

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 743 of 2014**

- Kalim Khan S/o Mohammad Salim Khan Aged About 21 Years
R/o. Near Hatri Sitamani Korba, Distt. Korba C.G.,

---- Appellant**Versus**

- State Of Chhattisgarh Through P.S. Kotwali, Korba, Distt.
Korba C.G.

---- Respondent**CRA No. 783 of 2014**

- Anil @ Neeraj Gadhewal S/o . Mahesh Gadhewal Aged About
20 Years R/o. Sitamani, P.S. City Kotwali Korba, Distt. Korba
C.G.

---- Appellant**Versus**

- State Of Chhattisgarh, Through P.S. Kotwali, Korba, Distt.
Korba C.G.

---- Respondent**CRA No. 876 of 2014**

- Jai Kumar @ Bijju S/o Shri Chaitram Kewat Aged About 24
Years R/o Sitamani, Dist. Korba C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through P.S. Kotwali, Korba, Distt.
Korba C.G. , Chhattisgarh

---- Respondent

CRA No. 892 of 2014

- Naresh @ Commando S/o Sammelal Kenwat Aged About 22 Years R/o Ratakhar, PS Korba, Civil And Rev. Distt. Korba C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through The Sho, Ps Kotwali Korba, Distt. Korba C.G.

---- Respondent

CRA No. 893 of 2014

- Umesh @ Thandaram S/o Bhurkhu Ram Sidar Aged About 20 Years R/o Sitamani, Ps Korba, Civil And Rev. Distt. Korba C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through The Sho, Ps Kotwali, Korba, Distt. Korba C.G.

---- Respondent

CRA No. 919 of 2014

1. Sonu @ Kanhaiya, S/o Jagdish Shrivastava Aged About 20 Years R/o Sitamani, Ps Kotwali, Distt. Civil And Rev. Distt. Korba C.G.
2. Samir @ Tausib S/o Ashif Khan Aged About 20 Years R/o Sitamani, Ps Kotwali, Distt. Civil And Rev. Distt. Korba C.G. , District : Korba, Chhattisgarh

---- Appellants

Versus

- State Of Chhattisgarh Through Ps Kotwali, Distt. Civil And Rev. District Korba C.G.

---- Respondent

For Appellants	: Shri R.K.Jain,
For Respondent/State	: Smt. Fouzia Mirza, Addl. AG

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Judgment On Board By Manindra Mohan Shrivastava, J.

04/01/2019

This appeal is directed against the impugned judgment of conviction and order of sentence dated 24.07.2014 passed by Additional Sessions Judge (FTC) District Korba in S,.T. No. 15/2013 whereby the appellants in the aforesaid appeals have been held guilty of the commission of offences and sentenced as described below :

Conviction	Sentence
U/s. 148 IPC	RI for 1 year and fine of Rs. 500/- with default stipulation.
U/s. 294/149 IPC	RI for one month
U/s. 341/149 IPC	RI for one month
U/s. 307/149 IPC	RI for 7 years and fine of Rs.2,000/- with default stipulation
U/s. 302/149 IPC	Imprisonment for life and fine of Rs. 5,000/- with default stipulation.

2. The prosecution story, as unfolded from the records of the case and judgment impugned, is that while some of the witnesses

namely Navin, Sukhem Kumari Kanwar, Asha Kumari, Gayatri and Kailash (PW- 2,3,4,5,6 and 9 respectively) were returning after pilgrimage, at Madwarani railway station, an incident of teasing of female members of this group took place. It is alleged that the appellants who were also present in the railway station, entered into quarrel with the victim group and a dispute is said to have arisen on account of teasing of family members. Further, prosecution story is that when the deceased victim along with other witnesses namely PW-2,3,4,5,6 & 9 reached Korba station and took auto rickshaw to go to their respective residence, on the way, near Shani temple, the appellants intercepted them and it is said that assault was given to Sukhem Singh and Navin as a result of which, Sukhem Singh sustained one injury on his head and Navin (PW-2) also sustained one injury on the back of his neck. Sukhem was admitted in the hospital and after about 17 days he succumbed to the injuries and died. The injury sustained by Navin was found to be simple in nature. In the investigation, according to the prosecution, the witnesses including victim Navin identified the appellants as the persons involved in teasing and quarrel at Madwarani Station and also assault given to Sukhem Singh and Navin near Shani temple at Korba. Charge sheet was filed against the appellants for alleged commission of offences. Appellants having abjured guilt, were put to trial.

3. In order to prove its case, prosecution mainly relied upon the eyewitness account of the two incidents, one at Madwarani railway station and other in Korba deposed by PW-2,3,4,5,6 & 9. According to the prosecution case, appellant Naresh @ Comando was found in

possession of hammer said to be used in giving assault on the head of Sukhem Singh and Samir was found in possession of rod which is said to be used for giving assault to Navin.

4. Though learned trial court found that the Test identification Parade was vitiated, taking into consideration that the victim and other witnesses had ample opportunity to see and recognize the face of the accused for a fairly long spell of period during the incident and they were actually identified on the dock during trial, relied upon the evidence of identification. Learned trial court, upon appreciation of evidence, further held that the sequence of the events, which started at Madwarani Station, on account of teasing the victim group and culminating in assault at Korba, proved formation of unlawful assembly with a common object of murdering Sukhem and Navin and as Sukhem succumbed to death and Navin, despite assault with intention to cause death, survived, held the appellants guilty of the commission of the offence under Section 302 IPC with the aid of Section 149 IPC and also under Section 307/149 IPC and other alleged offences said to have been committed in the alleged transaction.

5. Assailing correctness and validity of the judgment of conviction and also the order of sentence, learned counsel for the appellants argued extensively to contend before us that the conviction is unsustainable under the law and the appellants are entitled to be acquitted by giving them benefit of doubt.

