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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 13th September, 2012
% Date of Decision: 19th December, 2012

Criminal Appeal No. 433/2012

ANAND SINGH @ DHAMMAL Appellant
Through Mr. Jaideep Malik, Advocate.

Versus

STATE ...Respondent
Through Ms. Richa Kapoor, APP.

Criminal Appeal No. 434/2012

ANAR SINGH Appellant
Through Mr. Sunil Dalal and Mr. Ashish Sharma,
Advocates.

Versus

STATE ...Respondent
Through Ms. Richa Kapoor, APP.

Criminal Appeal No. 443/2012

SHAILENDER @ BABLEY Appellant
Through Mr. Mohit Mathur, Mr. Pawan Mathur
and Mr. Vikram Panwar, Advocates.

Versus

STATE ...Respondent
Through Ms. Richa Kapoor, APP.

Criminal Appeal No. 455/2012

ASHOK KHATRI & ANR.

Through

Mr. R.M. Tufail and Mr. Vishal
Sehijpal, Advocates.

....Appellant

Versus

STATE

Through

Ms. Richa Kapoor, APP.

...Respondent

Criminal Appeal No. 559/2012

RAJ KUMAR

Through

Mr. Sumeet Verma & Ms. Charu Verma,
Advocates.

....Appellant

Versus

STATE

Through

Ms. Richa Kapoor, APP.

...Respondent

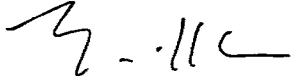
CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S. P. GARG

SANJIV KHANNA, J.

For detailed order see Criminal Appeal No. 384/2012 titled *Asha*
versus State pronounced today.


(SANJIV KHANNA)
JUDGE


(S. P. GARG)
JUDGE

December 19, 2012

VKR

Reserved on: 13th September, 2012

Date of Decision: 17th December, 2012

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+ (1)

Criminal Appeal No. 384/2012

ASHA

....Appellant

Through Mr. Jitender Sethi and Mr. Rohit
Bhargava, Advocates.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

(2)

Criminal Appeal No. 433/2012

ANAND SINGH @ DHAMMAL

....Appellant

Through Mr. Jaideep Malik, Advocate.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

(3)

Criminal Appeal No. 434/2012

ANAR SINGH

....Appellant

Through Mr. Sunil Dalal and Mr. Ashish
Sharma, Advocates.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

(4)

Criminal Appeal No. 443/2012

SHAILENDER @ BABLEY

Through

.....Appellant

Mr. Mohit Mathur, Mr. Pawan Mathur and Mr. Vikram Panwar, Advocates.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

(5)

Criminal Appeal No. 455/2012

ASHOK KHATRI & ANR.

.....Appellant

Through

Mr. R.M. Tufail and Mr. Vishal Sehijpal, Advocates.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

(6)

Criminal Appeal No. 559/2012

RAJ KUMAR

.....Appellant

Through

Mr. Sumet Verma & Ms. Charu Verma, Advocates.

Versus

STATE

...Respondent

Through Ms. Richa Kapoor, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S. P. GARG

SANJIV KHANNA, J.

Crimes, as distinguished from civil wrongs, are wrongs against the society and demand scriptic justice by way of punishment of

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imprisonment and/or fine. Power to investigate crimes and, thereafter, prosecute the offender, is given to the police, a neutral third party as a norm, and not to the victim though in certain cases a private complaint may be maintainable. Compelling reasons for this is that police investigation is expected to ensure independent, unprejudiced and objective verification, scientific and professional conduct in collection of evidence/material and filing of charge-sheet without bias in favour or against the perpetrator or the victim.

2. The present appeals by Ashok Khatri, Raj Kumar, Anil, Shailender, Anar Singh, Anand and Asha, impugning their conviction under Section 302 read with Section 149 of Indian Penal Code, 1860 (IPC, for short) for murder of Ajay, under Section 307 read with Section 149 IPC for attempt to murder of Vimla and allegations under Sections 147/148 IPC, are rendered somewhat arduous and laborious as both, the appellants and the family members of the deceased Ajay and injured Vimla, have hurled allegations against the police officers and have cast doubts and aspersions on them. Therefore, the present appeal requires a microscopic scrutiny of the statements of eye-witnesses, Vimla (PW-4) who, as is natural, happens to be injured herself and the family members of deceased Ajay. Similarly scrupulous scrutiny is required of the statements made by the two Investigating Officers. At this stage, it is pertinent to note that another co-accused Dharampal, father of three male appellants and father-in-law of Asha, had expired during the course of trial. The six appellants, all related and belonging to one family, have been sentenced to imprisonment for life and fine of Rs.25,000/- each in respect of offence under Section 302, read with Section 149 IPC, with

the stipulation that in case of default of payment of fine, they shall undergo simple imprisonment for 2 years. For the offence under Section 307 read with Section 149 IPC, they have been sentenced to 7 years simple imprisonment with fine of Rs.10,000/- each, again with stipulation that in default of payment of fine, the appellants would suffer simple imprisonment for one year. No separate sentence under Sections 147 and 148 IPC has been awarded in view of provisions of Section 71 IPC.

3. Before going into contentious issues; the alleged involvement of the appellants and, in case the involvement of the appellants is proved, the sections under which they should be convicted, we think it appropriate to first record admitted facts and our findings on some disputed facts which can be decided on the basis of contemporaneous documents, executed by doctors who had examined the deceased Ajay or injured Vimla or by examination of exhibits read with the statement of witnesses. Elucidation on the said admitted or disputed facts will be helpful when we examine the contentious issues raised that are required to be answered.

4. The admitted or other contentious or disputed facts, which we feel can be clearly determined without detailed reference to evidence are as under:

4.1 The deceased Ajay and injured Vimla, along with their family members, were residing at 195, Rajpura Gudmandi, Delhi.

4.2 The appellants were residents of 178/2 Rajpura Gur Mandi, Delhi. Thus, the appellants, deceased Ajay and injured Vimla and their family members were neighbours.

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4.3 There is evidence and material to show that the two families were known to each other and there was no past history of animosity or ill-will. Mecnun Rana (PW-1), Saurav (PW-2), Vimla Rana (PW-4) and Attar Singh (PW-7) have accepted and admitted that the deceased Ajay and Dharampal were property dealers and used to operate from the same shop/property.

4.4 Mecnun Rana (PW-1), wife of deceased Ajay Rana, has stated that they knew the family of Anar Singh, prior to the incident, as her late husband was a property dealer and used to carry on business with Dharampal, in the name of Khatri Properties. She has further stated that her mother-in-law was instrumental and had acted as a mediator in the matrimonial alliance between Ashok and his wife Asha who are appellants in these appeals. Gaurav (PW-2) had testified that, prior to the date of occurrence, no quarrel had taken place between the two families. He has also admitted that the deceased Ajay used to sit with accused Dharampal at Khatri Properties' office. Injured Vimla (PW-4), who is also the sister-in-law of the deceased Ajay, has averred that their family had participated in the marriage of appellant Ashok as also the family of Attar Singh and the deceased Ajay. She was not aware regarding what was the business relationship between deceased Ajay and Dharampal, but admitted that both of them used to sit together in one office and deal in properties. Further, prior to the incident, the relations between the two families were cordial. Kunal Rana (PW-5), a child then aged about 8 years, has stated that he knew the appellant Ashok, as his daughter used to study in the same school where his sister was studying and the appellant Ashok used to drop his daughter to the school. He has also accepted that his father,

deceased Ajay, was a property dealer and the accused were also property dealers and no quarrel had taken place between the two families prior to the occurrence. Attar Singh (PW-7), father of the deceased Ajay, has accepted that relations between Raj Kumar and his family were cordial.

4.5 There is ample evidence in form of MLCs (Ex. PW-23/A and PW23/B) of Sanjeevan Mann Hospital, Roop Nagar and Sanjeevaani Hospital, Darya Ganj, respectively, relating to injuries suffered by Ajay which caused his death. MLC (Ex. PW23/B), relating to Sanjeevani Mann Hospital, Darya Ganj, shows that the deceased Ajay was brought to the said hospital on 3rd September, 2005 with head-injuries and had expired at 12.45 A.M. on 4th September, 2005. Dr. Anil Shandil (PW-18) had conducted the post-mortem on the body of Ajay and, on examination, had found that he had following external injuries:-

- “(1) Abrasion reddish in colour over lower chest 16.5 cm x 0.5 cm. 5 cm from right nipple and 10 cm below left nipple crossing mid line.
- (2) Incised wound with clean cut well defined regular margins with dried up blood clots over vertex of head 15 cm. From right ear 14 cm. from left ear and 10.5 cm from protuberance of size 12.5 cm x 1.5 cm x cranial cavity deep with corresponding incised wound cut over the scalp with fracture extending towards frontal region and towards right parietal occipital region as depicted in fig. B and C. in the post mortem report with fracture part driven in.
- (3) Incised wound over left index finger 1.8 cm x 0.5 cm. with clean cut well defined regular margins subcutaneous to muscle deep.”

