted him. On hearing so accused Niranjana and Hari Om caught hold of my brother Hemraj and

accused Tony gave a knife injury in the stomach of my brother. When I caught hold of Tony from behind he gave a knife injury on my head with its back portion. Thereafter, accused Hari Om caught hold of me from behind and accused Rakesh assaulted me and caused injury on my person including on my head. I then saw accused Kanchan and Bhupender caught hold of the TSR driver Raju. And thereafter accused Bobby and Dharmender gave knife injury to TSR driver Raju and he sustained injury on his back. Thereafter accused Rakesh hit Raju with hockey and Hari Om accused caused injury to him and beat him with cycle chain. Thereafter accused Umrao, Shishpal and Balkishan also came there and they asked the accused person to beat us and we should not be able to escape. Thereafter the control room police van arrived when myself and Raju were removed to the hospital. Before our leaving the spot my brother Hemraj has been taken to the hospital but I do not remember how as to who removed him. The police recorded my statement which is Ex.PW-4/A and bears my signature at point 'A'. I identify all the accused present in Court today."

28. Chandu Lal PW-11 deposed inchoate facts, partially supporting the case of the prosecution. We are not noting his testimony, because the learned Trial Judge has not relied upon his testimony and learned counsel for the State conceded during arguments of the appeal that Chandu Lal's testimony may be excluded while considering the evidence against the accused.

29. Kanta Prasad PW-12, deposed as under, in examination in chief:-

"On 13.8.95, at about 5/5:30 PM, I was present at my shop which is situated in Gali Barna, which was at a distance of about 40-50 spaces from the place of occurrence. Hem Raj deceased was my younger brother. It was about at that time when I saw my brother Ram Swaroop, Hem Raj going with the luggage of our sister Bhagwanti who was to go to her

in-laws. Rajesh who resides in our neighbourhood and is a TSR driver was standing with his three-wheeler outside the gali near Om Sweets shop. The Om Sweet Shop is on the one hand of the gali and the other corner is the Shyam Sweet shop. The scooter three-wheeler was standing towards Om Sweet shop and its driver Rajesh @Raju was also standing there. Ram Swaroop and Hem Raj stopped near the stationary three-wheeler. My sister Bhagwanti and Talsa were coming in the gali to go to the matrimonial home. After 10/15 minutes I heard the noise of bachao-bachao and some other type from outside the gali. On hearing the noise I ran towards outside the gali. On reaching the spot that is outside the gali I saw that my deceased brother Hem Raj was held by Hari Om and Niranjan, accused who are present in Court today, and accused Tony who is also present in Court today was giving knife blows on the stomach of my brother Hem Raj. With the above mentioned accused persons named above accused Kanchan, Bhupinder, Bobby, Rakesh, Dharmender were also present there. Thereafter, Kanchan and Bhupinder caught hold of TSR driver Rajesh and Bobby and Rakesh were giving knife injury to Rajesh. Rajesh, TSR driver was assaulted by the above-mentioned accused persons as he was trying to save Hem Raj. As soon as Ram Swaroop tried to intervene and save Hem Raj, accused Tony from the reverse side of the knife caused injury on the head of Ram Swaroop. Ram Swaroop was also hit by Jitender by hockey. Again said it was not Jitender but it was Hari Om. The other accused persons were also having iron chain in their hand and had also given blows with the said chain to Ram Swaroop. After assaulting us the above-mentioned who are all present in court today ran away from the spot. Thereafter the PCR van came and they removed Rajesh and Ram Swaroop to the hospital, i.e., Bara Hindu Rao. My brother Hem Raj was removed to RML Hospital by my brother Chandu Lal and I also followed him. Jitender is my neighbour, he was also present and he also got admitted my brother Hem Raj in the hospital. Accused Umrao, Shishpal and Balkishan are also present in court today and I know them also as they reside in my gali. I gave my statement to the police first on 13.8.95. I again made statement to the police on 14.8.95 at the PS. I also named Umrao, Shishpal and Balkishan in my statement on 14.8.95 as

they were also standing at the time of occurrence near the spot and they were saying to the other accused persons "aaj inko mar do, jaane na payein". At the time of occurrence on 13.8.95 when the other accused persons were assaulting us."

30. Jitender PW-22 turned completely hostile. He disclaimed having told anything to the police. He disclaimed any recovery being effected in his presence. The other witness to the recoveries, namely Raj Kumar PW-3, also turned hostile and did not support any recovery which the prosecution sought to prove through him.

31. With reference to the testimonies of PW-4 and PW-12, the learned Trial Judge has held that since neither witness has attributed any role to Shishpal and Umrao and since the two witnesses deposed to the presence of said two accused as also Bal Kishan (who died during pendency of the trial), after the assault was over, and that PW-4 had inculpated them by attributing the role of giving exhortation after the assault was over and PW-12 simply deposed that said 3 persons were present at the time of the incident; further noting that as per PW-4 the said 3 persons came to the spot much after the 8 co-accused had not only reached but had commenced and completed the assault, the learned Trial Judge has acquitted Shishpal and Umrao. Qua Bal Kishan, no finding has been returned for the reason he had died during the trial.