6. It was contended that the Test Identification parade is proved to be farce on the basis of evidence of PW-3,4,5, and 9 because

most of these witnesses have clearly deposed in the court that even before holding the Test Identification Parade in the school which was conducted by the Executive Magistrate (PW-20), the police personnel had shown the arrested accused to these witnesses and therefore, no reliance could be placed in the Test Identification Parade and further that showing the accused to the witnesses also completely renders unbelievably dock identification. Learned counsel for the appellant would next submit that as the aforesaid identification of the accused, by showing their photographs to the witness Navin, who was not the part of identifying the witnesses, is also doubtful because the accused were not actually produced in the court and identification by photograph, in the circumstances that other witnesses were already shown by the accused in the police station, does not satisfy the legal requirement of identification of the accused by the said witness Navin (PW-2). Learned counsel for the appellants argued that though objection was taken to such a process of identification through photographs, which has also been recorded by the learned trial court, the objection was illegally overruled. In support of the submission regarding defective Test Identification parade and its vitiating effect on the identification in the court, learned counsel for the appellants placed reliance upon the decision of Supreme Court in the matter of **2007 (3) SCC 372 and 2009 (3) SCC Cr. 1037**.

7. Counsel for the appellant also argued that the so called episode of quarrel at Madwarani Station itself is a false and fabricated story because to prove the alleged incident at Madwarani Station only interested witnesses PW-2,3,4,5,6 and 9 have been

examined. These witnesses have stated that the quarrel followed by teasing of girl member of the victim group was taken to yardmaster and also to the police personnel and further that a '*chaiwala*' (Tea Vendor) is also said to be acquainted with this episode but the prosecution has neither examined these witnesses, nor has explained their non-examination therefore, the evidence with regard to the said incident is liable to be discarded.

8. Next submission of counsel for the appellants is that the alleged incident of assault given to Sukhem Singh and Navin while they were going from railway station to their respective residence, said to be caught near Shani Temple, is a false story. He would submit that the appellants have examined two independent witnesses of the incident, namely Man Singh and Laxman Shrivastava DW-1 and DW-2 who were carrying on their small business at the location where the incident is said to have happened. They are independent witnesses and have stated that two other persons had committed *maar-peeth* with Sukhem Singh and Navin and said that the appellants present in the court were not one of those assailants thus, the entire prosecution case becomes highly doubtful as the evidence led by the defence offers a plausible explanation as to how Sukhem and Navin sustained injury in the incident of assault on them while they were returning from railway station at Korba and intercepted near Shani Temple. A plea of *alibi* has also been taken on the strength of the evidence of DW-3, in so far as the appellant Anil is concerned as the witness has clearly stated that at the relevant time, when the incident is said to have happened, Anil was engaged as skill labour working in the house of these witnesses.

9. Learned counsel for the appellants further argued that the ocular testimony of the so called eyewitnesses is not corroborated entirely from the medical evidence because Sukhem Singh and Navin have sustained single injury whereas according to the witnesses both of them were assaulted by all the appellants out of which some of them are said to be holding hammer, rods etc. It is argued that if this is the evidence, large number of injuries would have been found on the body of the deceased and Navin and the other witnesses namely PW-3,4,5,6 & 9. The prosecution has failed to prove any injury on any of these witnesses who claim to have been present at the time of incident near Shani Temple at Korba. This, therefore, raises serious doubt with regard to the credibility of prosecution witnesses of they having seen the incident.

10. Learned counsel for the appellants would then argue that as only single injury was found on the head of Sukhem and one single injury on the back of the neck of Navin, sharing of common object to murder Sukhem or to assault Navin with intention to cause death cannot be inferred and at the most, in the proved circumstances of previous incident of teasing, it can be said that the appellants had entered into a fight to teach a lesson without any intention of causing death. Therefore, even if by assault, death of Sukhem is caused, it cannot be said that the unlawful assembly was formed with a common object of murdering Sukhem and Navin. According to them, none of the witnesses have specifically stated as to who gave single blow on the head of Sukhem and Navin and therefore, in such circumstances, the appellants could not be held guilty for commission of the offences under Sections 302/149 IPC.

An alternative argument has been advanced by the learned counsel for the appellants that in view of the fact that only single injury was caused to Sukhem and the circumstances in which the incident happened, involving two groups on the road, followed in continuity with the incident of quarrel which had taken place at Madwarani Station few hours before the incident, it may be only a case of knowledge that such injury may cause death without there being intention or premeditation and at the most, offence under Section 304 of IPC, which is culpable homicide not amounting to murder can be said to be made out. In view of the entire circumstances, nature of injury and that the appellants had otherwise not acted in a cruel or unusual manner, even if the appellants are found having committing criminal overt act, as alleged against them, conviction may be altered to one under Section 304 Part II IPC and the sentence may be reduced to the period already undergone by them.

In support of various submissions so made before us by counsel for the appellants, reliance has been placed on **2017 (3) SCC 261; 2013 (4) CGLJ 595; 2014 (3) SCC 366; 2008 (11) SCC 614; 2012 (8) SCC 222; 2011 (4) CGLJ 121 and 1994 SCC (Cri) 889.**

11. On the other hand, learned State counsel supporting the impugned judgment of conviction and order of sentence submits that present is a case of exceptional nature where the incident of quarrel had already taken place at Madwarani station, three hours before the alleged incident of assault, five prosecution witnesses who are

part of the victim group had clearly deposed regarding the incident of teasing a girl member of the group at the instance of present appellants and that thereafter, they had boarded the train and after having come to Korba, caught on the way from railway station and assaulted. She would submit that this evidence of the witnesses to the incident is coherent and does not suffer from any contradictions and omissions, therefore, proves that all the witnesses had ample opportunity to see the faces of all the accused, at two places in two incidents and, therefore, merely because the Test Identification Parade is vitiated, their evidence of dock identification could not be doubted. She would submit that Navin was not one of those witnesses who identified in the Test Identification Parade but then he has identified the witnesses through their photographs.