The following internal injuries were also noticed:-

- “(1) Subscalp extravasations of blood and clots over right parietal occipital region 8 cm x 6 cm and over frontal region 10 cm x 8 cm correspondingly. There was corresponding cut mark over brain matter about 10 cm. in

length, depressed with underlying brain matter confused with subdural, subarachnoid haemorrhage with intracerebral haematoma and blood clots over base of brain." 22

In PW-18's opinion, the death was caused by shock resulting from craniocerebral damage consequent upon head injury from heavy sharp edged weapon. Injury No. 2 was sufficient to cause death in ordinary course of nature. All injuries were ante mortem by nature. The Post Mortem Report, proved as PW15/A, was written and signed by PW-18.

4.6 Thus, it is clear from the aforesaid that Ajay had died a homicidal death as a result of injury No. 2. Ajay also had two other injuries in form of abrasions redish in colour over lower chest and index Finger 1.8 cm x 0.5 cm with clear cut, defined regular margins, which were subcutaneous to muscle deep. PW-18 has stated that the fracture against injury No. 2 was fissured fracture, usually caused by blunt forced impact. He was not shown weapon of offence (Ex. PW5), but after examining the sword in the cross examination, had stated that it was not correct to state that the same was neither sharp nor heavy nor pointed.

4.7 In the cross-examination, PW-18 has stated that injury No. 2 was caused by a single weapon and injury No. 3 was as a result of single infliction and not repeated blows by sharp weapon. Injury No. 1 was stated as simple injury possible by any pointed object and PW-18 could not say definitely whether 3 or 4 assailants simultaneously hit sword blows with force and that injury No. 1 would not be a result

thercof. He opined that injury No. 1 was a scratch linear abrasion possible by any pointed object or weapon. 24

4.8 Counsel for the appellants has submitted and raised dispute on the movement or admission of Ajay in Sanjeevani Mann Hospital, Roop Nagar, situated at about half a kilometer from the site of occurrence, then to Trauma Centre, near Civil Lines behind I.P. College and lastly to Sanjeevani Mann Hospital at Darya Ganj. It was submitted that the ostensible reason or justification for shifting i.e. non-availability of ventilator is belied in view of the MLC Ex. PW23/A of Sanjeev Mann Hospital, Roop Nagar, stating that the patient was already ventilated. It was also submitted that there was connivance and manipulation of the MLCs of Ajay. A false case has been set up. There is no merit in the said contentions. We are inclined to accept the statement of PW-1, PW-2, PW-4 and PW-6 to the extent that Vimla (PW-4) and deceased Ajay Rana were first taken to Sanjeevan Mann Hospital, Roop Nagar. The MLC of Ajay Rana, Ex. PW-23/A was prepared by Dr. Ashish Gupta. The said MLC was proved by Dr. Ashish Srivastava (PW23) to the effect that it was prepared at Sanjeevan Maan Hospital, Roop Nagar. The MLC was prepared at 10 P.M. and records that the time of arrival of patient was 9.50 P.M. We do not agree with the contention of the appellants that Ajay Rana was taken to some other hospital and was bandaged on head and incubated on ventilator in the said hospital. The words "scalp bandaged" and "profusely bleeding", mentioned in the MLC Ex. PW23/A show that after admission of Ajay at 9.50 P.M., he was bandaged and put on ventilator. MLC (Ex. PW23/A) uses the words 'patient was already on ventilator' but said MLC records and advised

① that the patient should be shifted to a higher centre. Ventilator can be manual through ambu bag or by a machine, both requiring incubation. The name of ASI A.A. Khan is mentioned in the said MLC, but that does not in any way negate or make the MLC or the contents thereof doubtful. Recording of the said name may be due to the fact that the police officer had visited the said hospital and had collected the MLC. In any case, this is inconsequential and does not make the prosecution version debatable. 25

4.9 We are also inclined to accept the statement of Mecnu Rana (PW-1) and Attar Singh (PW-7) that from Sanjeevan Mann Hospital, Roop Nagar, Ajay and Bimla were taken to Trauma Centre. Vimla (PW-4) was admitted in the trauma centre for treatment, but Ajay was in a serious condition and was taken to Sanjeevan Mann Hospital, Darya Ganj and admitted in the said hospital at 11.15 P.M. on 3rd September, 2005. Subsequently, he died at 12.45 A.M. on 4th September, 2005, in the said hospital. As per the statements of PW-1 and 7, Ajay was shifted from Trauma Centre because ventilator was not available there. This fact is recorded in MLC (PW-23/B) written in the Sanjeevan Mann Hospital, Darya Ganj. We do not accept the contention of the appellants that transfer from one hospital to another was made to fabricate or create evidence. At that time, the entire attention, object and purpose was to save Ajay and ensure that best medical treatment was made available and provided.

4.10. Similarly, contention that the deceased Ajay was not taken in the wheel barrow from the place of occurrence to Sanjeevani Mann Hospital, Roop Nagar is devoid of any force. The statement of PW-1

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and PW-2 are clear and categorical on the said aspect. There is no reason to disbelieve their testimony to the effect that they had taken Ajay in the injured condition to the said hospital. Attar Singh (PW-7) joined them over there, and thereafter, the deceased Ajay was taken to Trauma Centre and then to Sanjeevani Mann Hospital, Darya-Ganj.

4.11. The contention of the appellants with regard to place of occurrence i.e. where the incident or violence had taken place, in front of House No. 195 or 178, Rajpura Gudmandi, is not debatable. The actual occurrence or violence had taken place in front of house of Ajay at 195, Rajpura Gudmandi, Delhi. The fact that the DD entry No. 44B records the place of occurrence at 177-178 Rajpura Gur Mandi, cannot be determinative. The said DD entry was recorded at 22:19 Hrs. Immediately, thereafter another DD entry 45B was recorded, inter alia, stating that brother of A.S. Rana r/o 195 Rajpura Gudmandi had given a sword blow. The statements of police officers who went to the spot immediately after the aforesaid DD entries were recorded namely, ACP Hira Lal (PW-24), ASI A.A. Khan (PW-10), Const. Shahji John (PW-3), SI Anuj Nautiyal (PW19), Constable Ramesh Kumar (PW11) and Ct. Sushil Kumar (PW16) are consistent. They were first to reach the spot, where the violence had taken place, and the place was identified by them as 195, Rajpura Gudmandi. They had in seriatim stated that they reached the spot of occurrence at about 10.00/10.30 PM but by then the injured Ajay had been taken for treatment to Hospital, along with Vimla, the other injured. This is proved from the photographs, Ex. PW-9/A-1 to A-5, which were taken by the Crime Team and proved by Ct. Sushil Kumar (PW- 9) who had taken the photographs at 2.00/2.15 A.M on

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4th Sept., 2005. Evidence/material available/noticed at the spot were lifted by the mobile crime team and nakshanajiri marked Ex. PW24/C was prepared. The site plans, Ex. PW24/C, PW25/A and PW8/A, show and prove that blood in considerable quantity was not only found in front of house No. 195, Rajpura Gur Mandi but some blood was traced and found inside the house, next to the entrance door. The contention of the appellants that the place of occurrence, as mentioned and recorded in DD No.44B(Ex. PW10/DA) was 177-178, Gurmandi, Rajpura, is inconsequential as another DD No.45B was recorded within two minutes thereafter and in the said DD, it was mentioned that brother of A.S. Rana Rana had been given sword blow. DD No.45 has not been given an exhibit number but ACP Hira Lal (PW-24) and other police witnesses were extensively cross-examined on the said DD entry, which was obviously shown to them.

4.12 Similarly, the contention of the appellants that there is discrepancy as to the place where the police officers namely PW-3, PW-10, PW-16, PW-19 and PW-24 had, for the first time, seen the injured Ajay, is immaterial. The slight discrepancy, as to whether the injured Ajay and Vimla (PW-4) were seen by the police officers, for the first time in Sanjeevani Mann Hospital, Roop Nagar as stated by PW-24, or at Trauma Centre as stated by PW-3, PW-10, PW-16 and PW-19 is irrelevant for determining and deciding the core issues which arise for consideration. Such minor discrepancies are not consequential and occur because of lapse of time and inability of the witnesses to recollect irrelevant minute details. The credibility of the witnesses and the statements has to be examined on the basis of their overall statements and whether the version/deposition inspires

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confidence and credence. Some portion of the statement/testimony, if required and necessary, can be discarded. The presence of the police officers at the hospitals after the occurrence and thereafter at the scene of crime can hardly be disputed or denied. Contemporaneous endorsement written by ACP Hira Lal (PW-24) marked PW 24/A (the tehrir) for registration of the FIR after recording of statement of PW-1 (marked Ex. PW1/A) when read, supports the statements made by PW-3, PW-10, PW-16 and PW-19. Testimonies of PW-1, PW-4 and PW-7 also negate presence/appearance of the police officers at the hospital at Roop Nagar, when Ajay and PW-4 were taken there.