32. Holding that there was no reason to disbelieve PW-4

Ram Swaroop and PW-12 Kanta Prasad, notwithstanding that both were brothers and were related to the deceased Hemraj (being his brothers); with reference to their testimony, the learned Trial Judge has convicted the appellants, in terms, as noted in para 4 above. The two minor co-accused namely Kanchan Singh and Bhupender who were also convicted were referred to the Juvenile Justice Board for further proceedings.

33. We note that Bhupender has not filed any appeal in this Court against his conviction or the sentence imposed upon him. Kanchan Singh had filed an appeal against the impugned judgment and order convicting him, but being satisfied with the sentence imposed by the Juvenile Justice Board, chose not to press his appeal which was dismissed as infructuous as desired by his counsel because Kanchan Singh underwent the sentence imposed.

34. At the hearing of the appeals, Sh.Sandeep Sethi, learned senior counsel for appellants Ved Prakash and Dharmender urged that the learned Trial Judge has gravely erred in simply ignoring the testimony of Rajesh PW-1, the injured TSR scooter driver. Learned counsel urged that the testimony of Rajesh was relevant for the defence, inasmuch as the same evidences that Rajesh and Hemraj were attacked by 5 boys and the motive for the attack was that the said 5 boys wanted Rajesh to drop them to a destination and on Rajesh refusing to do so, as

sister of Hemraj had to be dropped to her matrimonial house, the said boys got enraged. One out of the five stabbed Hemraj and Rajesh and two out of the remaining hit them with hockey sticks. Learned senior counsel urged that the testimony of Rajesh completely demolished the testimony of PW-4 and PW-12. Learned senior counsel urged that PW-12 could not have witnessed the incident because his testimony shows that he was at his shop at a distance of 40-50 paces from the place of occurrence and the noise of '*bachao bachao*' drew his attention to the street and made him run outside his shop. With reference to the MLC and post-mortem report of the deceased and the MLC of Rajesh and the MLC of Ram Swaroop, learned senior counsel urged that a single stab blow was inflicted on the deceased Hemraj; Rajesh was stabbed twice and Ram Swaroop was not stabbed at all. Whereas Rajesh had seven lacerated wounds, Ram Swaroop had contusion wounds. Learned senior counsel was at pains to urge that as per the prosecution the actual assailants were five in number, others were assisting, either by exhorting or by catching hold and in that view of the matter, learned senior counsel submitted that the assault would be over in less than a minute, leaving hardly any scope for PW-12 to have witnessed the assault. Alternatively, learned senior counsel urged that the only commonality in the testimony of the two witnesses was that both alleged that Niranjana and Hari Om

caught Hemraj to facilitate a knife blow being inflicted on him by Toni @ Hira Lal. The further commonality was that both were consistent that when Ram Swaroop caught Toni @ Hira Lal to prevent any further assault on Hemraj, using the handle of the knife, Toni gave a reverse blow on the head of Ram Swaroop. Further commonality was with reference to both deposing that Hari Om joined the assault, but differing on the weapon used. Learned counsel pointed out that whereas PW-4 deposed that Hari Om had a cycle chain in his hand, PW-12 said that Hari Om used the hockey stick. Learned senior counsel further urged that the manner in which Rajesh was attacked has been disclosed differently by the two witnesses. Counsel pointed out that whereas both attributed the role of catching hold of Rajesh to Kanchan and Bhupender, they differed as to who inflicted the knife blow. Counsel pointed out that whereas PW-4 stated that Bobby and Dharmender attacked Rajesh with a knife, PW-12 deposed that Bobby and Rakesh attacked Rajesh with a knife. Further questioning the testimony of PW-4 and PW-12, learned counsel urged that both were interested witnesses being the brothers of deceased Hemraj and thus it was urged that their testimony should not be relied upon, more so for the reason the independent eye-witnesses had not supported the case of the prosecution.

35. Learned senior counsel urged that the alleged motive

sought to be projected through the testimony of PW-4 i.e. the eve teasing incident which allegedly took place a day prior to 13.8.1995 was not proved, inasmuch as on being cross examined, PW-4 stated that he had learnt about accused Toni @ Hira Lal being reprimanded by his father as told to him by his father; the reprimand being on account of Toni teasing his sister-in-law.