State counsel would submit that even if the accused were not produced in the court, their photographs were shown to Navin who identified all the accused after seeing their photographs. She would submit that the identification of the accused with the photographs is not in dispute, the identification through photographs particularly in the background of the witnesses having ample opportunity to see the accused and other witnesses having identified on the dock, the evidence of identification could not be doubted.

12. The next submission of counsel for the State is that once the entire episode, divided in two parts, one in Madhwarani station and one at Korba, is proved, it becomes clear that all the appellants after having entered into quarrel, chased the appellants not only up to Korba station but also on the way and finally intercepted the

victims while they were going on an auto rickshaw to their respective home, near Shani temple and gave assaults. The assault given on the head of Sukhem Singh was with a heavy object which resulted in severe internal injury. Use of heavy object and giving a blow on the head itself leads to an inference that the assault was with an intention to kill and once all other appellants are found to be member of unlawful assembly, the criminal overt act of one or more would make liable all the other accused on the principal of vicarious criminal liability.

State counsel would further argue that even though Sukhem sustained one single injury on the head and Navin sustained injury on the back, which was said to be simple, nevertheless, the injury given on the head of Sukhem was, by itself, sufficient to cause death in ordinary course of nature and, therefore, merely because Sukhem died after 17 days, the appellants cannot get any benefit of defence that there was no intention to cause death. In support of her submission, State counsel placed reliance upon the decisions in the matter of **2012 (8) SCC 365; 2015 (8) SCC 478; 2014 (8) ?SCC 340 and 2015(1) SCC 776.**

13. We have heard counsel for the parties and perused the records and gave out anxious consideration to the respective submissions made before us. The genesis of dispute between the two groups is reflected from the contents of the FIR in Ex.P-28 which has been proved by the informant, injured witness Navin (PW-2). In the FIR, it has been recorded that the informant Navin along with others namely Sukhem (deceased), Deepak, Kailash and others had

gone for Devi darshan at Madwarani on 25.10.2012 and when all of them were waiting for arrival of the train at Madwarani railway station, some of the boys came there and started teasing Sukhem Kumari, sister of Sukhem(deceased) and her friends Asha and Gayatri which lead to scuffle at the spot and those boys threatened him of dire consequences. FIR further records that thereafter, Navin and others boarded the train, reached Korba and while they were on the way to their houses in an auto near Shani temple, at about 8.30 p.m., some group of boys arrived and intercepted. They were armed with belt, rod, hammer and then they started hurling abuses and threatened to kill and assaulted due to which Navin sustained injury on his back, neck, head and Sukhem sustained head injury. Thereafter, Sukhem was taken to hospital. While lodging FIR, Navin has stated that though, he does not know the assailants, he would recognize and identify them.

14. The aforesaid genesis of dispute is also proved from the evidence of PW-2 Navin and other witnesses who had been in the group along with Navin and Sukhem from Madwarani station and were sitting at the railway station Madwarani for arrival of the train.

Navin (PW-2) in his evidence has stated that when he along with Sukhen, Deepak, Kailash, Abhishek and sister Sukhem Kumari, Asha and Gayatri, after having offered prayers in the temple, were waiting for the train at Madwarani station, some of the boys came out who were intoxicated and they started quarreling with them. He has also stated that the sisters who were moving along with them were also teased and when Sukhem came back there was a quarrel

between these boys with Sukhem and he has further stated that those boys hurled abuses. According to the assailant, group of boys were advised by the people as they were intoxicated and at that stage, one of them assaulted Sukhem from behind and upon being asked he slapped Navin also. Thereafter, they started assaulting them and then at that time one RPF constable came there in between and at that stage the train arrived. In his cross-examination, this witness has been confronted with the contents of the FIR which was lodged at his instance as also his case diary statement Ex.D-1 to elicit improvement relating to the minute details of the incident which happened at Madwarani railway station. However, with regard to the dispute having taken place at Madwarani station, the evidence of this witness remained unimpeached.

15. Sukhem Kumari, sister of the deceased has also narrated the story of quarrel at Madwarani Station in almost similar fashion as has been deposed by injured witness PW-2 Navin. She has also made allegation of her hair being pulled up and attempt made to catch hold of her waist, resistance offered by her brother, Sukhem, followed by hurling of abuses, assault to Sukhem from behind and *maar-peeth* with her brother. According to her, the railway police personnel, who were present at the station, pacified the dispute and at that stage, the train arrived. She has stated in her evidence that one of the assailant had threatened that they will be seen at Korba. In her cross-examination, no material omission or contradiction with regard to the incident that had happened at Madwarani station, could be elicited. It has to be noted that she is the sister of deceased Sukhem who was the victim of the incident of teasing at Madwarani

Station.

Asha (PW-4) who was also moving in the group, has also supported the statement of PW-2 and PW-3 by making similar statement of teasing at Madwarani Station, scuffle, *maar-peeth*, abuses in respect of which, nothing material can be elicited to disbelieve with regard to the incident of quarrel and the genesis of quarrel at Madwarani Station.

Gayatri PW-5 has also made similar statement as also PW-9 whose statements with regard to the genesis of dispute at Madwarani station and abuses, *maar-peeth*, is similar to what has been stated by PW-2, PW-5 and PW- 9.

16. One of the main argument of learned counsel for the appellants that since in the present case the concerned person, police official or the Yard master who got the dispute pacified at the railway station and a *Chaiwala* (Tea Vendor) who is said to have accompanied with the victims have not been examined, the evidence of these witnesses with regard to the incident which happened at Madwarani Station is liable to be disbelieved more so when the FIR was not lodged at Madwarani railway station in the GRP.