4.13 Soon after death of Ajay at 12.45 A.M. on 4th September, 2005, as recorded in MLC Ex.PW-23/B, ASI Ashiq Ali Khan (PW-10) recorded statement of Mecnu Rana (PW-1) and thereafter 'rukka' was sent for registration of FIR. This fact is confirmed by PW-1, PW-10 and PW-24. FIR No.497/2005, under Sections 147/148/149/302/307 IPC was recorded on 4th September, 2005 at 2.20 A.M. in the police station Model Town and two DD entries i.e. 5A and 6A were made. This has been proved in the statement of Constable Shahji John (PW-3), who had taken the 'rukka' to the police station and got the FIR recorded.

4.14 Head Constable Deepak (PW-22) has stated that he was given a copy of the said FIR for handing over the same to the senior officers and the Metropolitan Magistrate. He, in the cross-examination, has stated that he had delivered the special report to the Magistrate after 12 midnight. The Magistrate had made an endorsement on the copy

retained by him and he had returned back around 2 A.M., but he could not give the exact time. 29

4.15 We are not inclined to accept the contention of the appellants that there has been ante-timing of the FIR or there was delay in recording of the FIR. The deceased-Ajay Rana was taken from one hospital to the other and the primary concern of the family members, as noticed above, was to provide and get best medical treatment and save Ajay's life. At that time and in such circumstances, the eye witnesses would not have agreed to recording of their statement. Statement of PW-1 was recorded immediately after the death of Ajay. The trauma and shock suffered and felt by the eye-witnesses, stunned by the sudden turn of events, the injuries and the looming prospect and pervading thought of loss of life is not difficult to visualize and understand. The conduct of eye-witness was natural and understandable. The fact that PW-1 composed herself and made a statement within one hour of death of her husband-Ajay has to be appreciated.

5. This brings us to the crux of the matter; whether there was any unlawful assembly and who were the members of the unlawful assembly, sharing the common object and what was the common object shared or offence likely to be committed in terms of Section 149 IPC? Recently in Criminal Appeal No. 1490/2011, *Naresh @ Kalu Vs. State*, we have examined scope and ambit of unlawful assembly under Sections 141 and 149 IPC and have held as under:-

"28. Coming to Section 149 read with Section 141 IPC, it has two essential ingredients:

firstly, the offence must be committed by a member of an unlawful assembly (not necessarily by the accused himself) consisting of five or more members and,

Secondly, the offence must be committed in prosecution of common object of the assembly or that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

(See observations in *Ramachandran and Ors. v. State of Kerala*, AIR 2011 SC 3581).

29. Mere presence in the unlawful assembly does not render a person liable unless he shares the common object which is ultimately actuated. The word "object" means "purpose" or "design". The purpose for which the members of the assembly set out or the purpose which they desired to achieve is the object. In order to make it common, it must be shared by the members prosecuted. The object of the members should be the same. This requires that there should be proof of knowledge of the object pursued, that it was the shared object and there was a general agreement as to how it was to be achieved. The expression "in prosecution of common object" in Section 149 IPC has to be strictly construed as equivalent to "in order to achieve a common object". 30. Common object may be a result of a prior concert and common meeting of minds, but can be also formed on the spur of the moment. It may be formed at any stage by all or few members of an unlawfully assembly and the others may just join and adopt it. Once formed, it need not continue to be the same and can be modified, altered or abandoned at any stage. There must be community of object and object may exist up to a particular stage and not thereafter. A person may share a particular common object or there may be community of object, but the same may exist up to a particular stage or for a particular offence. (See *Charan Singh v. State of U.P.* (2004) 4 SCC 205).

31. Once it is established that the accused was a member of the unlawful assembly, which had common object, it is not necessary that all persons forming unlawful assembly must be shown to have committed some overt act or omission. Being part of an unlawful assembly, which shares a common object, itself is sufficient. However, caution must be taken to ensure that the accused concerned had an active mind i.e. shared a common object before he is held liable for the acts of third parties, who were members of the

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unlawful assembly. Passers-by or persons who were merely present at the site or the place of the assembly with no active mind have to be excluded. Some persons may even join the assembly as a matter of idle curiosity without entertaining a common object. (See *Masalti v. State of Uttar Pradesh* AIR 1965 SC 202 and *K.M. Ravi and Ors. v. State of Karnataka* (2009) 16 SC 337).

32. Common object is entertained in the human mind and, being a matter of intention, no direct evidence in the form of overt evidence may be available. Therefore, existence or non-existence of common object has to be gathered from the circumstances. (See *Lalji v. State of U.P.* (1989) 1 SCC 437). Specific overt acts and omissions by an accused do predicate formation of the common object and knowledge/sharing by the said accused, but contrary alone is not sufficient to hold that the accused did not share common object. Surrounding circumstances and all aspects have to be considered and it is not necessary for the prosecution to establish any specific overt action in all cases. (See *Daya Kishan v. State of Haryana* (2010) 5 SCC 81, *State of U.P. v. Krishanpal and Ors.* (2008) 16 SCC 73 and *Amerika Rai and Ors. v. State of Bihar* (2011) 4 SCC 677). It is obligatory on the part of the Court to examine the entire evidence and take a holistic and pragmatic view. Compendium of aspects like persons, who had joined the assembly, the weapons with the members of the assembly, the nature of injuries suffered, behaviour and act, before or after the scene of incident, etc. are relevant. Further, it is for the prosecution to prove against the person, who is alleged to be a member of unlawful assembly, that he was one of the persons constituting the unlawful assembly and entertained, along with other members, the common object or knowledge, as defined in Section 141, 149 IPC etc.

33. As noticed above, Section 149 read with 141 IPC consists of two parts. The first part criminalises and mandates punishment, when an offence is committed in prosecution of the common object and when the offence is committed with view to accomplish the said object. In such cases, the offence committed must connect or have direct or immediate nexus with the common object of the unlawful assembly, of which the accused was a member. The second part of Section 149 IPC is wider and consists of offences which are such as the member knew was likely to be committed. Thus, a member of the unlawful assembly shall be held liable if he knew that an offence, which he may not share, was likely to be committed in prosecution of the common object. The expression "knows" does not refer to a mere possibility which might or might not happen, but

cases where it can be ascertained that the accused had positive knowledge that such an offence was likely to be committed. (See *Cikkarange Gowda v. State of Mysore*, AIR 1956 SC 731)."

6. Supreme Court, in their decision dated 22nd November, 2012, *Bharat Soni etc. Vs. State of Chattisgarh* has dealt with purport and effect of provisions of Section 149 IPC on the question of determination of common object of an unlawful assembly or determination of the question whether a member of the unlawful assembly knew that the offence was likely to be committed. It observed that this was essentially a question of fact which requires examination of host or connected facts like nature of the assembly, background of the incident, motive, the arms carried by the members, behaviour of the members at or near the scene etc., but no exhaustive enumeration was possible. The object being entertained in human mind and being a mental attitude has to be gathered from the acts, which persons, who are members of the unlawful assembly, commit and result thereof. The said decision also made reference to another recent decision in *Kuldip Yadav & Others Vs. State of Bihar*, AIR 2011 SC 1736.

7. As noted, in the prefix to the present judgment, care and caution is required to be exercised when we examine the police witnesses as the two groups i.e. the appellants and the family members of the deceased-Ajay Rana have both made allegations of bias in investigation by the police officers. Evidence reveals that both sides did exert and apply pressure and had taken help or engaged retired police officers to influence the investigation. Investigation

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must be fair and objective as police is regarded as an independent investigator entrusted with a duty to unearth and present true and correct facts. Unfair investigation, which results in failure of justice or non-production of evidence or material on core issues, has resulted in acquittal in some cases. At the same time, care and caution has to be exercised that the accused using influence and indulging/ causing subterfuge should not go scot free and escape punishment. Nevertheless, the standard of proof in criminal cases mandates proof beyond reasonable doubt and, therefore, evidence must meet the said criteria. Even in cases of biased investigation, the standard of proof cannot be diluted but while examining the statement of witnesses, their credibility/truthfulness and the allegations made have to be kept in mind and cannot be ignored. In the present case, in order to reach the truth, we have relied upon contemporaneous records maintained and reflected in the MLCs, which were prepared when the deceased- Ajay and injured Vimla (PW-4) were taken to the hospital. We have also referred to other reasons and grounds for our findings.