36. The learned counsel further urged that from the testimony of PW-4 it was apparent that the appellants and the juvenile co-accused Kanchan Singh and Bhupender had reached one by one, as deposed to by PW-4, and thus it could not be said that all the accused persons had shared a common object to assault any one and thus each accused has to be responsible for his own acts and in that view of the matter, only Toni @ Hira Lal can be attributed the intention to cause the injury which resulted in the death of Hemraj. The other accused would likewise be responsible for their own individual acts. Qua accused Ved Prakash and Dharmender learned counsel urged that the role assigned to them as per the witnesses of the prosecution was of stabbing the TSR driver. Thus, counsel urged that at best his clients could be convicted for the offence of causing grievous hurt by using a dangerous weapon i.e. for the offence punishable under Section 326 IPC. Learned senior counsel buttressed his argument by submitting that, if at all, anybody had a grievance

it had to be Hira Lal @ Toni who was reprimanded the previous evening by the father of Hemraj and the other co-accused would obviously have no motive. Counsel wondered, why should other people join Hira Lal to further the motive of Hira Lal. Learned senior counsel submitted that only co-accused Niranjan Lal and Shishpal were the brothers of Hira Lal and at best, only they, being brothers, would be hurt by Hira Lal being rebuked. Learned counsel urged that the other co-accused were not even related to Hira Lal and would therefore, have no motive. Sh. Sandeep Sethi learned senior counsel relied upon certain decisions and urged that in view of the law laid down therein, it was at best a case of the appellants having a common object to beat Hemraj and Ram Swaroop and not cause the death of Hemraj, much less to assault Rajesh and hence except for Hira Lal who stabbed Hemraj and Niranjan and Hari Om who had caught hold of Hemraj, none else would be liable to be punished for the resultant death of Hemraj. Qua the injuries caused to Rajesh, learned counsel urged that the evidence establishes that Kanchan and Bhupender had caught him and Ved Prakash and Dharmender had stabbed him with knives and hence only said four persons would be liable to be punished for the results of their acts. Qua the injury caused to Ram Swaroop, learned counsel urged that only those who participated in the assault on Ram Swaroop would be liable for the offence of causing simple

injuries to him. The decisions relied upon by learned senior counsel are: 1992 Cri.L.J. 3953 Thakore Dolji Vanvirji & Ors. Vs. State of Gujarat; 1993 Cri.L.J. 63 Sarman & Ors. Vs. State of M.P.; 1994 (1) SCC 736 Haramant Laxmappa Kukkadi Vs. State of Karnataka; 2003 (2) SCC 257 Rajendra Shanta Ram Todankar Vs. State of Maharashtra; 1989 (16) DRJ 249 Soofi Abdul Majid & Ors. Vs. State; 1975 (3) SCC 379 Ram Anjore & Ors. Vs. State of U.P. and 1975 Cri.L.J. 1405 Bhupat Kumhar & Ors. Vs. State of Bihar.

37. It was urged that the accused persons were charged by the learned Trial Judge for the offence of forming an unlawful assembly having the common object of assaulting Ram Swaroop, Hemraj and Rajesh and not that of having a common object of murdering anyone of them and hence the conviction of the appellants for the offence punishable under Section 302 IPC with the aid of Section 149 IPC pertaining to the death of Hemraj and for the offence punishable under Section 307 IPC with the aid of 149 IPC pertaining to the assault on Rajesh cannot be sustained.

38. Learned counsel for other co-accused joined in the submissions made by Sh.Sandeep Sethi learned senior counsel. Additional submissions urged by learned counsel for the appellants in Crl.A.No.480/2008 were that if at all there could be a motive for Hira Lal to avenge the insult heaped on him the

previous evening, the target of the motive would be Leela Ram the father of Hemraj and Ram Swaroop because it was Leela Ram who had insulted Hira Lal. Learned counsel was at pains to urge that Hemraj had no role in the incident which took place the previous evening. Learned counsel highlighted the fact that the testimony of Rajesh completely demolished the ocular version deposed to by PW-4 and PW-12. It was urged in addition, that the MLC of Ram Swaroop shows the injury on his person to be fresh, which according to learned counsel could not corroborate the time of the incident. Learned counsel further urged that the fact that the deceased Hemraj was removed to RML Hospital and PW-4 was removed to Hindu Rao Hospital shows the unnatural conduct of PW-4 of being unconcerned for his brother. Learned counsel urged that this shows that Hemraj and PW-4 received injuries at different places. Sh.Sandeep Garg learned counsel who appeared for Sh.Jagdish Dhawan Advocate, counsel for the appellants in CrI.A.No.540/2008 urged that in addition to the submissions made by Sh.Sandeep Sethi learned senior counsel for co-appellants, he additionally urged that if presence of PW-12 as an eye witness is ruled out, it would be unsafe to convict the appellants on the sole testimony of a single eye witness. Learned counsel cited 2008 (1) Criminal Court Cases 575 (SC) Ramesh Krishna Vs. State of Maharashtra and 2008 (2) Criminal Court Cases 360 (SC) Animireddy Venkata Ramana & Ors. Vs.