17. True it is that though *chaiwala* (Tea Vendor) had not been examined nor it is a case where report was lodged at Madwarani Station but the evidence of PW-2,3,4,5,6 & 9 could not be disbelieved only on this ground. The FIR was lodged by PW-2 and the genesis of dispute and quarrel at Madwarani police station was clearly spelt out. In the case diary statement of this witness with

which they were confronted though there are improvements with regard to the manner in which the incident happened, the very happening of an incident or quarrel with the genesis of being teasing Sukhem Kumari is spelt out in all the evidence. Non-lodging of report at railway station Madwa Rani by itself would not be sufficient to disbelieve the coherent statement of all the witnesses because it shows that though there was a scuffle, quarrel followed by teasing, the dispute was pacified with the intervention of police officials and at that very time, train arrived and they boarded the train. Since the dispute at Madwarani station did not lead to any consequence, non-lodging of report, by itself, would not be a circumstance to disbelieve the testimony of these witnesses with regard to what happened at Madwarani railway station.

18. The second episode of assault is also narrated by these witnesses. PW-2,3,4,5,6 and 9, all have stated in their evidence that when after reaching Korba, they hired an auto-rickshaw and were going to their respective houses, they were intercepted by the very same group of appellants who had entered into quarrel with them at Madwarani railway station. They have stated in one word without there being any material contradictions that they all were intercepted near Shani temple, pulled out of the auto and assault was given to Sukhem and Navin. On this material aspects of the time and place of incident and assault given by Sukem and Navin, with the help of certain weapons like hammer, rod, the evidence of these witnesses is coherent. But then we find that these witnesses have not clearly stated as to who gave the assault to Sukhem and Navin because the medical evidence reveals that both of them received similar injury

but then the evidence that these two persons were pulled out from the auto and assaulted, has been established.

19. Once we believe the testimony of PW-2,3,4,5,6 and 9, as being witness to the two episodes one at Madwarani Station and the other at Korba near Shani Temple, even if it were to be assumed that it was about 8.30 in the night when the incident happened near Shani temple at Korba, we have no hesitation to conclude that all these witnesses had ample opportunity to see and recognize the faces of all the accused persons. It is not a case where the witnesses claim to have seen the assailants only once and that too in dark or in flash of moment so as to dilute the memory of these witnesses to identify the faces of the accused who were present at Madwarani railway station and who came to assault Sukhem and Navin near Shani temple. On this peculiar factual circumstances, we will now examine as to whether the evidence of identification in the present case could be relied upon.

20. PW-2 Navin is one of the injured witness but he was not brought for the purposes of identification. The other witnesses PW-3 Sukhem Kumari, sister of the deceased along with Asha PW-4, Gayatri PW-6, Kailash Kumar and Abhishek Yadav PW-9 are the witnesses who are said to have witnessed the appellants/assailants. PW-3 Sukhem Kumari states that an identification was carried out. She states that she had identified the appellants in the police station and proves her signature in Ex.P-12, the identification memo. According to this witness, the identification was done only in the police station and she does not say that identification was done

anywhere else. In her cross-examination she further states that she affirms that the identification was carried out in the police station.

21. PW-4 on the aspect of identification, though, states that she was taken for identification by the police people and proved her signature in identification memo Ex.P-12, in para 12 of her cross-examination, she admits that in the police station, the accused people were shown to her by the police people saying that they have to identify these persons. She further states that the identification was done at police station and no other identification proceedings were drawn.

22. PW-5 is also one of the eyewitness to the identification who admits in her evidence that while she was sitting in the police station, the police people indicated accused persons for being identified.

PW-6 has stated that he was called for identification in the station and signed Ex.P-12,13,4 & 5, but in cross-examination, he admits that the police people showed them the appellants saying that they have to be identified.

23. PW-9 states that for the purpose of identification he was taken to the school by the police along with the accused. From the aforesaid evidence of the prosecution witnesses what is elicited is that when these witnesses i.e. PW-3,4,5,6 & 9 were called in the police station, there itself, they were shown the accused persons.

It is relevant to note that there is no dispute that identification proceedings were drawn at two different stages one on 14.11.12 in which five accused namely Samir, Umesh, Soni, Anil and Jaikumar

have been identified and another on 5.12.12 when Naresh @ Commando is said to have been identified, whereas, Umesh was not identified.

24. The Executive Magistrate who conducted identification proceedings on 14.11.12 (PW-20) Harikrishna Sharma has admitted in para 7 of his cross-examination that the accused persons were already shown to the witnesses in the police station itself.

Other Officer Nand Kumar Singh (PW-11) who conducted Test Identification parade on 5.12.12 has proved the proceedings drawn by in so far as the identification of Naresh @ Commando is concerned.

25. We, however, are not inclined to rely upon the identification proceedings and so called identification parade conducted by two Executive Magistrates in support of prosecution case of identification of the accused by the witnesses for the reason that the witnesses have stated that while they were called in the police station the accused persons were shown to them. This, in our opinion, vitiates the Test Identification proceedings and that cannot be used as corroborative evidence.

It then leaves us with the substantive evidence of identification of the accused by the witnesses either by photograph or by their physical appearance during trial. PW-2 Navin, the injured witness who, throughout remained present in both the episodes of quarrel, *maar-peeth*, one at Madwarani Station and the other at Korba near Shani Temple, few hours after the first incident, was shown

photographs of the appellants in the court and he has identified them from their photographs. We find that the objection was also taken from the side of the accused to this kind of identification used by the photographs, but there is nothing on record nor submission made in this court that there was any dispute with regard to the fact as to the photographs were that of the accused. In a case where the identification had taken place only through records, it may be taken as a doubtful evidence and the court may as a rule of caution and prudence, require corroboration. At the first place, Navin is the injured witness himself and is not that he is one of those who may have only seen the incident. Secondly, present is a case where Navin PW-2 had an opportunity to see the accused in action not once but twice at two different places within a short gap of few hours. Navin was moving in the group of victims and he was standing in Madwarani railway station where teasing, followed by *maar-peeth* /quarrel took place. In the incident which happened near Shani temple at Korba, only two persons are said to be assaulted, out of which, one is Navin (PW-2). These are two strong circumstances of the case which tend to lean towards acceptance of his testimony in the court and he having identified four accused through their photographs.