8. Meenu's statement (Ex.PW1/A), under Section 154 Cr.P.C., which became the FIR, reads as under:-

"I reside at the aforesaid address along with my family and I am a housewife. (Today) in the evening (I) was present at the house along with my husband Ajay, Jethani (elder sister-in-law) Bimla, her son Sourav @ Golu. At about 9:30 P.M. our neighbour Ashok S/o Sh. Dharampal, Rajkumar @ Billu, Anil @ Susi S/o Sh. Dharampal, Anaar Singh S/o Sh. Ratan Singh, Anand @ Dhammal, Shailender @ Balley and Dharmpal came and after calling my husband outside, Ashok said to (him) that as to why he was asking them to remove the debris from the gali. Thereupon, my husband and myself persuaded them while saying to them that as they were doing construction to their house in front

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of our house and debris of the same was lying on the road which is causing a trouble for us while visiting herd and there and because of the same we had asked you to remove the debris from there. At this, Ashok asked his associated to do away with Ajay. After that, Ashok took the sword from his father Dharmapal and gave a blow of the same on the head of my husband. When my husband tried to run away from there Dhammal and Dharampal caught hold of him and Rajkumar and Anil caused sword blows to Ajay. When I tried to save they pushed me away. Shailendra @ Balley also gave blow of sword to my husband as a result of which he fell down there itself. On hearing the commotion, my Jethani (elder sister-in-law) Bimla and her son Saurav came out. When we tried to save Ajay, Anaar Singh and Shailendra gave a blow of sword on the head of Bimla as a result of which she also fell down there itself and they all fled from the spot. Thereafter, Saurav and myself took my husband and Jethani (elder sister-in-law) to Mann Hospital, Shakti Nagar and from there they both were taken to Trauma Centre, where they admitted my Jethani (elder sister-in-law). But my husband was taken to Sanjivani Hospital as his condition was critical where my husband has expired. All the aforesaid persons with a common intention attacked my husband and Jethani (elder sister-in-law) with the swords and cause them injury in order to kill them as a result of which my husband has died and Jethani (elder sister-in-law) is injured. Legal action may kindly be initiated against aforesaid persons.

I have heard the statement and the same is correct."

9. Endorsement on the 'rukka' recorded by ACP Hira Lal (PW-24) reads as under:-

"To,
The Duty Officer,
P.S. Model Town, Delhi.

It is officially submitted that I, the Inspector along with Constable Sushil Kumar No. 1302/NW reached at the spot i.e. 195, Rajpura, Delhi at the receipt of D.D.No.4413. 45B, where Mr. A.A. Khan, Constable Shahji Jaan No. 1297/NW were present at the spot. No ocular witness was found at the spot. It was learnt there that the family members of the injured had carried him to Mann Hospital, Roop Nagar. Leaving Constable Ramesh No. 1427/NW at

the spot I, the Inspector, along with the other staff reached at Roop Nagar Hospital where M.L.C. No. 105/05 of injured Ajay Rana S/o Madu....(sic) Rana was obtained. The doctor had written on it "nature of injury dangerous, head injury, patient is unfit for statement". It was learnt about the injured that he had been admitted in the Trauma Centre. I, the Inspector along with the staff reached at the Trauma Centre where it was learnt that the injured was carried to Sanjivni Hospital, Darya Ganj as his condition was very critical. And injured Bimla Rana w/o Jawahar Rana r/o the aforesaid address was found to be admitted at M.L.C. No. 67385/05 on which the doctor had written "nature of injury U/o Sharp edged weapon on head, blunt injury on other body". I, the Inspector along with other staff reached at Sanjivni Hospital, Darya Ganj where injured Ajay Rana was declared 'brought dead' on his M.L.C. No. 124/05. At the same place, eye witness Smt. Meenu, the wife of the deceased met us and got her foregoing statement recorded. The perusal of the M.L.C., observation of the circumstances and contents of the statement, reveal the commission of an offence punishable u/ss 147/148/149/307/302/34 I.P.C. Hence, this writing is being sent to the police station through Constable Shahji Jaan No. 1297/NW for the purpose of the registration of the case. After registration of the case, its number may be intimated. The dead body was sent under the supervision of Constable Sushil Kumar No. 1302/NW. I, the Inspector left for the spot. Dog squad and Crime Team may be sent at the spot.

Time and date of occurrence - 03.09.2005 at about 9:30 P.M.

Place of occurrence - House No. 195, Raj Pura, Gur Mandi, Delhi.

Date and time of the dispatch of writing - 04.09.2005 at 1:45 A.M.

Sd/- illegible
(In English)

Additional SHO, P.S. Model Town
04.09.2005"

10. PW-1, in her statement in chief in the Court, has stated as under:-

"I know all the accused persons present in the court today as they are living in my village Rajpura Gurmandi. On 3.9.05 at about 9.30 pm, I was present in my house along

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with my husband, my Jethani Bimla and her son Saurabh @ Golu and my son Kunal who was playing on the roof of my house. At that time accused Ashok (correctly identified) called my husband on the door of my house. On hearing the call of accused Ashok, I and my husband came out on the door of our house. Accused Dharampal, accused Susi @ Anil, Babley @ Shailender, Anar Singh, Dhammal @ Anand, Asha, Raj Kumar @ Billu were also present on the gate of my house. I saw a sword in the hand of accused Dharampal, Susi @ Anil was also having a sword in his hand, accused Babley @ Shailender was also having a sword in his hand, accused Anar Singh was having an iron pipe in his hand, and accused Dhammal @ Anand was having a Farsa in his hand. They were standing with their weapons. As soon as we came out on the door of our house, accused Ashok had asked my husband "TUNE HUME GALI KA MALWA SAAF KARNE KE LIYE KYUN KAHA". On this I and my husband tried to make understand accused Ashok that the accused persons used to put "Malwa" in the street in front of our house and it creates inconvenience to us. On this accused Ashok asked his associates to kill Ajay today itself. Accused Ashok took the sword from the hand of accused Dharampal and hit on the head of Ajay, my husband. I embraced my husband but accused Asha pushed me aside. In the meantime my Jethani Bimla and her son Golu @ Saurabh also came there on hearing the noise. Asha uttered to Susi @ Anil, "AJAY ASHOK KE TALWAR SE NAHI MAREGA, TU APNI TALWAR SE ISKE SAR PAR MAAR". On this my husband tried to run by saving himself. But accused Anar Singh, Dharampal @ Anand and Dharampal caught hold my husband. Accused Dhammal and Dharampal uttered, "AAJ AJAY KO JAAN SE MAAR DO". On this my Jethani Bimla rushed to save my husband but Asha and Raj Kumar @ Billu pushed back my Jethani Bimla. Accused Susi @ Anil and Babley @ Shailender hit swords on the head of my husband. Ajay fell down on the ground. Bimla fell down on my husband to save him. Asha and Raj Kumar again pushed her back. At that time Shailender hit his sword on the head of Bimla. She also fell down on the ground. My son Kunal was standing on the roof of my house and was weeping and shouting that "MERE PAPA TO MAT MARO - MERE PAPA TO MAT MARO". All the accused ran away from the spot with their weapons. I, Kunal and Saurabh put Ajay and Bimla in a Rehri which is used to carry cow dung and took them to Maan Hospital, Roop Nagar and the concerned doctor did not admit them because of their serious conditions. Then we took them to

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Trauma Center behind IP College where Bimla was admitted by the concerned doctor but my husband was taken to Sanjeevan Mann Hospital, Darya Ganj as there was no Ventilator in the Trauma Center where my husband was declared dead. After some time police came and recorded my statement which is Ex. PW1/A which bears my signature at point A. Thereafter, I returned to my house. After some time police also came at my house. I showed the place of occurrence to the police. My further statement was also recorded by the police. They also prepared rough site plan and also taken photographs. After two days I received copy of the FIR which was brought by my Jeth Attar Singh Rana. After going through the copy of FIR I came to know that name of accused Asha and the name of weapons was missing and the presence of my son Kunal was also missing. I told this fact to my Jeth. Thereafter, I and my Jeth went to the police station and reported the matter to the police but the police did not hear us and turned us out of police station while stating that statement is correct. Thereafter, my Jeth sent a complaint to the Commissioner of Police. On 27.9.05 the police had again recorded my statement which was recorded correctly. On 25.10.2005, one draughtsman along with the police came at the place of occurrence and I showed the spot to them. I can identify the swords, if shown to me with which the accused persons had attacked (objected to).

(At this stage a sealed parcel duly sealed with the seal of FSL NK is produced. Same is allowed to be opened. Seal is broken and its contents are shown to the witness) Sword Ex. P1 is one of the swords similar to which the accused persons namely Ashok, Shailender and Anil were having.

(At this stage another sealed parcel duly sealed with the seal of FSL NK is produced. Same is allowed to be opened. Seal is broken and its contents are shown to the witness) Sword Ex. PW2 is one of the swords similar to which the accused persons namely Ashok, Shailender and Anil were having.