Public Prosecutor HC of AP to urge that where an eye witness is contradicted by another eye witness it would be unsafe to rely upon the eye witness account which supports the case of the prosecution. Supplementing the decisions cited by Sh.Sandeep Sethi, senior counsel for co-appellants on the applicability of Section 149 IPC, learned counsel supplemented with reference to the decisions reported as 2008 (2) Criminal Court Cases 103 (P&H) Gurmukh Singh & Ors. Vs. State of Punjab; 2007 (4) LRC 148 (SC) Bhagwan Bahadure Vs. State of Maharashtra and 2008 (4) Criminal Court Cases 675 (SC) Rajesh Kumar Vs. State of H.P. Since learned counsel Shri F.Haq and Sh.Sandeep Garg had desired to file written submissions, we had permitted them to do so. The written submissions have been filed and we note that the same conform to the arguments which were advanced in Court save and except the fact that the factual narration which was laid before us by Sh.Sandeep Sethi learned senior counsel for the co-appellants and was not re-narrated by said counsel during their respective arguments have been restated by learned counsel in their own language in the written submissions; but the same conforms to the submissions made by Sh.Sandeep Sethi learned senior counsel pertaining to the analysis of evidence and as noted by us hereinabove.

39. Pertaining to the plea that PW-4 and PW-12 are interested witnesses on account of they being related to the deceased, suffice would it be to say that relationship is not a factor which affects the credibility of a witness. It is more often than not, that a relation would not conceal actual culprits and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether the testimony of such a witness is credible. In the decision reported as AIR 1953 SC 364 Dalip Singh & Ors. vs. The State of Punjab it was observed:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

40. The afore-noted decision has been consistently followed by the Courts in India as is evidenced from the

decisions reported as AIR 1957 SC 614 Vadivelu Thever vs. State of Madras, AIR 1965 SC 202 Masalti vs. State of U.P., 1974 (3) SCC 698 Guli Chand vs. State of Punjab, 2002 (3) SCC 76 Lehna vs. State of Punjab and 2003 Cri.L.J. 41 (SC) Gangadhar Behera & Ors. vs. State of Orissa.

41. If PW-4 and PW-12 were interested witnesses, in that, they had a motive to falsely implicate Hira Lal and assuming that their anger was directed against all family members of Hira Lal, it does not stand to reason why should they implicate the other co-accused, who, even as per the contentions urged by learned counsel for the appellants are not related to Hira Lal. The credibility of the testimony of PW-4 and PW-12 can be vouched for on said factor i.e. they have deposed about the involvement of other co-accused persons who are not related to Hira Lal and no motive is attributed to these two witnesses to do so. It prima facie shows the truthfulness of the two witnesses.

42. The plea that since Rajesh PW-1 has not supported the case of the prosecution and has deposed facts pertaining to his being injured as also Hemraj being injured in a manner, totally inconsistent with the facts deposed by PW-4 and PW-12; and hence PW-4 and PW-12 should be disbelieved, requires it to be considered, whether PW-1 deposed freely or with a motive to

hide the truth and hence save the accused persons, whether being induced or being threatened by the accused.

43. That Rajesh was grievously injured around 5:30 PM on 13.8.1995 is not in dispute. The said fact finds corroboration in his MLC Ex.PW-9/C which records his being admitted at Hindu Rao Hospital at 5:45 PM and his being unfit for statement. The grievousness of his injuries can be inferred from the fact that he remained in the hospital till 26.8.1995, as recorded on the MLC against the column: "*Date of discharge*".

44. Thus, Rajesh could not hide the said truth. It is for this reason he admitted that he was assaulted on the date in question and at the time in question. Since Hemraj was also grievously injured at the same place, due to which injury, Hemraj died the next day, Rajesh had no option but to admit that even Hemraj was assaulted along with him. The fact that Rajesh has told an obvious lie is evidenced by the fact that according to him, except for himself and Hemraj nobody else was present, much less assaulted; a statement totally contradicted by the MLC Ex.PW-10/A of Ram Swaroop which shows that even Ram Swaroop was admitted at Hindu Rao Hospital at 5:45 PM and the further fact that the MLC Ex.PW-10/A pertaining to Ram Swaroop and the MLC Ex.PW-9/C pertaining to Rajesh, both record that the two were brought to

the hospital by HC Umesh Kumar PW-28. The two MLCs prove that even Ram Swaroop was found injured at the spot by HC Umesh Kumar who came to the spot in a PCR van and removed Rajesh and Ram Swaroop to Hindu Rao Hospital. Besides, HC Umesh Kumar who appeared as PW-28 has also deposed that on 13.8.1995 he was posted as HC in-charge of IC Van, PCR, 'Oscar' and his duty hours were from 8:00 AM to 8:00 PM at main Sadar Bazar Chowk and around 5:30 PM an information was received that a quarrel was taking place at Om Sweet House and on reaching the spot he removed two injured persons to Hindu Rao Hospital whose names he later on learnt were Ram Swaroop and Rajesh.