26. Other witness of the incident namely PW-3,4,5,6 & 9 have identified the accused on the dock and it is not a case that they also identified them by photographs only. All these witnesses are those who were present at the time of both the incidents on the same day which occurred within a short gap of few hours, one at Madwarani railway station and the other at Korba.

It is also submitted by the counsel for the appellants that in respect of both the incidents, evidence has come that it became dark. This argument, however, must be rejected because the incident took place at Madwarani railway station. It is not highway to say that in the absence of there being light, it was not possible to see and recognise the faces. It was a railway station and cannot be said to remain in dark. Furthermore, it is not an incident of flash of moment. The incident at Madwarani railway station shows that it must have taken fairly a long time to begin and commence, commotion, resistance offered, abuses hurled and quarrel taking place, in which, assaults were exchanged. Definitely, a fairly long time must have elapsed if not in hours which in all human probability is sufficient for the witnesses to have seen not only the faces but the demeanour of those who were involved in teasing, abusing etc.

27. We can not ignore that the second incident of quarrel took place within few hours as the party reached Korba. Evidence is that on the way to their houses in an auto rickshaw, the victims were intercepted on road, auto was spotted, Navin and Sukhem were pulled out of the auto and then they were assaulted. This was the second occasion when the assailants assaulted them and they lodged the FIR immediately on the very next day and we find that the incident had taken place on 25th October 2012. All this taken cumulatively leaves to an irresistible conclusion that PW-2,3,4,5,6 & 9 had more than ample opportunity to clearly see and recognize the faces of the accused. Sukhem Kumari (PW-3) is the sister of the deceased Sukhem and is said to have been teased at the railway station Madwarani, who according to the prosecution evidence, is

the genesis of dispute between the two groups. How can she forget the faces of those who are involved in teasing her ?

28. All these witnesses have identified the appellants on the dock which is substantive evidence. At this juncture, we must advert ourselves to various decisions relied upon by counsel for both the parties, with regard to the legal position on the aspect of identification of accused, when they are not known to the witnesses. In **2007 (15) SCC 372**, the settled legal position was reiterated by their Lordships in the Supreme Court by holding that the substantive evidence of identification of the accused is the one made in the court and to sustain the judgment of conviction, it is not necessary to hold the Test Identification Parade in all the cases. In cases where the witnesses are not very sure as to whether they had seen the accused before, in the circumstances of the case, the Test Identification parade in terms of Section 9 of the Evidence Act, become necessary to be held, as early as possible to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. The intention of the law is that the conviction should not be based on vague identification, Whether in a given case, not holding of TIP session or defective TIP would render evidence of dock identification liable to be disbelieved, would essentially depend upon facts and circumstances of every case and it cannot be said as universal rule that in all cases, where no Test Identification Parade has been held or that where Test Identification is found not reliable, dock identification must necessarily and invariably be disbelieved.

In the matter of ***Subhash Krishnan Vs.State of Goa (2012 (8) SCC 365)***, the legal position enumerated in the decision was as below :

23. It will be appropriate to refer to the decisions of this Court in *Simon Vs. State of Karnantak*, (2004) 2 SCC 694: 2004 SCC (Cri) 646, *Dana yadav Vs. State of Bhiar* (2002)7 SCC 295:2002 SCC (Cri) 1698 and *Daya singh Vs. Stte of Haryana* (2002) 3 SCC 468:2001 SCC (Cri) 553:AIR 2001 ?SC 1188. The following passages in the abovereferred decisions can usefully referred as under :

23.1. *Simon V. State of Karnantaka* (SCC pp. 703-04, para 14)

“14..... mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification parade is to test and strengthen the trustworthiness of that evidence. The courts generally look for the corroboration of the sole testimony o the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of test identification parade belongs to the stage of investigation and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.....”

23.2. *Dana Yadav Vs. State of Bihar* : (SCC p. 315-17, para 38)

“38..... (a)-(e)

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(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of

conviction.

(g) * * *

23.3. *Daya Singh Vs. State of Haryana* : (SCC p.478, para 13)

“13.For this purpose, it is to be borne in mind that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion-what in present-day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution.”

24. With this, when we examine the reliance placed on the decision in *Mohanlal Gangaram Gehani Vs. State of Maharashtra* wherein it was held that without knowing the accused beforehand the identification made by the witness, in the absence of any TIP would be valueless and unreliable, the said decision does not apply to the facts of this case. In the decision reported as *Mohanlal Gangaram Gehani Vs. State of Maharashtra* (1982) 1SCC 700: 1982 SCC (Cri) 334, it was only held that where at the earliest opportunity the eyewitness failed to mention any identifying feature of the accused persons, the identification of the accused by one of the witnesses nearly two months later in TIP cannot be accepted. In the case on hand while the occurrence took place on 10.10.2003, the TIP was held on 3.11.2003, therefore, it cannot be held that there was a long gap in between in order to state that the witnesses could not have identified the appellant-accused. On the other hand, PW-14 stated that she had already seen the appellant in the village though she did not know his name.

In another decisions of the Supreme Court in the matter of

Chandra Prakash Vs. State of Rajasthan reported in **2014 (8)SCC**

340, it has been held as under:

34. That apart, the witnesses, namely, Prem Prakash Gupta, PW-78 and Mohit Jain, PW-30, have identified them in the Court. In the *State of Maharastra Vs. Suresh* (2000) 1 SCC 471:2000 SCC (Cri) 263, it has been held as follows: (SCC p.478,para 22)

“22. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a rest identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.”

In the matter of ***S Vs. Sunil Kumar and Another, 2015 (8)***

SCC 478, it has been held thus:

11. It has consistently been held by this Court that what is substantive evidence is the identification of an accused in court by a witness and that the prior identification in a test identification parade is used only to corroborate the identification in court. Holding of test identification parade is not the rule of law but rule of prudence. Normally identification of the accused in a test identification parade lends assurance so that the subsequent identification in court during trial could be safely relied upon. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the witness is otherwise trustworthy and reliable. The law on the point is well settled and succinctly laid down in *Ashok Debbarma Vs. State of Tripura* (2014) 4 SCC 747: (2014) 2 SCC(Cri. 417).