(At this stage another sealed parcel duly sealed with the seal of FSL NK is produced. The same is allowed to be opened. Seal is broken and its contents are shown to the witness). Farsa Ex. P3 is the same which the accused Anand was having at the time of incident.

(At this stage another sealed parcel duly sealed with the seal of FSL NK is produced. Same is allowed to be opened. Seal is broken and its contents are shown to the witness). Iron pipe Ex. P4 is the same which the accused Anar Singh was having at the time of incident.

(At this stage another sealed parcel duly sealed with the seal of FSL NK is produced. Same is allowed to be opened. Seal is broken and its contents are shown to the witness) Sword Ex. P5 is one of the swords similar to which the accused persons namely Ashok, Shailender and Anil were having."

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11. Similar and identical testimonies in chief have been made by Saurav (PW-2), Vimla Rana (PW-4) and Kunal Rana (PW-6).

Before we elucidate upon and examine the evidence of the purported eye witnesses, we would first like to refer to the accepted or admitted position that the eye witnesses, namely, Meenu Rana (PW-1), Saurav (PW-2), Vimla Rana (PW-4) and Kunal Rana (PW-6) are related to the deceased. The appellants herein belong to other fraction/group in the sense that they are family members or are related with Dharampal - being sons or relatives of late Dharampal. (Dharampal, as noticed, was also an accused but had expired during the pendency of the trial.) The evidence or statements of related witnesses has its advantages and disadvantages. The advantage being that the relatives' presence, when the incident/occurrence was outside their residential house, is natural and probable, though it still requires verification and is accepted when proved. The related witnesses would, it is stated, ensure that the guilty, i.e. perpetrator of the crime, gets punished. The accused would not be shielded. However, caution is to be exercised as there could be a tendency or an attempt to include the innocent with the guilty. The Court has to guard itself against condemning the innocent. This caution mandates insisting upon acceptable evidence, which in some measure implicates the accused and satisfies the conscience of the Court. [see *Ranvir Yadav*

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Vs. State of Bihar, (1995) 4 SCC 392 and observations of the Supreme Court in *Kuldip Yadav (supra)*/. It would be appropriate here to reproduce observations of a Division Bench of this Court in *Daya Kishan & Ors. v. State* 2010 (3) JCC 2194 recording as under:-

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“4. ...This task has to be performed with care and caution when all the eye witnesses are not only inter-related to each other, but even to the deceased and further when all the accused are inter-related to each other. Indeed, in a situation of the kind where the entire members of a family, being 11 in number, are roped in as accused, it is the duty of the Judge to carefully see whether the complainant group is using an opportunity where the folly of a few of the opposite group, is used; nay misused, as a golden opportunity to ensnare in the clutches of criminal law the entire family of the ones who have committed the folly. How is this task to be performed? No straight jacket formula can be prescribed, but the quintessence and the signature tune of whatever formula is applied would have a common denominator i.e. use of commonsense as a prudent person and have a 360° microscopic look at the evidence.”

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“19. In such a scenario, as held in the decisions reported as 1981 Cri.LJ 1034 *State of UP Vs. Sahai & Ors.*, 2003 Cri.LJ 401 *Raghunath & Ors. Vs. State of Haryana* and JT 2010 (1) SC 24 *Boddella Babul Reddy Vs. Public Prosecutor HC of AP*, it was not unusual for a factionist to take advantage of every situation and occurrence and there was an incurable tendency in the factionists to rope in the innocent members of the opposite faction along with the guilty and twist and manipulate the facts with regard to the mode and manner of the occurrence so as to make their case appear true with the innocent members of the opposite faction also as participants in the occurrence. In such situations, it was the duty of the Court to microscopically scrutinize the evidence of the eye witnesses.”

12. PW-1's statements were recorded on four occasions. The first statement (Ex.PW-1/A) was recorded at 1.45 A.M. on 4th September, 2005. The second statement, it is alleged, was recorded at about 3.00 A.M. on 4th September, 2005, at the place of occurrence, by PW-24.

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This statement under 161 Cr.P.C acknowledges receipt of the FIR by PW-1. This supplementary statement, as held below, does not appear to be true and correct. PW-1 has categorically stated, in her testimony in the court, that the 2nd statement was regarding pointing out the place of occurrence and details. 3rd and 4th statements of PW-1, under section 161 Cr.P.C., were recorded, as per the prosecution, by PW-25 on 27.9.2005 and 25.10.2005. The court testimony, in chief, is a combination of Ex. PW1/A and the statement recorded under Section 161 Cr.P.C on 27.9.2005. There are some differences between the court testimony and Ex. PW1/A, but the main and material difference relates to the allegations and presence of the appellant Asha, at the scene of the crime as a member of the assembly. The contention and statement of the witnesses is that the IO ACP Hira Lal (PW-24) was mixed up and under influence of the appellants. The aforesaid contention could be partially correct. Our reasons, for the same, are elucidated below.

13. We are inclined to and do believe and substantially accept the initial version as stated and mentioned by Meenu Rana (PW-1) in Ex. PW-1/A and reject the contention that the Investigating Officer (PW-24) or ASI Ashiq Ali Khan (PW-10), under influence of the appellants, did not record true and correct statement made by Meenu. Events established from the statements of witnesses, including statements of PW-1 and PW-7 show and prove that ASI Ashiq Ali Khan (PW-10) and ACP Hira Lal (PW-24) had moved from one hospital to other and were in touch with PW-1 and PW-7. It is not possible to accept that PW-10 and PW-24 could have been influenced by a third person so as to wrongly record the statement of Meenu

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(PW-4). The said allegation has been made by PW-7 in his written complaint to the Commissioner of Police (Ex.PW-7/A) made on 9th September, 2005. In the said written complaint, PW-7 had stated that two retired police officers, namely, Ram Narayan, ACP (Retd.) and Bhagwan Singh, ACP (Retd.) were already present in the police station before the case was lodged to exert pressure for diluting the reporting of the crime. The statement of Meenu (Ex. PW 1/A) was not recorded in the police station, but in the Sanjeevan Mann Hospital, Darya Ganj. The said statement is signed by her. It is difficult to accept that the said two retired ACPs, who were not present at the spot, and far away, could have influenced ASI Ashiq Ali Khan (PW-10) and ACP Hira Lal (PW-24). As noticed below, there are good reasons to doubt the subsequent investigation and their conduct on or after 4th September, 2005, but it would be incorrect and wrong to hold that the initial statement of PW-1 (Ex.PW-1/A) itself was manipulated and facts were not mentioned to save and help the appellant Asha.

14. Another reason, why we feel that the statement, Ex.PW-1/A should be accepted, is that the Investigating Officer, it does appear, at the said time was not under any influence, as is reflective from the prompt and swift manner in which the appellants-Ashok and Raj Kumar were arrested from the hospital itself, vide arrest memo Ex.PW-24/D2 and D1, wherein the time of arrest stated is 3.30 A.M. on 4th September, 2005. The said two appellants had got themselves admitted for treatment in the Hindu Rao Hospital. (The injuries suffered by them and the alleged failure of the investigation, has been examined separately).

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15. Statement of Meenu Rana (Ex.PW-1/A) does not make any reference to Asha. However, it implicates the other six appellants. The statement also implicates Dharampal who had expired during the trial. The roles have been attributed and specifically stated to the six appellants and their individual conduct had been elucidated and clearly mentioned. It is difficult to accept and believe that Asha w/o Ashok would have joined and was the sole woman family member of the unlawful assembly armed with swords/weapons and had gone to the house of Ajay i.e. House No.195, Gurmandi, Rajpura, Delhi. MLCs of Ashok and Raj Kumar (Ex.D/2A and Ex.D/2) show that both of them were smelling of alcohol and, therefore, were intoxicated. Attar Singh (PW-7) in his written complaint (Ex. PW 7/A) had stated that Asha was carrying an iron rod in her hand but this fact was not mentioned in Ex.PW-1/A. The said complaint was made on 9th September, 2005. Meenu Rana (PW-1), Saurav (PW-2), Vimla Rana (PW-4) and Kunal Rana (PW-6) in their statements in the Court have not alleged or stated that Asha was carrying an iron rod and had attacked the deceased. The role attributed to Asha, in their statements, is entirely different and to the effect that Asha had pushed Meenu (PW-1) and Vimla (PW-4) and had instigated and shouted and called upon the male members to attack the deceased-Ajay and Vimla.