45. Thus, no credence can be given to the testimony of Rajesh, who probably has sold his conscience or due to being intimidated by the accused has withheld the truth from the Court. His tainted deposition cannot be used to determine the purity of the testimony of PW-4 and PW-12 on the simple principle of chemistry: it is impermissible to react a chemical, purity of which is in doubt, to determine the purity of another chemical. As noted above, on being cross examined by the learned public prosecutor, Rajesh admitted that he was a resident of the same locality in which the accused resided.

Thus, it was easy for the accused to either intimidate him into submission or win him over.

46. There is no universal rule of law that in each and every case where one eye witness contradicts other eye witnesses, the entire eye witness account has to be thrown into a dustbin. Where, on an analysis of the evidence on record, recording reasons for the opinion, the Court opines that a particular eye witness has been won over and has deposed facts to help the accused persons, the evidence of other eye witnesses, subject to the same being credible, would be good evidence to be considered along with other evidence and the attendant circumstances.

47. That PW-4 was present at the spot is established by the fact that his MLC Ex.PW-10/A recorded on the same day of the incident shows that he has suffered five lacerated wounds, all of which he has explained in his testimony. His presence at the spot is supported by the fact that the MLC records he being brought to the hospital by HC Umesh Kumar, the same Head Constable who took Rajesh to the same hospital. Thus, PW-4 being present at the spot is not in doubt. It is obvious that he saw the assault on his brother and the TSR driver Rajesh. The only thing which requires to be further seen is, whether he has spoken the truth.

48. Before dealing with his testimony we may note and deal with the submission urged by learned counsel that the injuries on PW-4 recorded in the MLC are fresh injuries and thus they do not conform to the time of the incident; as also the argument that being taken to different hospitals i.e. PW-4 to Hindu Rao Hospital and Hemraj to RML Hospital shows unnatural conduct of PW-4 who would be expected to be with his brother; both circumstances requiring an inference to be drawn that PW-4 and Hemraj were injured at different places.

49. We fail to understand the logic of the first submission. The incident took place at about 5:30 PM and the MLC of Ram Swaroop PW-4 shows his being admitted at Hindu Rao Hospital at 5:45 PM. Injuries sustained 15 minutes back would obviously be fresh injuries after 15 minutes.

50. The contention that since Hemraj was removed to R.M.L. Hospital and Ram Swaroop was removed to Hindu Rao Hospital requires an inference to be drawn that both got injured at different places needs hardly any explanation. At the spot where the two brothers and Rajesh were injured, on the arrival of the police, all would have heaved a sigh of relief on seeing the police. All three could not be put inside the same van. Whereas Hemraj was put in a different vehicle and Ram Swaroop and Rajesh were put in a different vehicle is a pure

chance. Were they to ask the police personnel as to which hospital they would be taken to. It is a fortuitous circumstance that the deceased was transported to R.M.L. Hospital and Hemraj and Rajesh to Hindu Rao Hospital. It would not be out of place to note here that Chandu Lal PW-11 the third brother of Hemraj and Ram Swaroop who reached the spot immediately upon hearing about the incident had accompanied Hemraj to the hospital, a fact deposed to by Chandu Lal PW-11. We find that the MLC Ex.PW-5/A pertaining to Hemraj records that he has been brought to the hospital by Chandu Lal his brother. Thus, if Chandu Lal had reached the spot it was another fact of reassurance to Ram Swaroop of the safety of his brother Hemraj.

51. If we peruse the testimony of PW-4 and PW-12 we find substantial corroboration by each to the other, except that PW-4 deposed that Bobby and Dharmender attacked Rajesh with a knife and PW-12 deposed that Bobby and Rakesh attacked Rajesh with a knife; and the sequence of the assault deposed to by the two.

52. We find no contradiction between the two on the first count, inasmuch as on a clarification sought by the learned APP, PW-12 corrected himself by stating: *It is correct to suggest that accused Rajesh the TSR driver when held by Kanchan and*

Bhupender he was given knife injury by accused Bobby and Dharmender and not by accused Rakesh. It is correct to suggest that earlier above I had inadvertently mentioned that Rakesh gave knife injury to Rajesh TSR driver instead of accused Bhupender as long time has passed.

53. The incident took place on 13.8.1995. PW-4 deposed on 24.9.1999 i.e. after four years. PW-12 deposed on 30.3.2001 i.e. after nearly five years and seven months of the incident. With the passage of time, the two brothers forgetting the sequence of events which actually transpired on the day of the incident cannot be ruled out.

54. In the decision reported as 1987 (3) SCC 747 State of U.P. vs. Dan Singh & Ors. it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act.

55. The reason is obvious, where the members of an unlawful assembly act in concert and witnesses depose after a considerable gap of time, it would be difficult for each to remember the exact sequence of events. Thus, unless there is a material variation in the deposition of the witnesses, the credibility of neither witness can be questioned only on the ground that on some aspects pertaining to the sequence of

events, the prosecution witnesses have not deposed in a parrot like manner.