12. In the present case the appellant was subjected to sexual intercourse during broad daylight. The fact that she was so subjected at the time and in the manner stated by her, stands proved. Three witnesses had immediately come on the scene of occurrence and found that she was raped. The immediate reporting and the consequential medical examination further support her testimony. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon

her mind the identity of the offender.

13. In *Malkhanshingh Vs. State of M.P.* (2003) 5 SCC 746: 2003 SCC (Cri) 1247, in a similar situation where identification by the prosecutrix for the first time in court was a matter in issue, this Court had observed : (SCC p. 755, para 16)

“16. ... She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity.”

29. The legal position has been succinctly reiterated by the Supreme Court that while the identification of the accused by the witnesses during trial alone is the substantive piece of evidence, the Test Identification, at times, may be necessary to give full credence to the prosecution case, more particularly where the circumstances make it doubtful that the witnesses may not have enough time to see and recognize the faces of the accused. But then, it cannot be laid down as an absolute proposition of law that without Test Identification Parade under no circumstances, identification in the dock could be relied upon. In the case of 2012 (8) SCC (***Subhash Krishnan Vs.State of Goa***), relying upon earlier decision in the case of ***Dana Yadav @ Dahu and Others Vs. State of Bihar (2002 (7) SCC 295***), it was held that in the exceptional circumstances, evidence of identification at the first time, without there being corroboration by the previous identification in the test identification parade or any other evidence, can form the basis of conviction.

30. What, therefore, follows is that though evidence of dock

identification cannot be disbelieved only because there is no Test Identification parade conducted or the same is defective, ordinarily the Test Identification parade must precede, keeping in view that the purpose of Test Identification Parade is to have corroboration to the evidence of eyewitnesses in the form of earlier identification and whether or no dock identification should be believed, is essentially an aspect of evaluation and assessment of evidence.

31. In the case of **Daya Singh Vs. State of Haryana 2001 (3) SCC, 468** Hon'ble Apex Court observed that gaining and enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and in such case non holding of Test Identification Parade would not be fatal to the prosecution case.

32. The most exceptional circumstances of the present case which leads this Court to accept the evidence of dock identification despite defective TIP is that all the witnesses are those who had ample opportunity to see the accused in two different episodes on the same day. None of them have deposed in their testimony that they entertained any doubt with regard to the identity of the accused until they were shown at police station. Not only this, present is a case where other witnesses have identified all the accused. Sukhem Kumari (PW-3) who is said to have been teased in the earlier incident at Madhwarani railway station has also identified. Therefore, the cumulative effect of this evidence and circumstances leaves no manner of doubt that the appellants are none other than those who were involved in the incident at Madwarani station and, thereafter, at

Korba, near Shani Temple.

33. It now takes us to the other aspect as to whether in the circumstances of the case and on the basis of the evidence led by the prosecution, the appellants can be held liable for commission of offence under Section 302 IPC with the aid of Section 149 IPC that they are all formed unlawful assembly. In this regard, it is appropriate to refer to some of the celebrated decisions of the Supreme Court which settle the legal position with regard to the applicability of Section 149 IPC. In ***Badal Murmu & Others Vs. State of West Bengal 2014 (3) SCC 366***, it has been held thus:

13. In this connection, we may usefully refer to the judgment of this Court in *Sukhdev Singh Vs. State of Punjab 1992 Supp (2) SCC 470 : 1992 SCC (Cri.) 829: AIR 1992 SC 755*. In that case, the appellant therein was convicted under Section 302 IPC and sentenced to life imprisonment. The question arose as to what was the nature of the offence committed by him. He had given one blow to the deceased. Thereafter, the deceased had fallen down. That blow, according to the prosecution, was sufficient to cause death in the ordinary course of nature. This Court accepted the testimony of PW-3, PW-4 and PW-5 as to the participation of the appellant therein in the crime. But, it rejected their evidence giving specific overt act to each of the accused because according to the prosecution, the victim was surrounded by all the four accused, each one was armed with weapons and they attacked the deceased simultaneously. This court observed that it was therefore difficult to say that fatal injury was caused by the appellant therein. This Court observed that the evidence of the witnesses on that aspect has to be observed that the evidence of the witnesses on that aspect has to be observed considered with a pinch of salt. Under the circumstances, the sentence of the appellant under Section 302 IPC was set aside and he was sentenced under Section 304 Part II IPC. In the instant case also all the accused are stated to have assaulted the deceased simultaneously. No individual role is ascribed to anyone. The doctor has not stated which injury was fatal. It is difficult therefore to say that all the appellants are guilty of

murder.

14. In *Sarman Vs. State of M.P . (1993 Supp (2) SCC 356:1993 SCC (Cri)554* , there were seventeen injuries on the deceased. The appellants therein were armed with lathis. They were charged for the offences punishable under Section 147 and 302 IPC. Some injuries were described as incised wounds. Injury 15 had resulted in a depressed fracture of parietal bone. Like the present case, the doctor in a general way stated that the cause of death was "multiple injuries". He specifically stated that Injury 15 individually was sufficient to cause death of the deceased. It must be noted that no such assertion is made by the doctor in the instant case. The prosecution case in *Sarman case*, in general, was that all of them were found with lathis. Nobody had stated which of them had caused injury 15 which unfortunately resulted in the death of the deceased. This Court in *Sarman case* observed that in these circumstances the question that arose was whether all the accused were responsible for the death of the deceased. This Court noted that if anyone of the appellants had exceeded the common object and acted on his own, it would be his individual act but, unfortunately, no witness had come forward to say which of the accused had caused which injury. This Court noted that in those circumstances, it was difficult to award punishment under Section 302 read with Section 149 IPC. This Court notices that although the postmortem report stated that all the injuries might have caused the death of the deceased inasmuch as the accused inflicted injuries with lathis and particularly when they were simple, and on non-vital parts, it cannot be said that their object was to kill the deceased. They may merely have knowledge that the blows given were likely to cause death. This Court, in those circumstances, set aside the conviction of the appellants for the offences punishable under Section 302 read with Section 149 IPCF and instead convicted them for the offence punishable under Section 304 Part II read with Section 149 IPC.