16. In these circumstances and in view of the aforesaid factual position, we do not think that the statements of Meenu Rana (PW-1), Saurav (PW-2), Vimla Rana (PW-4) and Kunal Rana (PW-6), in the Court, implicating and stating that Asha was part of the assembly should be accepted. It has to be established beyond doubt that she

was present at the spot/place of occurrence. She is entitled to acquittal as her presence, at the spot, has not been proved and established beyond doubt. 43

17. We will now examine the involvement of the other appellants. As noticed above, Meenu Rana (PW-1), Saurav (PW-2), Bimla Rana (PW-4) and Kunal Rana (PW-6) are eye witnesses to the said occurrence. PW-1 is the person, on whose statement (Ex. PW1/A) the FIR was recorded immediately after the death of Ajay at night in the Sanjeevan Mann Hospital, Darya Ganj. We uphold and accept that she is an eye witness and had seen the entire occurrence. She was the wife of Ajay, the deceased. Presence of Vimla Rana (PW-4) can also not be doubted as she had suffered injuries at the time of occurrence and admitted in the Trauma Centre for treatment. When she arrived at the spot of the crime and what she had seen is a different aspect and is being examined separately. We reject the contention that Saurav (PW-2) and Kunal Rana (PW-6) had no occasion or cause to see the "occurrence". Their presences in the house at 9.30 P.M. to 10.30 P.M., is natural, normal and not a make belief. However, Kunal Rana (PW-6) is a minor child and, therefore, his statement has to be viewed and examined with greater caution and care. The fact that Kunal's name was not mentioned in the FIR cannot be a ground to disbelieve and hold that he was not an eye witness who had seen the occurrence from the roof of the house. Family members of Kunal would not have wanted a small child to appear in the witness box and face cross-examination. PW-6 had lost his father and, therefore, the trauma and shock suffered by him should be recognized and accepted. Presence of PW-6, the minor child at

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about 9 P.M.-10 P.M. at home is natural and probable. When an occurrence of this nature happens; children come out to see the happening, unless some elder family member prevents and directs them not see the occurrence. The contention that Meenu (PW-1) had not given or mentioned PW-6's name in her original statement cannot be a justification or ground to reject and hold that PW-6 was not an eye witness. Statement of PW-1 (Ex.PW-1/A) is her reflection and version of what had transpired and was seen by her. She, it is apparent, was not required to give details of all persons, who had visually seen the occurrence. She was not asked to state and specify whether Kunal had also seen the occurrence from the roof top. She may not be aware of the said fact, as she might not have had the occasion and chance to talk to Kunal after the occurrence, during movement from one hospital to another. However, the possibility of the family members influencing and prompting Kunal cannot be ruled out. This possibility in the present case is being taken care of as we intend to primarily and mainly rely upon the court testimonies of other witnesses, the first statement i.e. Ex. PW1/A and other corroborating material to the extent it supports the said statement. In view of the deposition of the said witnesses we accept the identification and presence of the five male appellants, along with Dharampal as the true and correct factual position.

18. However, we agree with the contention of the appellants that PW-2 and 4 were not present when Ashok had hit Ajay's head with sword which he had taken from the hands of Dharampal. The statement of PW-2 and 4 that they had seen the said occurrence is not correct and plausible because they were in the cow-shed and came out

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after hearing commotion, noise or the cries of Ajay and PW-1 and were only eye witnesses to the occurrence thereafter. But this does not help the appellants, Ashok, Anil, Anar Singh, Raj Kumar, Shailender and Anand.

19. It is also apparent from the statement of PW-1 that Ashok had given initial blow and hit the sword on Ajay's head. To this extent there is no contradiction between the court deposition and Ex.PW1/A. The sword blows thereafter attributed to Anil, Raj Kumar and Shailender in the statement Ex.PW-1/A, were not on the head of Ajay. Whereas, as per PW-1, 2, 4 and 6 depositions in the Court, the sword blows given thereafter, by Anil and Shailender, were on the head of Ajay. Raj Kumar is not named by them as the person who had hit Ajay with the sword in their testimonies in the Court. We have referred to the Post Mortem Report Ex. PW Ex.PW15/A and the three injuries mentioned therein. There is one injury on the head of Ajay and the same had resulted in his death. As per Dr. Anil Shandil (PW-18), the said injury was caused by a single blow and was not a result of multiple blows. Ajay had also suffered injuries on his chest and index finger. In these circumstances, it will be reasonable and correct to hold that appellant-Ashok had given the sword blow on Ajay's head and at that time nobody had joined him. Dharmapal, father of Ashok, did not hit Ajay and Ashok had taken the sword from his hands. The other five appellants did not, at that time or simultaneously, hit Ajay. Thereafter, Vimla had reached there and, when she tried to intervene, was beaten and injured. The appellants and Dharampal, who were present there, had caught hold of Ajay and Vimla. She and Ajay were given beatings by the

appellants but the said beatings/hits have not resulted in the injury no.2 that caused the death of Ajay.

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20. In view of our aforesaid conclusion, it would be appropriate and proper to attribute and hold that the appellant-Ashok had acted individually when he had caused the head injury, which resulted in Ajay's death. He is certainly liable and we feel has been rightly convicted under Section 302 IPC. The injury may have been caused by a single stroke, but was caused by a dangerous weapon i.e. sword and the hit itself was directed on the head, a vital part of the body. The hit, it is apparent from the injury, was made with full force, impact and power. It was a deliberate and targeted hit. Cross-examination of PW-18 shows that the said injury was caused by the sword only and not by any other weapon, i.e., rod/farsa. The sword (Ex.P-5) was shown to the said witness, in the cross-examination on behalf of the appellants.

21. The next question which arises for consideration is whether there was any unlawful assembly and accordingly the other appellants Anil, Anar Singh, Raj Kumar, Anand and Shailender can be constructively convicted for the offence of murder and if not, can they be convicted under any other offence? In other words if there was an unlawfully assembly, what was the common object or whether members of the unlawful assembly were aware that an offence under Section 302 IPC or some other offences were likely to be committed?

22. We accept the prosecution version that there was an unlawful assembly of the appellants, except that Asha was not a member of the said unlawful assembly. The term 'unlawful

assembly' as defined under Section 141, requires assembly or five or more persons, which satisfies any of the five tests/requisites mentioned therein. Clause (i), (iii) and (v) thereof, in one way or the other, would be applicable to the facts of the present case as it has been established and shown beyond doubt that the appellants herein (except Asha) who were residing in 178 Rajpura Gur Mandi, Delhi, had assembled with arms outside the house of Ajay at 195, Rajpura Gur Mandi on 3rd September, 2005 at about 9.30 PM. We are also satisfied that they had a common object and that is why they had assembled with the arms. The appellants belong to one family and were residing at one place. Apparently, they were aggrieved and had grievance against Ajay. He was asked to come out.

23. The next question is, what was the common object and whether the appellants Anil, Anar Singh, Raj Kumar, Shailender and Anand, shared the common object of committing murder of Ajay or his family members including Vimla or they had knowledge that murder or attempt to murder/injuries was likely or could take place? Statement of Mecnu Rama (PW-1) shows that the appellant Ashok was not armed but he took the sword from his father and attacked Ajay and hit him with the said sword on his head. Dharampal, did not hit. No other member of the assembly joined in this strike or attacked him simultaneously. The said strike was made by Ashok individually and no one had participated when the said hit was made by Ashok. Thereafter, Ajay tried to run away and as per PW-1, on hearing the cry and commotion, Vimla (PW-4) and Saurav (PW-2), came out. As per the version and testimony of PW1, 2, 4 and 6; Anil and Shailender had subsequently given sword blows to Ajay and for

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reasons recorded above we have held that the said blows/hit were not on the head and had not caused Ajay's death. Vimla tried to save him and at that time, Shailender hit the sword on the head of Vimla. Anar Singh, Anand and Dharampal had caught hold of Ajay. Anar Singh, Anand and Dharampal, it is alleged, had uttered words and instigated others to finish off Ajay. We are inclined to disbelieve the alleged oral utterances i.e. the quotes attributed as exaggeration. These details are not mentioned in Ex. PW1/A and the FIR. Even the written complaint Ex. PW7/A is silent on the oral utterances. Not that oral exchange did not occur or transpire, it must have, but we doubt and do not attribute the quotes mentioned in the court testimonies to the appellants. We have noticed the injury suffered by Ajay on his chest and on his hand. Apparently, these are the injuries which were suffered because of the hit by Shailender and Anil. The injuries were on the chest and on the index finger of the hand. Keeping in view the facts, we do not think that the members of unlawful assembly had the common object to commit murder of Ajay or any of his family members. As noticed above, the two families were close to each other and even had business relationship. The motive and the cause of quarrel, as stated, was garbage/malwa on the street due to construction. The dispute was trivial and by no stretch can be treated as impelling enough to be the cause or motive to kill or to assemble with an idea to kill or commit murder.

24. The presence of weapons in the hands of the members of the assembly indicates that they wanted to show their determination, strength and anger and to question Ajay. Heated quarrel and arguments took place and thereupon the appellant Ashok took the

Q sword from Dharampal and hit it on Ajay's head. Others were spectators till this happened and had not joined Ashok, by catching hold of Ajay or by simultaneously attacking him with sword or weapons in their hands. 48

25. The next question is whether the members of unlawful assembly knew that murder or killing was likely, though they did not share the common object and did not have intention to cause death. The distinction between Section 300 and 304 Part I/II, is rather thin, but does exist and is accepted. Noticing the conduct of the appellants, other than Ashok who has been convicted under Section 302, (and Asha who has been acquitted) we feel that the other appellants should be convicted by applying the likelihood clause under Section 304 Part II IPC. We have given benefit of doubt to the appellants keeping in mind the nature of injuries suffered by Ajay, on the chest and on the hand, as well as injuries suffered by Vimla. We have also kept in mind that the statement of PW-1 (Ex. PW1/A) is also susceptible to some exaggeration and has to be collated and corroborated with the nature and extent of injuries suffered by the deceased Ajay and injured PW-4. As per the prosecution witnesses PW-1, PW-2, PW-4 and PW-6, the appellants had full opportunity to cause injuries of their choice, desire and design, with virtual no or real resistance from Ajay and his family members except the attempt made by the two women, Meenu (PW-1) and Vimla (PW-4), to save and protect Ajay from further beating or hurt. The said injuries reflect the object which the appellants (other than Ashok) had in mind or had acted.

26. Injuries, suffered by and caused to PW-4, as noticed are made subject matter of debate. The appellants have been convicted under

(c)

Section 307 IPC i.e. attempt to commit murder of PW-4. As per statement of PW-1, PW-2, PW-4 and PW-6, Vimla had tried to protect Ajay who had fallen on the ground. To save Ajay from hits by swords/weapons Vimla had covered him. It is not the case and statement of PW1, 2, 4 and 6 that the appellants were prevented or obstructed from causing hurt and hitting Vimla. They had a full go at her, as in case of Ajay. Therefore, in the present case, the nature and extent of injuries suffered by Vimla is an important and relevant consideration, when we decide the question of offence committed and whether the conviction under Section 307 IPC is justified. Vimla was admitted in the Trauma Centre and was treated there. It is claimed that Vimla, because of the injuries, had become unconscious and had regained consciousness after a long delay. It is possible that Vimla (PW-4) may have become delirious or unconscious immediately after the occurrence, but she had soon regained her consciousness and was able to speak and narrate the facts when she was admitted in the Trauma Centre. The MLC (Ex. PW14/A), specifically mentions that the patient herself had alleged and given history of assault. She was conscious and oriented. Her BP was 118/98 mm and pulse was 84/m. The injuries suffered by her, as indicated, are as under:-

"I/E --- Incised wound on left parietal region is 10 cm x 0.2 cm.

-Tenderness and restriction of movement of right shoulder.

-Tenderness on left leg.

-Tenderness and deep abrasion on left hand.

-Tenderness chest right side."

27. She was declared unfit on 4th September, 2005 (time is not indicated), but the injuries mentioned in the report, as per the opinion

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of the doctor, were simple in nature. X-rays did not indicate any fracture. She had certainly suffered an injury on her head i.e. left parietal region and other parts of the body, like shoulder, hand and chest. But injuries were relatively not dangerous. (PW-14) Dr. Nitin Kumar's statement, in the court, is relevant. He has stated that Vimla had an incise wound on the left parietal region on the head and there was restriction of the movement of right shoulder. The wound on the shoulder was caused by sharp edged weapon though weapon of offence was not shown to him. Other wounds were caused by another blunt object. It was put to PW-14, whether the incise wound on the head of Vimla was purely superficial and simple, but PW-14 opined that opinion regarding depth of the wound would be given by a forensic expert or the general surgeon. He denied the suggestion that the abrasions and tenderness were result of friendly jostling, fall or feigned or as a result while tending to cattle, handling fodder etc., observing that abrasions were deep in nature and keeping in view the location mentioned, this was not possible. He accepted that the depth of the wound was not stated by him. As per the MLC (Ex. PW14/A) Vimla (PW-4) was treated in the hospital from 3rd September, 2005 till 7th September, 2005 i.e. for a period of about 3 and a half or 4 days. Interestingly, Attar Singh Rana in his complaint (Ex. PW7/A) had the stated as under:-

"Mrs. Bimla Rana, w/o of my second brother, who had come for rescue of Mr. Ajay Rana, was also attacked with same weapons by some people. She received multiple cuts & injuries, who was admitted to L.N.J. Trauma Centre of Civil line for treatment, who was discharged on the same date of admission i.e. 4.9.2005, inspite of the fact, that her condition was not stable and wounds were still bleeding. She was given 28-30 stiches in the head and leg. When insisted by us, doctors at Trauma Centre agreed to review

the patient after which it was decided to keep her admitted for further observation & treatment. Now that she has been discharged and brought at home, police has not bothered to inquire about the condition of a eye-witness of the gruesome murder, what to talk of recording of her statement."

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28. The allegation in the said letter that Vimala was given 28-30 stitches on her head and leg was not supported by any evidence or material or the statement of PW-14. PW-4 has also not alleged that she was given around 28-30 stitches on her head and leg. Thus, it can be stated that it is a false statement in the said letter.

29. Appellants have submitted that the prosecution version must fail because of numerous reasons. Appellants Ashok and Raj Kumar had also suffered injuries and were admitted to Bara Hindu Rao hospital vide Ex. DW1/A and DW2/A, respectively. It is contended that the police did not investigate or go into the question of injuries suffered by the appellants Ashok and Raj Kumar. The appellants have relied on several judgments to contend and plead that they and the other appellants are entitled to acquittal because of failure on the part of the police to investigate, elucidate and explain the injuries suffered by the said appellants and to investigate the offences committed by Ajay and their family members. We have examined Ex. DW1/A and DW2/A which relate to injuries suffered by Ashok and Raj Kumar. In the MLC of Raj Kumar (DW1/A), it was mentioned that the patient was conscious and had given the history of assault. His general condition was fair. He had a scar over right hand. The name of the person who had brought him was mentioned as Shailender, cousin brother who is also an appellant before us. Smell of alcohol was present. The remarks "Patient was brought by

police for medical examination" has been specifically scored off in the said MLC. But the said words are recorded in the MLC of Ashok Ex. DW2/A. However, it is also mentioned that Ashok was brought to the said hospital by Shailender, his brother. As per the said MLC, there was alleged history of assault and smell of alcohol was present. There was no distress and the patient was oriented. There was tenderness present on the left side of abdomen and right hypochondrium and limber region. CLW was seen over the forehead on right side. Two of them reached hospital at 10.55/11.00 P.M. on 3rd September, 2005. The so-called alleged injuries suffered by the appellants Ashok and Raj Kumar are minor in nature and superficial.

30. There is a contradiction, as noticed in the MLC (Ex. DW2/A) of Ashok Khatri. The contention that he was taken to the hospital by police at 11.00 P.M. of 3rd September, 2005, which though appears to be attractive on the first flush, has to be rejected for three reasons. Firstly, similar entry in the case of Raj Kumar has been scored off and secondly the MLC itself records that Ashok was brought by Shailender (brother), and one of the appellants. Thirdly, the appellants Ashok and Raj Kumar were arrested from the hospital itself vide arrest memos Ex. PW24/D1 and D-2. The time of arrest shown therein is 3.30 AM on 4th September, 2005 from Bara Hindu Rao Hospital. The arrest was made by Investigating Officer Hira Lal (PW-24) who, at least till 2.30/3.00 A.M, had been moving with the witnesses. In *Takhji Hiraji vs. Thakore Kubersing & Ors.* (2001) 6 SCC 145, it was held as under:

"17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In *Rajendra Singh & Ors. Vs. State*

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of Bihar, 2000 CriLJ 2199, Ram Sunder Yadav vs. State of Bihar, 1998CriLJ4558 and Vijayee Singh & Ors. Vs. State of U.P. : 1990CriLJ1510, all 3-Judges Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear cogent and credit worthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

18. The High Court was therefore not right in overthrowing the entire prosecution case for non-explanation of the injuries sustained by the accused persons. The High Court ought to have made an effort at searching out the truth on the material available on record as also to find out how much of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful."

31. We do not agree with the contention that there was failure to examine alleged eye-witnesses to the occurrence in form of neighbours in the said locality who would have seen the occurrence. For one, the actual acts of violence hardly lasted 5 minutes and thus no one else might have seen the occurrence i.e. the actual acts of violence. No such name was indicated or stated in the cross examination of the witnesses. Secondly, that the appellants were also

residing in the same neighbourhood. Fear and likelihood of creating enemies and foes, in case a neighbour comes forward and makes a statement against another is a real possibility, which cannot be ruled out and ignored in the present case. Lastly, the testimonies of the witnesses who have deposed have to be examined on their own merits and not on the basis that a third person, who could have possibly also been a witness, has not been examined. A gap or infirmity in the prosecution case can be supplied or made good by examining the witnesses who though available were not examined and it is only then that the deficiency of withholding of material witnesses causes the court to draw an adverse inference against the prosecution. In *Takhaji Hiraji's case (supra)*, it was held:

"19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The Court of facts must ask itself -- whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the

32. There appears to be justification that after initial investigation and arrest of Ashok and Raj Kumar, there was slackness and failure of the police to investigate and cause arrest of others. Other appellants, mentioned in Ex. PW1/A, were not questioned or arrested. Weapons used by them were not seized. Even blood stained clothes of Vimla (PW-4) and others were not taken into custody and send for forensic examination. As noticed, Shailender had brought the appellants Ashok and Raj Kumar to the hospital. Failure and inaction on the part of the police to take any action against all persons mentioned in Ex. PW1/A remains unexplained. Family of Ajay had, apparently lost faith in the I.O. Hira Lal (PW24) as is clear from Ex. PW7/A, a complaint letter written by PW-7 Attar Singh Rana. The noting on the letters itself indicates that the case was subsequently transferred to the crime branch. Thereupon, the new I.O. SI K.B. Jha (PW-25) took over the investigation and the other accused, who are also the appellants herein, were arrested or surrendered subsequently.

33. Learned counsel for the appellants had laid considerable emphasis on the statement of ACP Hira Lal (PW-24), who had stated that in spite of his best effort Vimla (PW-4) had refused to give her statement under Section 161 Cr.P.C. The allegation that there was failure to collect alleged blood stained clothes is false and in fact there were no such blood stained clothes. The allegation is debatable. For one Vimla (PW4) was certainly injured and admitted in the hospital for treatment. PW-1's statement was recorded on 3rd September, 2005. As per MLC (Ex. PW14/A), PW-4 was unfit to

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make a statement on 4th September, 2005. On the next day, 5th September, 2005, copy of the FIR was given to Saurav. Question or debate arises whether PW-24 had tried and asked PW-4 to make/give her statement. As per PW-24 he did try and asked PW-4 but she refused. Other family members did not permit PW-24 to record Vimla's statement. Plea and statement of PW-4 is to the contrary. The reluctance on the part of the PW-4 to give statement to the IO PW-24 can be easily explained and is understandable in view of the complaint made by PW-7. Their frustration and anger can be appreciated as other accused mentioned in PW1/A remained untouched and in spite of death of Ajay, the investigation was lackadaisical. It would be illogical to exclude and not to take into account the statement of PW-4, the injured witness who was herself attacked, solely on the ground that due to apprehensions and reasons that she had refused to give statement to the police and made her statement only before the IO, (PW-25) SI K.B. Jha. However, while examining her statement, we have to keep in mind that the delay and the hardening attitude would have resulted in exaggeration, improvements and false implications of acts being attributed to different persons facing prosecution. Her statement, therefore, has to be read with great caution and care as we have done. Her testimony has to be collated, corroborated by what has been stated by others and read keeping in mind the actual injuries suffered by her and stated and proved by PW-14. We have, therefore, read her testimony in court as only corroborating and cementing the statement of PW-1 to the extent, she has proved and established the case. Same is the case



when we have examined and relied upon statements of PW-2 and PW-6. 58

34. Involvement of appellant Ashok and Raj Kumar is also proved from their blood stained clothes which were seized by PW-24, the Investigating Officer, vide seizure memos Ex. PW10/B and PW10/C. These were subsequently sent to Forensic Science Laboratory and as per the FSL Report (Ex. PW29/A) blood was found on the shirt and jean pant worn by Ashok Khatri and the shirt and half pant worn by Raj Kumar. Blood group 'O' found on the pant and shirt of Ashok and the shirt of Raj Kumar matches with the blood group of the deceased Ajay.

35. On the basis of disclosure statement made by Ashok Khatri (Ex. PW19/A) the sword (Ex. PW5) was recovered vide seizure memo Ex. D-10. The said sword was also sent for FSL examination and as per the FSL Report (Ex. PW29/A) human blood was found on the said sword but the blood group could not be ascertained as there was no reaction, vide Ex. PW29/B.

36. Appellants Anil and Anar Singh were arrested more than one month after the occurrence on 17th October, 2005 and after SI K.B. Jha (PW-25) took over the investigation on 24th September, 2005. On 27th October, 2005, the other two accused Anand and Shailender surrendered before the court of ACMM and were arrested. PW-25 has averred that Anil and Anar Singh had made disclosure statements Ex. PW21/A and PW21/G-1 respectively, and on this basis on 19th October, 2005, weapons of offence i.e. sword used by Anil and the iron pipe were recovered vide seizure memo Ex. PW21/D. Similarly, Shailender and Anand had made disclosure statements Ex. PW21/G-2

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and PW21/G3 on 28th October, 2005 respectively, and pursuant to their disclosure, PW-25 claims that a sword and farsa were recovered near a canal at Hyderpur outer Ring Road. The FSL Report (Ex. PW29/A-2) records that on sword and farsa Ex. 17 & 18, which were sent to them, no blood could be detected. Similarly on sword and pipe Ex. 14 and 15, no blood could be detected as per FSL Report (Ex. PW29/A).

37. Keeping in view the huge time gap in the arrest of the said accused and the manner and mode of recovery, we are inclined not to rely and refer to the same as incriminating circumstances against Anand, Shailender, Anar Singh and Anil. Yet there is still sufficient incriminating material against them in the form of the testimonies of the eye witnesses and the injured corroborated and supported by medical evidence. The lapses on the part of the first IO (PW-24) does not negate or create doubts viz. their involvement and does not merit their acquittal. The core case, as proved and established, sustains against them.

38. We have examined the nature and extent of injuries suffered by Vimla above. The next issue is whether the six male appellants have been rightly convicted under Section 307 IPC for attempt to commit murder of Vimla. Injuries or absence of injuries is not necessary to constitute an offence under Section 307 IPC but the prosecution must prove that common object of the assembly was to commit murder i.e. they had the *mens rea* mentioned in Section 300 IPC and with the said intention or knowledge they had acted though death was not the result, or that the assembly had knowledge that murder of Vimla or

some other person may be attempted by a member of the unlawful assembly. 60

39. We have examined the evidence on record but do not find that the ingredients of Section 307 IPC viz. Vimla are satisfied. The evidence mentioned above, postulates that the common object of the assembly was to attack Ajay but Vimla was hit/attacked and suffered injuries because she intervened. Saurav (PW-2) and Meeenu (PW-1) wife of Ajay, did not suffer injuries. In these circumstances, we do not think that Section 307 IPC can be invoked as far as injuries suffered by Vimla are concerned. The appellants, however, had caused hurt to Vimla by dangerous weapons and it can be gathered and inferred that they had common object to cause hurt/injure a third persons who intervened. This was also likely to happen when a number of assembly members are armed with weapons. The appellants are accordingly liable to be convicted under Section 324 read with Section 149 IPC for the injuries caused to Vimla. Keeping in view the injuries suffered, the weapon used, i.e., the sword or for that matter the iron pipe, using which the injury was caused on the head, and the fact that the six male appellants had attacked a woman Vimla, we feel they deserve rigorous imprisonment of 3 years and fine of Rs.10,000/- each. Accordingly, their conviction, in respect of injuries suffered by and caused to Vimla, is converted to Section 324 read with Section 149 IPC, from Section 307 read with Section 149 IPC.

40. In view of the aforesaid discussion, the appeals are disposed of as under:-

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- (1) Appeal filed by Asha is allowed and she is acquitted. She will be released forthwith unless detained in accordance with law in any other case.
 - (2) Conviction of Ashok Khatri under Section 302 IPC for murder of Ajay is maintained. He is sentenced to life imprisonment and fine of Rs.25,000/- and in default of payment of fine, shall undergo simple imprisonment for a period of 1 year.
 - (3) Raj Kumar, Anil, Shailender, Anar Singh and Anand are convicted under Section 304 Part II read with Section 149 IPC for having caused injuries and death of Ajay and they are sentenced to rigorous imprisonment of 8 years with fine of Rs.25,000/- each and, in default of payment of fine, they shall undergo simple imprisonment for a period of one year.
 - (4) Ashok Khatri, Raj Kumar, Anil, Shailender, Anar Singh and Anand are convicted under Section 324 read with Section 149 IPC for the injuries caused to and suffered by Vimla and they are sentenced to 3 years rigorous imprisonment with fine of Rs.10,000/- each with stipulation that in default of payment of fine, they shall undergo simple imprisonment for six month.

The sentences are accordingly and to the extent indicated above
modified. The sentences will run concurrently and Section 428
Cr.P.C. will apply.

The appeals are accordingly disposed of.

SANJIV KHANNA, JUDGE

SG

S.P. GARG, JUDGE

December 19th, 2012
kkb/NA/VKR

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