56. In the instant case, PW-4 and PW-12 have corroborated each other on the role played by different accused persons and merely because in the narrative of events, the sequence thereof has been altered here and there, does not take away the credit worthiness of their testimony.

57. In the decision in Gangadhar Behera's case (supra) the fact that some of the witnesses did not specifically attribute any definite role to some of the accused persons and deposed in an omnibus manner was held not to be a factor to discredit the presence of said witnesses or the clear and cogent testimony of the others.

58. PW-12 has deposed that he was present in his shop which was forty to fifty paces from the place where his brothers were assaulted. He deposed that he came out of the shop when he heard a commotion on the street. He deposed that he saw the incident with his own eyes. As deposed by PW-4, when the accused, other than Shishpal, Bal Kishan and Umrao, reached the place where the TSR was stationed and he along with Hemraj and the TSR driver were standing by, Tony @Hira Lal, asked his companions to beat him and his brother because their father had insulted him. Though PW-4 has not deposed that

seeing so many persons, three armed with a knife each and two armed with a hockey stick and a cycle chain respectively, he and his brother raised a hue and cry to attract the attention of passersby, with the hope that somebody would rescue them, conduct of victims so finding themselves in a hostile situation, crying for help, cannot be ruled out. PW-12 has categorically deposed that the shrieks of bachao-bachao attracted his attention and propelled him to come out of the shop. The evidence on record does not rule out the cries of help by PW-4 and his brother before the assault commenced and these cries propelling PW-12 to come out of the shop, which was forty to fifty paces away, and hence PW-12 being able to see the assault. Further, the assault would have continued for at least two to three minutes. There were three victims; two of whom were stabbed and the other was thrashed. Some accused were attempting to hold and did manage to hold the deceased, to facilitate the attack by Hira Lal. Some accused attempted to hold and did manage to hold Rajesh, to facilitate the assault on him. We do not find that the evidence on record requires an inference to be drawn that it was impossible for PW-12 to have witnessed the incident.

59. Thus, it is not a case of a solitary eye witness account, but a case of the eye witness account of two eye

witnesses. The contention urged that Courts have consistently held that it is unsafe to sustain a conviction on the testimony of a solitary eye witness and the decisions cited by learned counsel for accused Hari Om and another need hardly any explanation save and except to note that the very decision cited namely in Ramesh Krishna's case itself holds that conviction can be based on the testimony of a single witness if he is wholly reliable and corroboration would be necessary only when a witness is partially reliable.

60. It is settled law that where the commission of an offence is proved by direct evidence, it hardly matters whether motive is proved or not. Thus, it becomes irrelevant whether the incident which took place the previous day in which father of the deceased, Ram Swaroop and Kanta Prashad rebuked Hari Om stands proved or not.

61. But we note that the testimony of PW-4 proves the said fact. It has to be noted that in his deposition PW-4 has deposed that a day prior, some hot words were exchanged with regard to his sister-in-law, and his father had scolded Toni. In cross examination the witness was questioned only with respect to the scolding given to Toni by the father of the witness and not with respect to the incident involving Toni and the sister-in-law of the witness. Thus, the testimony of PW-4 pertaining to an

incident involving Toni and his sister-in-law has gone unchallenged.

62. The plea that the anger of Toni @ Hira Lal, in said circumstance would be against Leela Ram, the father of the deceased and Ram Swaroop and hence there would be no motive to assault Hemraj and Ram Swaroop, ignores that a human mind seeks vengeance not only against the person who has insulted but even against the near and dear ones. In any case, we need not discuss much on the issue of motive for the reason, as noted above, where eye witness account is satisfactory and establishes the commission of the crime by the accused, it becomes immaterial whether motive is proved or not.

63. The plea urged that the charge against the accused persons is of forming an unlawful assembly having the common object of assaulting Ram Swaroop, Hemraj and Rajesh and not that of having a common object of murdering anyone of them and hence the conviction of the appellants for the offence punishable under Section 302 IPC with the aid of Section 149 IPC pertaining to the death of Hemraj and for the offence punishable under Section 307 IPC with the aid of 149 IPC pertaining to the assault on Rajesh, is nothing but an attempt to take advantage of a defective language used while framing the charge.

64. Section 218 Cr.P.C. 1973 requires framing of a charge for every distinct offence which the accused is charged of. Section 221 is an Exception to Section 218. It provides that if a single act or series of acts is of such nature that it is doubtful which of several offences the facts which can be proved will constitute, the charge can be framed for all offences or alternative charges can be framed. At the trial if it is established that the accused has committed an offence, he may be convicted though he may not have been charged with the offence. Section 218 embodies the fundamental principle of criminal law that the accused person must have notice of the charge which he has to meet. However, it cannot be read pedantically to provide escape route to an accused. Justice Vivian Bose in the judgment reported as AIR 1956 SC 116, Willie (William) Slaney vs. State of M.P. observed:-

“That in judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.”

65. The said enunciation of law has stood the ground till date. Section 215 of the Code of Criminal Procedure states that no error either in stating the offence or the particulars required

shall be regarded as material unless the accused was misled by the error or defect resulting in a failure of justice.

66. The plea that except for Toni, no other accused had any motive against the victims and hence each would be liable for his own role and the plea that the testimony of PW-4 shows that all the accused save and except Shishpal, Umrao and Bal Kishan had reached the spot one by one evidences that all chanced upon the place by fate without sharing a common object requires the matter to be considered with reference to the language of Section 149 of the Indian Penal Code which reads as under:-

“149. If an offence is committed by any member of 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, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

67. It is apparent that the emphasis is on the common object and not on common intention. 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 object is one of those set out in Section 141 IPC. The crucial question to be determined 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 as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of the unlawful assembly, it cannot be said that he is a member of the unlawful assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common' it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point

beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he/she shares the community of objects, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

68. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve the object.

69. The common object of an assembly is to be ascertained from the acts and the language used by the members composing the assembly; taking into account all surrounding circumstances. The conduct adopted by the members of the assembly is an important circumstance to be kept in mind. Similarly, the arms carried by the members of the assembly and their behaviour at or near the scene of the incident is another important circumstance to be kept in mind. The time of forming an unlawful intent is not material. An assembly of persons may be an innocuous gathering initially but

may subsequently become unlawful. In other words, common object can develop during the course of an incident at the spot coinstanti.

70. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member of. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is that object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from

the acts which the person commits and the result therefrom. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'.

71. Even the plea that definite roles have not been ascribed to the accused and therefore Section 149 IPC is not applicable, is untenable in view of the observations of the Supreme Court in Masalti's case (supra) wherein it was observed as follows:

"Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to shift the evidence carefully and decide which part of it is true and which is not."

72. Keeping in mind the afore-noted legal principles and applying the same to the facts of the instant case, the testimony of PW-4 and PW-12 has to be appreciated. Due to an incident which had taken place the previous day, Hira Lal @Toni was nurturing a grievance against the family members of deceased Hemraj. Save and except the two accused who were acquitted and the accused who died during trial namely Bal Krishan, all the accused assembled near the place where the TSR of Rajesh was parked, by the side of which Rajesh, Hemraj and Ram Swaroop were standing. That the said accused reached the place one by one as deposed to by Ram Swaroop does not necessarily mean that they did not assemble with a common object. The fact that they had some object in mind is evidenced by the fact that of the eight persons who gathered at the spot, three were armed with knives, one was armed with a cycle chain and one was armed with a hockey stick. One does not move around on the streets armed with knives, chains or hockey sticks. The place where the incident took place is a public place and not to be noticed as a group, being armed, the constituent members walking up to the place one by one where they want to assemble is the most likely thing to be done by the constituent members of an unlawful assembly. The acts committed by the members of the unlawful assembly were to firstly assault Hemraj and then Ram Swaroop who intervened to

save his brother. Simultaneously, some members of the unlawful assembly participated in the attack on Rajesh. It is apparent that the intention of the accused was to overcome any resistance which they met to achieve the common object which appears to be to do away with Hemraj. The ferocity of the blow directed towards the abdomen of Hemraj also evidences the object of the unlawful assembly. The post-mortem report of Hemraj shows that the knife pierced the abdominal cavity to a length of ten inches and cut the pancreas, liver and intestines. There is no evidence of any provocation by either Hemraj or Ram Swaroop or Rajesh. That even Rajesh was not spared is another factor indicative of the fact that the members of the unlawful assembly were hell bent to achieve their common object i.e. to do away with Hemraj. It is not out of place to record that as per PW-4 and PW-12 all members of the unlawful assembly i.e. the eight persons who had gathered when the assault commenced had participated, some by catching hold of the deceased, Hemraj, Ram Swaroop and Rajesh and the others who were armed with knives, a cycle chain and a hockey stick used the respective object in their hand.

73. That all the accused persons i.e. the eight who had initially gathered at the spot are not related to each other

makes no difference because even friends and sympathizers can join to avenge an insult inflicted on anyone of them.

74. The plea that since two co-accused viz. Shishpal and Umrao have been acquitted, notwithstanding the testimony of PW-4 and PW-12, requires their testimony to be disbelieved in full, is premised on an incorrect appreciation of evidence and the impugned decision. The reason why Shishpal and Umrao have been acquitted is the fact that PW-4 categorically deposed that Umrao, Shishpal and Bal Krishan came to the spot when the assault was over. The only role assigned to the said three persons by PW-4 was of asking the other accused persons to beat them i.e. Ram Swaroop, Rajesh and Hemraj. It is important to note that PW-4 did not say that thereafter, the assault recommenced. Similarly, PW-12 referred to the presence of said three persons after deposing the facts pertaining to the assault. Under the circumstances it is apparent that Umrao, Shishpal and Bal Krishan were not members of the unlawful assembly consisting of only eight accused persons who initially gathered and launched as also completed the assault. The said three persons appeared to have chanced upon the place of occurrence and intended to fish in troubled waters.

75. The decisions cited by the learned counsel for the appellants are clearly distinguishable on facts. In Thakore Dolji

Vanvirji, though the number of accused were five, one having a sword in his hand, another a barchhi and the remaining three a stick each and all had participated in the assault, the special circumstance of the sudden manner in which the occurrence took place in the village was held to be indicative of that neither shared a common object. To quote from the decision:-

“In differentiating the case of A-2 to A-3 to that of A-1 we do not mean to say that for the purpose of Section 149 IPC everyone of them should participate and inflict serious injuries but having regard to the special circumstances of this case particularly in sudden manner in which the occurrence took place in the village itself, we think it would be unsafe to make everyone of the accused liable for offence of murder by application of Section 149 IPC.”

76. The distinguishable fact in Sarman's case (supra) was the fact that the individual acts and conduct of the accused being six in number could not be culled out from the evidence and the mere fact that all were armed with lathis was held not to be sufficient evidence to attract Section 149 IPC. As noted herein above the common object of an assembly has to be ascertained from the acts and the language used by the members composing the assembly; taking into account all surrounding circumstances. The conduct adopted by the members of the assembly is an important circumstance to be kept in mind. Similarly, the arms carried by the members of the

assembly and their behaviour at or near the scene of the incident is another important circumstance to be kept in mind.

77. In Haramant Laxmappa Kukkadi's case (supra) the fact that all accused did not use the weapons and a child in the arms of a witness suffered an accidental blow and admittedly the child who suffered the death due to the accidental blow was not the target of the common assembly was held to be a circumstance ruling out the applicability of Section 149 IPC.

78. In Rajendra Shantaram Todankar's case (supra) the fact noted by the Supreme Court was, as recorded in para 13 of the decision that a close scrutiny of the testimony of the eye-witnesses revealed that, in fact, there were two incidents of assault which took place in quick succession, and thus such accused who were not concerned with the other incident were held entitled not to be brushed with Section 149 IPC pertaining to the incident in which they had not participated.

79. Similarly, the Division Bench of this Court in the decision in Sufi Abdul Majid's case (supra) shows that the evidence established only the gathering of a body of persons i.e. an assembly of the kind contemplated by Section 141 IPC without sharing any common object to commit the crime which was committed; the object of the assembly being to commit a

mischievous or trespass and obtain possession of a mosque and the shops attached thereto.

80. In Ram Anjore's case (supra), on facts it was held that the evidence established that the common object of the unlawful assembly was to simply assault Ram Palat and Vishwanath and not to murder Vishwanath. It may be noted that the conviction of the accused was sustained with the aid of Section 149 IPC in relation to the injuries caused to Ram Palat and for the murder of Vishwanath only accused Ram Kumar was convicted as he had exceeded the object of the common assembly.

81. In Bhupat Kumhar's case (supra) the application of Section 149 IPC on the facts of the case was upheld but noting that the injuries on the deceased and his sons were on the non vital part of the body, it was held that the common object of the unlawful assembly appeared to be to cause grievous injury to the deceased and his sons and not to murder the deceased and hence the conviction of the appellants was altered from under Section 302 IPC read with Section 149 IPC to one under Section 326 IPC read with Section 149 IPC.

82. The decision in Gurmukh Singh's case (supra) does not relate to the applicability of Section 149 IPC but relates to the applicability of Section 34 IPC. The decision in Bhagwan

Bahadure's case (supra) also does not deal with the applicability of Section 149 IPC. It simply deals with the issue, whether on facts the offence made out was of culpable homicide amounting to murder or culpable homicide not amounting to murder. The decision in Rajesh Kumar's case (supra) does not deal with the issue of applicability of Section 149 IPC. It deals with the issue of applicability of Section 34 IPC.

83. We eschew reference to the recoveries effected pursuant to the disclosure statements made by Hira Lal and Rakesh since the witnesses to the recovery have not supported the recoveries. We have rested our decision on eye witness account.

84. Before bringing the curtains down we highlight the fact that the offence took place at around 5:30 PM. The police got information of the incident as per DD No.11, Ex.PW-27/A at 5:40 PM. The statement Ex.PW-4/A of Ram Swaroop, which has been treated as the information resulting in the registration of the FIR was recorded sometimes before 8:45 PM, evidenced by the fact that the said statement with the endorsement Ex.PW-32/A made by SI Narender Kumar was forwarded from the spot to the police station for the FIR to be registered. It is apparent that Ram Swaroop had hardly any time to concoct and fabricate a story. The role played by each accused in the commission of

the crime stands disclosed in the statement Ex.PW-4/A. A presumption of truth arises to the statement made by a witness to the police soon after the incident.

84. The appeals are dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

April 24, 2009
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