15. As earlier noted by us, in this case none of the eyewitnesses have given specific role to any of the appellants. They have not stated which appellants gave which blow and on which part of the deceased's body. They have not stated which injury was fatal. Undoubtedly, the deceased had suffered two fractures and haematoma under the scalp, but nobody has said that any particular appellant caused these injuries. It bears repetition to state that though sharp cutting weapons i.e. tangies were available,

the appellants did not use them. In the peculiar facts of this case, therefore, it is not possible to hold that the appellants shared the common object to murder the deceased and in prosecution of that common object they caused his death. It would not be possible to sustain their conviction for the offence under Section 302 read with Section 149 IPC. It would be just and proper to resort to Section 304 Part II IPC and treat the sentence already undergone by them as sentence for the said offence.

In the matter of ***Nand Kumar Vs. State of Chhattisgarh*** (2015(1) SCC 776), it has been held that :

20. While distinguishing on facts and then explaining the view taken by this Court in *Baladin Vs. State of UP* AIR 1956 SC 181: 1956 Cri LJ 345, the four-Judge Bench speaking through Gajendragadkar, J. in *Masalti Vs. State of UP* AIR 1965 SC 202: (1965) 1 CriLJ 226, laid down the following principle of law on the aforesaid question : (Masalti case, AIR pp. 210-11, para 17)

“17.in the case of [Baladin v. State of Uttar Pradesh](#), AIR 1956 SC 181,, it was observed by Sinha, J., who spoke for the Court that it is well-settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under [Section 142](#) IPC. The argument is that evidence adduced used by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly.....It appears that in the case of Baladin the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of

an unlawful assembly is that he was one of the persons constituting the assembly and he entertained long with the other members of the assembly the common object as defined by [Section 141](#) IPC Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of [Section 141](#), is an unlawful assembly. The crucial question to determine in such a case 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 by [Section 141](#). While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, [Section 149](#) makes it clear that 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; and that emphatically brings out the principle that the punishment prescribed by [Section 149](#) is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin² must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition or law.....”

21. Recently, this Court in *Om Prakash Vs. State of Haryana*, (2014) 5 SCC 753, placed reliance on the aforesaid principle laid down in *Masalti* (supra) in following words:

“15. The aforesaid enunciation of law was considered by a four-Judge Bench in

[Masalti v. State of U.P.](#), AIR 1965 SC 202 which distinguished the observations made in Baladin AIR 1956 SC 181 on the foundation that the said decision should be read in the context of the special facts of the case and may not be treated as laying down an unqualified proposition of law. The four-Judge Bench, after enunciating the principle, stated as follows: (AIR p. 211, para 17) “17. ... it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal commission in pursuance of the common object of the assembly. In fact, [Section 149](#) makes it clear that 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 committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by [Section 149](#) is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly”.

In the matter of ***Najabhai Desurbhai Wagh Vs. Walerabhai Deganbhai Vagh & Others***, 2017 (3) SCC 261, it has been held as follows :

12. This Court in [Mizaji and Another v. State of U.P.](#)[2]observing that various High Courts of India had interpreted [Section 149](#) held that every case has to be decided on its own facts. This court proceeded to deal with [Section 149](#) in detail as under:

“The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary

that there should be a pre-concert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under [Section 149](#) if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of [Section 149](#). Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in *Sabid Ali case* [(1873) 20 WR 5 Cr] that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of [Section 149, Indian Penal Code](#) cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of [Section 149](#) as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part." Mizaji's case was referred to and relied upon in a long line of decisions of this court. (See, e.g., [Avtar Singh v. State of Haryana](#)[3], [Roy Fernandes v. State of Goa](#)[4], [Lokeman Shah v. State of W.B.](#)[5])

13. Applying the well settled principles laid down by this court we proceed to examine whether the Accused can be convicted for an offence under [section 302](#) with the aid of [Section 149](#) IPC. As per

Section 141 IPC an assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is to commit an offence mentioned therein. Guidance is supplied by this Court regarding the requirement of examining the circumstances in which the incident occurred, the weapons used and the conduct of the accused during the course of the incident. In *Lalaji v State of Uttar Pradesh*[6] this court held that: “The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.”

The broad legal position which has been fairly well settled is that where there is an unlawful assembly formation with a common object, the members of the unlawful assembly would be criminally liable for the criminal overt act committed by some of its members and it is not at all necessary, as requirement of law, that in order to fasten the criminal liability for the criminal act committed by one of the members of the unlawful members, each one of them must have committed some criminal overt act, as Section 149 fastens criminal vicarious liability in certain circumstances.

34. Present is not a case that all of a sudden some dispute arrived at a given spot and the appellants happened to be present at the spot having committed no criminal over act towards commission of the offence. The evidence of PW-2,3,4,5,6 & 9 unmistakably proves beyond reasonable doubt that all the appellants were involved in the first incident followed by next incident at Korba. In fact, the evidence proves that after the incident of quarrel took place at Madwarani

station, victims were threatened of dire consequences which transpired into action at Korba after both the groups reached Korba on the same day after a few hours. According to the evidence of PW-2,3,4,5,6 and 9, they along with Sukhem (deceased), reached near Shani Temple, their auto rickshaw was stopped, they were taken out and it is said that Navin and Sukhem were assaulted. This clearly proves that there was formation of unlawful assembly since after the incident at Madwa rani Station took place, it led them to come jointly near Shani Temple, stop the victims and assault.

35. The question, however, which arises for consideration is to what was the common object of this unlawful assembly. Learned trial court has taken a view that the common object of the assembly was to commit murder of Sukhem and Navin.

We find that the group of assailants and the victim consisted of young boys and girls. The incident of teasing Sukhem and other two girls who have been part of the victim group, had taken place which lead to assault at the railway station. The dispute at Madwarani Station, however, appears to be not very serious but a trivial one, which did not lead to any serious consequence.

At this stage, we must notice that in the entire episode, Sukhem sustained one injury on his head whereas Navin sustained one simple injury on the back of his neck. None of the witnesses PW-2,3,4,5,6 & 9 have sustained any injury whatsoever. Navin PW-2 and Sukhem, the deceased, were subjected to medical examination by Dr. PW-12 who examined them at the first instance after the incident which happened near Shani Temple at Korba. The

prosecution has not come out with any evidence of any injury much less in small abrasions, scratch on any other witnesses. That would only mean that at Madwarani Station, the incident did not take any serious turn and it could only be said to be an incident of scuffle because of teasing of girls. The threat having been administered there that they were to be seen at Korba, cannot, itself, be taken as an indication of intention to commit murder.

36. Though all the witnesses say that Navin and Sukhem were taken out of the auto rickshaw and they were assaulted, we find that the medical evidence prove only one single injury on the head of deceased Sukhem. The evidence on record shows that Sukhem remained admitted in the hospital for about 17 days and then he succumbed to death because of the singular injury on his head which is said to have been caused by hard object. The prosecution claims to have recovered a hammer from accused/Naresh @ Commando and a rod from accused/appellant Samir, though, the independent witnesses have not supported any such recovery from their possession.

37. The witnesses have also stated that they cannot say as to who gave assault to Sukhem, in fact, they cannot specifically say as to which of the accused have given the assault to Sukhem and to Navin, but, the fact is that each of them sustained single injury. The injury sustained by Navin is simple in nature. In this factual scenario, in the backdrop of oral and medical evidence, it is difficult for us to reach to the conclusion that the formation of unlawful assembly of the appellants was with the common object of murdering Sukhem

and Navin. In the background of the quarrel which had taken place at Madwanrani railway station and that no other injury was found except one single injury on the head of Sukhem and one injury on the back of neck of Navin, we are inclined to draw inference that the common object of the assembly was only to teach lesson to the victim group and in that process, a heavy blow was given on the head of Sukhem which proved to be fatal leading to his death. Certainly, a common object of killing must have manifested in several injuries and not confined to one on Sukhem.

In ***Badal Murmu & Others Vs. State of West Bengal (2014 (3) SCC 366***), in the background that following formation of unlawful assembly, assaults were given but it could not be clearly stated by the witnesses as to which of the assailant gave assault, their Lordships in the Supreme Court held that it was not possible to uphold conviction under Section 302 IPC with the aid of Section 149 IPC and the conviction was altered into one under Section 304 Part II IPC. It was held thus :

15. As earlier noted by us, in this case, none of the eyewitnesses have given specific role to any of the appellants. They have not stated which appellants gave which blow and on which part of the deceased's body. They have not stated which injury was caused by which accused. The doctor has not stated which injury was fatal. Undoubtedly, the deceased had suffered two fractures and haematoma under the scalp, but nobody has said that any particular appellant caused these injuries. It bears repetition to state that though sharp-cutting weapons i.e. tangies were available, the appellants did not use them. In the peculiar facts of this case, therefore, it is not possible to hold that the appellants shared the common object too murder the deceased and in prosecution of that common object they caused his death. It would not be possible to sustain their conviction for the offence

punishable under Section 302 read with Section 149 IPC. It would be just and proper to resort to Section 304 Part II IPC and treat the sentence already undergone by them as sentence for the said offence.

In the case of ***Dhanraj & Others Vs. State of CG 2013 (4)***

CGLJ 595, this Court has also taken similar view, relying upon various decisions of the Supreme Court holding thus :

28. In the instant case, the skull and near about 3 abrasions were found on the back of the deceased. Doctor S.N.Yadav (PW-3), who conducted the postmortem on the body of the deceased opined in his report (Ex.P-3) that the cause of death was coma due to head injury. It was the injury No.1 in which there was multiple fractures of skull and brain membrane and some portion of brain had also come out. Therefore, in absence of common object of the death of the deceased, in the facts and circumstances of the case, all the accused persons cannot be said to have common object to commit murder of the deceased, though they had knowledge that the blows given could likely to cause death. If anyone of the accused exceeded the common object and acted on his own, that would be his individual act, but in absence of the evidence as to who acted so conviction of all the accused persons with the aid of Section 149 under Section 302 of the IPC would not be possible. But since there is evidence of their knowledge that the blows given could likely to cause death for which they were sharing common object, they would be convicted under Section 304 Part II read with Section 149 IPC.

38. In so far as the conviction of the appellants under Section 307 with the aid of Section 149 IPC is concerned, looking to the nature of incident and in view of the finding as has been recorded by us hereinabove, where we have found that the common object of the assembly was only to teach a lesson to the victim group and not to

murder, the conviction of the appellants under Section 307 cannot be sustained, in so far as the assault on Navin is concerned. It has to be altered under Section 323 IPC with the aid of 149 IPC. The conviction of the appellants in respect of other offences remain unaltered.

39. In the result, this appeal is allowed in part. Conviction of the appellants under Section 302/149 IPC is altered to Section 304 Part II IPC and the conviction under Section 307/149 IPC is altered to Section 323/149 IPC.

In the circumstances of the case and the nature of injury and that the appellant did not have seen acted otherwise unusual or in a cruel manner we are inclined to impose sentence of 7 years for commission of offence under Section 304 Part II IPC with the aid of Section 149 IPC and six months under Section 323 IPC.

40. As far as the offence under Section 323 read with 149 IPC is concerned, the fine amount is altered to Rs. 1,000/-. Fine amount for commission of offence under Section 304 Part II IPC would be Rs. 5,000/-. Appellants are stated to be in jail therefore no further orders are required to be passed. Trial court's order that the sentence shall run concurrently, also remains unaltered.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge

