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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 21st December, 2022Decided on: 27th March, 2023

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CRL.A. 514/2019

SH. BHARAT BHARDWAJ alias NIKKU Appellant

Represented by: Mr. H.S. Dhillon, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI Respondent

Represented by: Mr. Prithu Garg, APP for the
State with SI Virender Pal
Singh, PS Malviya Nagar.

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CRL.A. 653/2019

AMIT GULIA Appellant

Represented by: Mr.B. Badrinath Advocate
(DHCLSC).

versus

THE STATE Respondent

Represented by: Mr. Prithu Garg, APP for the
State with SI Virender Pal
Singh, PS Malviya Nagar.

+

CRL.A. 246/2019

AMIT PANDEY AND ANR Appellants

Represented by: Mr. Vikas Arora, Advocate.

versus

STATE (NCT OF DELHI Respondent

Represented by: Mr. Prithu Garg, APP for the
State with SI Virender Pal
Singh, PS Malviya Nagar.

+ **CRL.A. 308/2019**
 SHASHIKANT BHARDWAJ alias KAKU Appellant
 Represented by: Mr. Vikas Arora, Advocate.
 versus

STATE Respondent
 Represented by: Mr. Prithu Garg, APP for the
 State with SI Virender Pal
 Singh, PS Malviya Nagar.

+ **CRL.A. 423/2019**
 BHISHAM SHARMA alias SIDHARTH SHARMA Appellant
 Represented by: Mr. Vikas Arora, Advocate.
 versus

STATE (NCT OF DELHI) Respondent
 Represented by: Mr. Prithu Garg, APP for the
 State with SI Virender Pal Singh, PS
 Malviya Nagar.

+ **CRL.A. 422/2019**
 MANOJ GULIA Appellant
 Represented by: Mr. Vikas Arora, Advocate.
 versus

STATE NCT OF DELHI Respondent
 Represented by: Mr. Prithu Garg, APP for the
 State with SI Virender Pal
 Singh, PS Malviya Nagar.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By these appeals, all the seven appellants challenge the common judgment of the learned Trial Court dated 8th February, 2019 whereby all

appellants were convicted for offences punishable under Section 326 read with Section 149 of Indian Penal Code, 1860 ('IPC'), Sections 147/148 read with Section 149 IPC, Section 452 read with Section 149 IPC and appellants Bharat Bhardwaj and Amit Gulia were also convicted for offence punishable under Section 302/34 IPC. Appellants also challenge the order on sentence dated 13th February, 2019, whereby two appellants Amit Gulia @ Andal and Bharat Bhardwaj @ Nikku were sentenced to imprisonment for life and fine of ₹10,000/- each in default whereof simple imprisonment for eight months for offence punishable under Sections 302/34 IPC. Further, all the seven appellants Amit Pandey @ Monu, Sunil Pandey @ Sonu, Shashi Kant Bhardwaj @ Kaku, Manoj Gulia and Bhisham Sharma as also Amit Gulia @ Andal and Bharat Bhardwaj @ Nikku were directed to undergo rigorous imprisonment for a period of six years along with fine of ₹5,000/- each, in default whereof simple imprisonment for six months for offences punishable under Section 326/149 IPC and also rigorous imprisonment for one year along with fine of ₹1,000/- each, in default whereof simple imprisonment for 15 days for offence punishable under Sections 147/148/149 IPC. Accused Kuldeep @ Kanjhi died during the trial and thus, the trial qua him abated.

2. In nutshell, case of the prosecution is that on 25th June, 2009, in the engagement function of one Kuldeep, appellants Bharat Bhardwaj @ Nikku and Amit Gulia had also come, who were in a drunken condition and were misbehaving with the guests. On seeing this, father of said Kuldeep namely Sh. Shivhari tried to control the situation, however, the said appellants Nikku and Amit Gulia, caught Shivhari from his collar, on which Vijender @ Vijay and Shivhari took both Nikku and Amit Gulia out of the function

with the help of Vikas. Thereafter, Nikku and Amit Gulia threatened to kill Vikas and Vijay. On the next day i.e. 26th June, 2009, Akash Shandilya @ Honey (PW-1) saw Nikku, Amit Gulia, Kuldeep Sherawat, Sonu Mundewala, Kaku, Sonu, Monu, Kapil and Mane beating Vikas and Vijender (deceased persons). Nikku, Amit Gulia and Kuldeep Sherawat had knives in their hands, Sonu and Bhisham had iron rods in their hand, Sonu, Monu, Kaku and Kapil had dandas and Manoj was carrying a gun/*katta*. Amit and Nikku laid Vikas on the ground and stabbed him with the knives, while remaining persons took Vijender out of the house and gave an iron rod blow on Vijender due to which he fell on the ground. Mane gave an *ustra* blow at the left side stomach of Vijender. Akash (PW-1) and Mahesh (PW-13) tried to intervene but they were also beaten and thereafter, all the accused persons ran away. Akash with the help of neighbours removed Vijender and Vikas to the car and one of the neighbours Amit took Vijender and Vikas firstly, to Modi Hospital where first aid was given and afterwards, to Trauma Centre, AIIMS. Upon receipt of information, ASI Vijay Singh (PW-5) along with Ct. Mukesh Tomar (PW-17) went to House No.710, Chirag Delhi where he came to know that the injured had been shifted to the hospital, upon which they went to the hospital where Vijay and Vikas were found unfit for statement. ASI Vijay informed about the situation to IO/Insp. Dheeraj Narang (PW-26) who reached the spot and found blood lying in the front of the aforesaid house in the *gali* as also in the veranda of the house and steps from *gali* to the house. *Rukka* (Ex.PW-1/A) was recorded on the statement of eye-witness Akash (PW-1) on which FIR No.323/2009 dated 27th June, 2009 under Sections 147/148/149/307/323/452/392/397 IPC and also Sections 25/27 of the Arms Act, 1959 at PS

Malviya Nagar (Ex.PW-3/B) was got registered. SI Vijay Kasana of the Crime Team was also called at the spot who submitted his report (Ex.PW-4/A). Information was received that Vikas and Vijay had succumbed to the injuries at the hospital and the bodies of the deceased persons were sent for post-mortem examination. Eye-witnesses Akash and Mahesh were also sent for medical examination.

3. Dr. Adarsh Kumar (PW-2) conducted the post mortem examination on body of both Vikas and Vijay and tendered his report Ex.PW-2/A and B respectively and opined:

POST-MORTEM REPORT OF VIKAS

1. *Incised stab wound of size 3.1 x 0.1 cm present in left inguinal region placed horizontally, medial end 7 cm lateral to public tubercle and 5 cm below inguinal ligament going down wards, medially and backwards directions cutting femoral vessels and going upto depth of 10 cm. Stent present in the femoral artery. Outer angle of wound is blunt and inner angle is sharp.*
2. *Reddish abrasion of size 0.5 x 0.5 cm present on outer end of left eye brow.*
3. *Reddish abrasion of size 4 x 1 cm present on right lower arm, later aspect placed horizontally 3 cm above elbow joint.*

All the internal organs paled in appearance.

Opinion: *The cause of death in this case was hemorrhagic shock due to injury to major vessel as described in injury no.1 and produced by stabbing/cutting weapon. All the injuries were ante mortem in nature and injury no.1 was sufficient to cause death in ordinary course of nature.*

POST-MORTEM REPORT OF VIJENDER

1. *Incised stab wound over left lower abdominal placed obliquely of size 5 x .2 cm present having the blunt outer end, upper angle and sharp inner and lower angle. The inner lower angle is present at a distance 14 cm from mid line and 14 cm above the left anterior superior iliac spine. On the dissection the*

wound track is going backwards, inwards and slightly downwards cutting the soft tissues of the abdominal wall, perineum and small intestinal loops upto para-vertebral muscles where a cut of 1.5 cm is present alongwith cut fracture of lumbar vertebra. The total depth of the wound is 17 cm.

2. Laparotomy wound over anterior abdomen of size 22 x 15 cm with evisceration of intestinal loops covered with plastic surgical dressings.

3. Brownish abrasion of size 3.0 x 0.5 cm present linearly going downwards and medially over right anterior chest, 6 cm below the right nipple and 7 cm lateral to mid line.

4. A bluish black contusion of size 7 x 3 cm over left lower back placed linearly above downwards, 13 cm lateral to mid line and at the level of left anterior superior iliac spine with extravasation in underlying muscles.

All internal organs were pale in appearance. Clotted and fluid blood about half liter present in abdominal cavity. Clotted blood present in para-vertebral muscles. Inferior vena cava was stapled.

Opinion.

The cause of death in this case was hemorrhagic shock due to injury to major vessel as described in injury no. 1. All the injuries were ante mortem in nature and injury no. 1 was sufficient to cause death in ordinary course of nature. Injury no. 1 was produced by sharp cutting pointed weapon. Injury no. 2 was due to surgical intervention. Injury no. 3 and 4 were produced by blunt cylindrical object”

4. On 28th June, 2009, a secret informer informed the IO that two accused persons namely Amit Gulia @ Andal and Kuldeep Sherawat @ Kanjhi were at a park near BRT corridor, Sheikh Sarai, Part-II pursuant to which, after identification by the eye-witnesses and the secret informer, these two accused persons were arrested vide arrest memo Ex.PW-1/H and Ex.PW-1/J respectively, and their disclosure statements Ex.PW-11/B and

Ex.PW-11/A respectively were recorded. On 29th June, 2009, eye-witnesses Akash and Mahesh again joined the investigation and proceeded towards Panchsheel Vihar where one secret informer informed them about the presence of Sonu, Monu and Bhisham Sharma at Triveni Complex near Sheikh Sarai and on identification by the eye-witnesses as well as the secret informer, Sonu and Monu were arrested from near Axis Bank ATM at Triveni Complex vide arrest memo Ex.PW-1/K and Ex.PW-1/L respectively, while Bhisham Sharma was arrested from near a wine shop vide arrest memo vide Ex.PW-1/M. Their disclosure statements (Ex.PW-26/A, B and C respectively) were recorded. Thereafter, on 30th June, 2009, when the two eye-witnesses came to inquire about the progress of investigation, a secret information regarding another accused coming at the bus stand near Malviya Nagar *gole chakkar* was received on which he went to the aforesaid place and apprehended Manoj Gulia after identification by the eye-witnesses and arrested him vide arrest memo Ex.PW-1/S and his disclosure statement (Ex.PW-26/D) was recorded. On 10th July, 2009 an information about presence of Shashikant @ Kaku at MMTC Colony road leading to Aurobindo College was received and the accused was arrested vide arrest memo Ex.PW-1/U and his disclosure statement (Ex.PW-18/A) was recorded. On 19th July, 2009 accused Bharat Bhardwaj @ Nikku surrendered at the police station and was arrested vide arrest memo Ex.PW-19/A and his disclosure statement (Ex.PW-19/C) was recorded. Upon completion of investigation, charge-sheet was filed against all the eight accused persons and all the eight accused persons were charged for offences punishable under Sections 147/148/149 IPC as also for offences punishable under Sections 452/302 IPC. To prove its case, prosecution examined 29

witnesses including three eye-witnesses Akash (PW-1), Mahesh (PW-13) and Sunita Sharma (PW-14).

5. Learned counsel appearing for appellant Bharat Bhardwaj @ Nikku contended that no document or evidence was brought on record with regard to the incident dated 25th June, 2009, and the only account of that incident is the version of the alleged eye-witnesses. Even otherwise, there is no evidence on record that appellant Bharat was present at the said ring ceremony. Claim of appellant Bharat Bhardwaj @ Nikku was that he was not present at the spot. As per the prosecution case, one stab injury was inflicted on the deceased by a knife however, neither any knife as alleged was recovered at the instance of the appellant nor any efforts were made to recover any knife. Further, no history of any personal enmity of the appellant with the deceased was brought on record and thus it was prayed that the appellant has been wrongly convicted and is liable to be acquitted after setting aside the impugned judgment.

6. Appellant Amit Gulia assails the impugned judgment on the grounds that the injuries to the eye-witnesses to the incident is doubtful for the reason that the medical check-up of the two eye-witnesses PW-1 and PW-13 was conducted on 27th June, 2009 (Ex.PW-22/A and B respectively) after about 24 hours of the incident, despite the fact that the IO (PW-26) in his testimony stated to have met PW-1 at the hospital on 26th June, 2009 itself when statement of PW-1 was recorded. Neither the IO sent the two eye-witnesses for medical examination nor did the said eye-witnesses inform the IO if they needed any medical treatment. Further, PW-13 stated in his testimony that he was assaulted by Manoj and Bhisham by an iron rod blow on his head after which he fell unconscious and that he regained

consciousness at his home at about 11.00 PM and that the police met him at his house. The prosecution failed to cite the concerned police official as a witness who discovered PW-13 at his house and thereafter, took him for medical treatment to the hospital. Although Ex.PW-12/A records the presence of one ASI Sher Khan however, the said officer was never cited as a witness. It is apparent from the facts of the case that PW-1 and PW-13 returned to their respective homes after their statements were recorded by the IO on the day of the incident. Further the nature of injuries as evident from the medical record of PW-1 and PW-13 (Ex.PW-22/A and B respectively) does not corroborate the claim of the witnesses being assaulted by multiple persons. It was further contended that even the presence of the eye-witnesses PW-1 and PW-13 at the time of incident is also doubtful as the injuries described by PW-1 to have been caused by Amit Gulia and Nikku to deceased Vikas were not corroborated by the PM report (Ex.PW-2/A and B). Further it is suspicious and unbelievable as to why PW-1 did not attend the wedding of his cousin brother residing in the same locality and taking place in his neighbourhood at Community Center, Chirag Delhi while his parents went to attend the same. Furthermore, the clothes of the said two eye-witnesses were never seized by the IO and even the testimony of PW-13 is unbelievable and suspicious and thus, the eye-witnesses were not present at the spot and were discovered at a later stage. It was further contended that even the presence of the third eye-witness Sunita Sharma (PW-14) is also doubtful. PW-26 stated to have not found any other witness to the incident other than PW-1 and PW-13. PW-1 also does not state anything about the presence of PW-14 at the spot and it was doubtful as to why PW-14 did not attend the wedding of her family member when the

same was performed in the neighbourhood itself. Even in her testimony, PW-14 stated that she did not know any of the accused persons and therefore, she could not recognize anyone at the time of incident and identified the accused persons for the first time in the Court at the time of deposition. Neither any TIP was conducted nor any description of the appellants was given by her to the police nor the clothes worn by the appellants or the weapon used by the appellants were shown to her and thus, the identification of the accused for the first time after about four years of the incident was unreliable, for which reliance was placed on the decision in (2022) 9 SCC 402 Amrik Singh vs. State of Punjab. It was further contended that the Trial Court rightly disbelieved the manner of arrest of the appellant Amit Gulia as recorded in the impugned judgment. The seizure memo of recovery of weapon of offence (Ex.PW-1/P1) recovered at the instance of the appellant Amit Gulia does not record the presence of any bloodstains and the said weapon was recovered from a public place on a subsequent disclosure statement (Ex.PW-24/A) however, his first disclosure statement (Ex.PW-11/A) recorded that the place of hiding the knife was Noida. It was further contended that even if the case of the prosecution is accepted as it is, at best a case under Section 304 IPC is made out against the appellant Amit Gulia as the prosecution failed to prove any premeditation in causing the death, how the appellant reached the spot with weapons, the fact that the weapon i.e. a knife is an household article easily available in the market, the fact that the death was caused pursuant to the quarrel which took place at the spur of the moment, the injury being caused at the left inguinal region with a single stab without any repeating thrusting of the weapon suggests

the absence of any intention for which benefit of doubt must go to the appellant.

7. Learned counsel appearing for appellants Amit Pandey @ Monu, Sunil Pandey @ Sonu, Shashikant Bhardwaj @ Kaku, Bhisham Sharma @ Siddharth Sharma and Manoj Gulia contended that despite seven assailants in total attacking the deceased Vikas and Vijender, however, as per the medical evidence only one incised injury each on Vikas and Vijender was found, which contradicts the ocular version of the eye-witnesses. It was further contended that the eye-witnesses PW-1, PW-13 and PW-14 are all interested witnesses and hence not reliable. It was pointed out that the *ustra* recovered from the scene of crime was not sent for FSL examination. It was also pointed out that as per the version of the eye-witness Akash (PW-1) he with his friend took the deceased persons to Modi hospital at the first instance, however, no record of Modi hospital was ever produced by the prosecution. It was pointed out that the first DD entry No.42A (Ex.PW-5/A) recorded by the police mentions “4-5 *ladke*”. It was contended by the counsel that as per the case of prosecution the appellants were carrying *dandas* with them however, no *danda* injury has been recorded as per the medical evidence and therefore, the said appellants cannot be held liable for the same. It was further contended that no evidence of any conspiracy or definite intention to cause death of the deceased has been brought forth by the prosecution and, therefore, on the facts of the prosecution case if accepted at best offences punishable under Sections 323/147/148/149 IPC are made out.

8. On the other hand, learned APP for the State submits that the present appeals being devoid of merits deserve to be dismissed and to substantiate, reliance is placed on the following facts.

i. Eye-witnesses PW-1 and PW-13 knew the assailants from before and both the witnesses consistently deposed against the appellants and categorically attributed the weapon, roles and injuries to the accused persons. Statement of PW-1 forms the basis of *rukka* and consequently, registration of FIR. The third eye-witness PW-14 who was the mother of both the deceased, elaborately deposed about the incident and stood by her version narrated to the police in her statement (Ex.PW-14/DA). Amit Sharma (PW-16) who had taken the victims to the hospital along with PW-1, also corroborated the eye-witness account of the events.

ii. MLC of deceased Vikas (Ex.PW-5/B) and MLC of deceased Vijay (Ex.PW-5/C) corroborate the version of the eye-witnesses. As per the MLCs, the deceased persons Vikas and Vijay were admitted in the hospital on 26th June, 2009, having been brought by “brother” (cousin, PW-1). As per the post-mortem report of Vikas and Vijay (Ex.PW-2/A and B respectively), the cause of death was opined to be stab injury inflicted on their bodies. Furthermore, on examination of the knives recovered at the instance of the appellants, subsequent opinion (Ex.PW-2/C) of Dr.Adarsh Kumar (PW-2) who conducted the post-mortem was sought and it was opined that injuries inflicted on the victims were possible by thrusting impact of the said knives.

iii. As per the MLC of the eye-witness PW-1 (Ex.PW-22/B), bite mark on his left shoulder and erythematous over right dorsum were

noted and as per the MLC of PW-13 (Ex.PW-22/A), fresh stitched wounds on scalp and left arm were noted. Even the non-MLC treatment record of PW-13 was proved by Rajender Singh (PW-12) who was the record keeper of AIIMS Trauma Centre and as per the original registration cards of PW-13's non-MLC case, injuries on elbow, scalp and thigh were noted.

iv. As per the FSL reports (Ex.PW-27/A and B), human blood was detected on the clothes recovered at the instance of appellant Amit Gulia @ Andal (Ex.PW-26/A), Sunil Pandey @ Sonu and Amit Pandey @ Monu (Ex.PW-13/DA), Bhisham Sharma (Ex.PW-26/C) and Manoj Gulia (Ex.PW-13/DB).

v. Further as per the FSL reports (Ex.PW-27/A and Ex.PW-27/B), human blood was also detected from the weapons recovered at the instance of the appellants i.e. the *ustara* (Ex.PW-1/E) recovered from the spot, bamboo stick (Ex.PW-1/N) at the instance of Sunil Pandey and Amit Pandey, knife (Ex.PW-1/P1) recovered at the instance of Amit Gulia, knife (Ex.PW-1/Q1) recovered at the instance of Kuldeep Sherawat @ Kanjhi and *danda* (carved stick) (Ex.PW-1/Q1) recovered at the instance of Manoj Gulia. The *katta* which was recovered at the instance of Bharat Bhardwaj @ Nikku (Ex.PW-1/W) was examined and as per FSL report (Ex.PW-24/AA), the same was found in working order.

vi. CDR analysis of the mobile number of Sunil Pandey @ Sonu and Bhisham Sharma @ Siddharth Sharma (Ex.PW-25/A and Ex.PW-25/E1) for the relevant time on 26th June, 2009 shows that the location of these two appellants was Sheikh Sarai and Chirag Delhi.

9. Learned APP submitted that minor improvements and omissions in the statement to the police and in the testimony before the Court, does not affect the credibility of the witnesses and the same can be attributed to the passage of time and number of assailants involved in the case and therefore, the same need not be given undue weightage. Learned APP further submitted that apart from the present seven appellants, there were four other persons. One Kuldeep Sherawat @ Kanjhi died during the course of trial and hence, the proceedings abated against him; one Mane was caught and beaten by the public gathered at the spot at the time after the incident and he died as a result of the injuries sustained; one Kapil Jogiwal was not summoned during trial and application on behalf of State under Section 193 Cr.P.C. was dismissed; and one Sonu Mundewala could not be traced during investigation as deposed by the IO. It was further submitted that the appellants' contention, based on the cross FIR of the incident in question and the contention that the victims' side was the aggressor and had assaulted the appellants is untenable. The present incident took place inside and outside the house of the victims and thus it was the appellants' faction who were the aggressors who formed an unlawful assembly to attack the victims to cause death and thus they cannot be acquitted. Reliance was placed on the decisions reported as (2009) 12 SCC 546 Annareddy Sambasiva Reddy vs. State of A.P., AIR 1954 SC 695 Gajanand vs. State of U.P., (2009) 9 SCC 719 Jarnail Singh vs. State of Punjab and (2010) 6 SCC 673 Balraje vs. State of Maharashtra.

10. Having heard the parties at length and perusing the record, the following evidence emerges.

11. Akash Shandliya (PW-1), the eye-witness deposed that on 25th June, 2009, one Kuldeep residing in his *mohalla* was getting engaged and in the said engagement accused Nikku and Amit Gulia came in a drunk condition and misbehaved with the guests in the engagement, on which, Shivhari tried to make them understand and thereafter Vijender @ Vijay, Shivhari and Vikas removed the accused Nikku and Amit Gulia outside the place, whereafter, the said two accused persons threatened to kill Vikas and Vijay. On 26th June, 2009 he was at the first floor of his house No.710, Chirag Delhi and the deceased persons Vikas and Vijender were at the ground floor of the said house. In the meantime, he heard noise coming from the ground floor on which he rushed to the ground floor and saw that Nikku, Amit Gulia, Kuldeep Sherawat, Sonu Mundewala, Kaku, Sonu, Monu, Kapil and Mane were beating Vikas and Vijender. Accused Nikku, Amit Gulia and Kuldeep Sherawat had knives in their hands, Sonu and Bhisham had iron rods in their hand, Sonu, Monu, Kaku and Kapil had dandas and Manoj had a *katta*. Amit and Nikku laid down Vikas on the ground and stabbed him with knives, while remaining persons took Vijender out of the house while beating him and Bhisham gave an iron rod blow to Vijender on which Vijender fell on the ground and at the same time Mane gave an *ustra* blow at the left side stomach of Vijender. He and Mahesh tried to intervene but they were also beaten. Thereafter all the accused persons ran towards their houses and he with the help of neighbours removed Vijender and Vikas into the car. At that time, he saw Mane was caught by the public persons. He and one neighbor Amit took Vijender and Vikas firstly to Modi Hospital where first aid was given and thereafter took them to Trauma Centre at AIIMS. He and Mahesh were also given first aid and police came there and

recorded his statement (Ex.PW-1/A) after which he went to the spot with the police. In his cross-examination, he stated that he knew the accused persons for the last three to four years as they were the residents of the same locality. He stated that Vijender was not a member of his family and that Vijender was not present at his house at that time on 26th June, 2009. Vijender's house was situated in the adjoining street however, Vijender's house was under construction and therefore, he used to stay at a house situated in front of his house.

12. Mahesh Kumar @ Tandi (PW-13) stated that on 25th June, 2009, he went to the engagement ceremony of Kuldeep. Andal @ Amit Gulia and Nikku @ Kapil were also present there and were under the influence of liquor and misbehaved with the guests at the engagement and did *gali-galoch* and *dhakka-mukki* with the guests. Thereafter, Shiv Hari tried to make Amit Gulia and Nikku understand that they should not misbehave with the guest, on which they caught hold of Shiv Hari's collar and thereafter, he (Mahesh) alongwith Vikas and Vijender pushed Amit Gulia and Nikku out of the function, at which both of them threatened that they will not be spared. At about 11.00-11.30 PM both Amit Gulia and Nikku along with five-six persons which included Manoj, Kanjhi, Bhisham, all of whom were under the influence of liquor did *gali-galoch* and threatened him while he was standing at the roof of his house. On 26th June, 2009 at about 10.00-10.30 PM he heard the noise of banging of the doors from the house of his neighbor Vikas. From the roof of his house, he saw 10-12 persons pushing the door of Vikas on which he went downstairs. Accused Manoj was standing at the gate of the house of Vikas, Sonu and Monu were standing armed with *dandas* and inside the house Nikku, Andal, Kanjhi

were attacking Vikas and Vijender with knives. He caught hold of Manoj and scuffle ensued between them. Manoj tried to escape and, in an attempt to apprehend him, Bhisham who had iron rod in his hand stuck him at the back of his head. Thereafter, all the accused persons grappled with him and gave him a beating with legs and fists after which they ran away leaving him in an injured condition. After some time, he fell unconscious and regained his consciousness at about 11.00-11.30 PM at his home and the police had met him at his house and took him to Trauma Centre, where the doctor treated him and gave stitches on his head and his left hand. At about 2.00-2.15 AM in the night Akash met him at the Trauma Centre who was also having injuries. He was apprised by Akash that Vikas and Vijender had sustained severe injuries after which a police officer recorded his statement. He further stated that one Mane was running out of Akash's house after giving knife blows to Vikas and while he was running away, the crowd had apprehended Mane. In his cross-examination he stated that on 25th June, 2009, neither the police was called nor any complaint was made to the police and also stated that Kuku Pandit was not his relative and was the cousin of Akash Shandliya. The marriage of Kuku Pandit was on 26th June, 2009 however, he did not attend the marriage because of the quarrel which had taken place between him and the accused persons on 25th June, 2009.

13. Sunita Sharma (PW-14) who was the mother of both the deceased persons deposed that on 26th June, 2009 there was a marriage at the house of her relative Kuldeep Sharma @ Kuku at Chirag Delhi. She did not attend the *sagai* function on 25th June, 2009 but got to know about *dhamki* given to her sons and therefore, she had not permitted her sons to attend the marriage

for the said reason. On 26th June, 2009 at about 10.30 PM she was cooking in her kitchen when 8-10 persons pushed the door of her house and forcibly entered and caught hold of her son Vikas, laid him on the ground and gave blows by *danda*, *chaku*, *ustra* and iron rod. Vijay came to the rescue of Vikas but he was also dragged out from the house and was beaten. She raised an alarm and Akash from the first floor and Mahesh @ Tandi came from a neighboring house to save Vijay but those 8-10 boys also started beating them. And thereafter, those boys fled away and both her sons were taken to the hospital by Akash and Amit in a car. On the next morning, she came to know that both her sons had died due to injuries. She identified accused Amit as one of those 8-10 persons who entered her house, but did not say anything about the other accused Bhisham, Sunil, Amit Pandey and Shashikant present in the court. Further, she identified all the 8 accused persons in the court by their faces but did not know their name. In her cross examination, she stated that she tried to save her sons when they were attacked and she also sustained minor injury in the process and that her clothes were stained with blood.

14. Amit Sharma (PW-16) deposed that on 26th June, 2009, at about 10.30 pm he heard shrieks from outside the house, on which he came out of his first floor and saw a gathering of about 20-25 people at the *chowk* in front of his house and on reaching the *chowk*, he found Vijender lying in an injured condition, and further ahead in the gathering, found Vikas also lying in an injured condition. Thereafter, he with help of Akash lifted both the injured and shifted them in a car and took them to Modi Hospital, where both the injured were given first aid and were advised to take the injured to trauma centre, and after getting the injured admitted at the Trauma Centre,

he came back to his house. In his cross examination, he stated that he did not find Mahesh Tandi or mother of deceased Sunita at the spot. He stated that he did not see any other injured except the deceased.

15. IO/ Insp. Dheeraj Narang (PW-26) deposed that on 26th June, 2009 at about 11.15-11.30 PM he received the information regarding the incident from ASI Vijay Singh on which he reached the spot i.e. House No.710, Chirag Delhi and inspected the spot. He found blood lying outside the house in the *gali* as also inside the house in the veranda and the steps from *gali* to the house. Thereafter, he went to Trauma Centre at AIIMS, where he met one Akash Shandliya and recorded his statement (Ex.PW-1/A) on which endorsement was made and FIR was got registered. He went back to the spot with Akash and found Crime Team present there. He prepared the unscaled site plan at the instance of Akash (Ex.PW-1/DA). He lifted the blood, blood smeared earth, earth control, one pair of chappal of dark blue colour having bloodstains and bloodstained *ustara* with words 'EADEN' from the spot. Thereafter, he received the information that the injured Vikas and Vijay had succumbed to the injuries and the bodies were sent for post-mortem examination. He called both the eye-witnesses Akash and Mahesh to the police station and sent them to AIIMS for medical examination and stated that both were medically examined prior to preparation of their MLCs. He received a secret information about the two appellants namely Amit Gulia @ Andal and Kuldeep Sherawat @ Kanjhi being present at a park near BRT corridor, Sheikh Sarai, Part-II pursuant to which, after identification by the eye-witnesses and the secret informer, the aforesaid two appellants were arrested vide arrest memo Ex.PW-1/H and Ex.PW-1/J respectively, and their disclosure statements Ex.PW-11/B and

Ex.PW-11/A respectively were recorded. In pursuance of the disclosure statements, raids were conducted at Noida and Gurgaon however, nothing was recovered. On 29th June, 2009, eye-witnesses Akash and Mahesh joined the investigation and proceeded towards Panchsheel Vihar where one secret informer informed them about the presence of Sonu, Monu and Bhisham Sharma at Triveni Complex near Sheikh Sarai and on identification by the eye-witnesses as well as the secret informer, Sonu and Monu were arrested from near Axis Bank ATM at Triveni Complex vide arrest memo Ex.PW-1/K and Ex.PW-1/L respectively, while Bhisham Sharma was arrested from near a wine shop vide arrest memo vide Ex.PW-1/M. Their disclosure statements (Ex.PW-26/A, B and C respectively) were recorded. In pursuance of these disclosure statements Sunil Pandey and Amit Pandey led the police to *khandars* of Satpuda near Press Enclave Road. There, Sunil Pandey got recovered one bamboo stick of about three feet and Amit Pandey produced a *danda* of two feet having carving. Bhisham Sharma led the police to a place at some distance from PSRI Hospital and pointed out one place having groove of trees opposite to the said hospital from where one iron rod of about 44 inches long and one and a half centimeter in diameter was produced. Amit Gulia @ Andal led the police team to a place near the bushes and drain of Triveni Complex, opposite SFS Complex, Sheikh Sarai-I, New Delhi and got recovered a knife of 24.2 cm (total length) and blade of 13.1 cm and the same was seized (Ex.PW-1/P1). Accused Kuldeep Sherawat @ Kanjhi led the police team to a place situated on the left side between Sheikh Sarai stand to Chirag Delhi red light falling at BRT corridor and from the bushes got

recovered one dagger/knife of 33.5 cm (total length) with blade of 20.08 cm having wooden handle and the same was also seized (Ex.PW-1/Q1).

16. Insp. Dheeraj Narang further deposed that thereafter, the five accused persons Amit Gulia, Sunil Pandey and Amit Pandey, Kuldeep Sherawat and Bhisham Sharma led the police to their respective houses and got their clothes recovered. Thereafter, on 30th June, 2009 when the two eye-witnesses came to inquire about the progress of investigation, a secret information regarding another accused coming at the bus stand near Malviya Nagar *gole chakkar* was received on which he went to the aforesaid place and apprehended Manoj Gulia after identification by the eye-witnesses and arrested him vide arrest memo Ex.PW-1/S and his disclosure statement (Ex.PW-26/D) was recorded. Pursuant to the disclosure statement, Manoj Gulia got recovered one *danda* of about two and a half feet having 2½ inches which was like a baseball bat from a place Andolan Park, Sheikh Sarai and thereafter, also got recovered his clothes from his house. On 10th July, 2009 an information about presence of Shashikant @ Kaku at MMTC Colony road leading to Aurobindo College was received and the accused was arrested vide arrest memo Ex.PW-1/U and his disclosure statement (Ex.PW-18/A) was recorded, pursuant to which he got recovered his clothes from his house. On 19th July, 2009 accused Bharat Bhardwaj @ Nikku surrendered at the police station and was arrested vide arrest memo Ex.PW-19/A and his disclosure statement (Ex.PW-19/C) was recorded. Pursuant to this disclosure statement, Bharat Bhardwaj led the police to his house and got recovered his clothes which were stained with blood and also got recovered one country made pistol with one live cartridge of 315 bore from a place near bushes of *nala*, *khandar* Satpuda, which was seized (Ex.PW-

1/W). In his cross-examination, he stated that during the course of inquiry, Akash and Mahesh mentioned that other family members were also witness to the incident but no names were disclosed. He also got to know that injured Mane had also received injuries at the spot itself and investigation regarding the same was being conducted by Insp. S.S. Yadav. He further stated that when Akash and Mahesh met him for the first time, neither of them informed him if they needed any medical assistance or if their medical was got conducted. He did not get any opinion from the doctor regarding possibility of *ustra* found at the scene of the crime to have been used for causing injuries to the deceased persons and since no statement came regarding use of *ustra* in his investigation, he did not send the same for medical opinion. He further stated that he tried to make inquiries at the Modi Hospital however, no reply was given by them and no medical documents regarding admission and treatment at the said hospital was found. He further stated to have not obtained any opinion from the doctor with regard to the *dandas* and *saria* recovered at the instance of the accused persons. He stated that he did not notice any injury on the person of Mahesh and Akash. He stated that during investigation it was revealed that Kapil was not at the spot at the time of the incident and no person by the name of Sonu Mundewala was found although their names were mentioned in the *rukka*.

17. ASI Vijay Singh (PW-5) deposed that on 26th June, 2009, at about 11.00 PM he received the information from Duty Ct. Kishan Pal that at H.No. 710, Chirag Delhi, 4-5 boys had entered the house and stabbed the inmates. He along with Ct. Mukesh went to the spot and came to know that the injured were shifted to the hospital, after which he proceeded to the

Trauma Center at AIIMS. He found three injured admitted at the hospital, out of which, name of one was unknown to him while two others were Vikas and Vijay. Doctor opined them to be unfit for statement. He informed about the situation to SHO who reached there and recorded the statement of the witnesses. Thereafter, both the injured were declared dead and the bodies were sent for post mortem examination. In his cross examination, he stated that he reached the spot at about 10.15-10.20 PM and did not find anyone at the spot. He entered the house and inspected the spot, after which he left for the hospital. He did not find any weapon of offence lying at the spot. He stated that as per the DD entry, 4-5 persons had caused injuries, but from the spot it was found that several persons had attacked the injured. The third injured namely Mane also died at the hospital and after post-mortem, his dead body was handed over to Mane's relatives.

18. Rajender Singh (PW-12) stated that Mahesh, son of Hari Chand was examined at the hospital on 27th June, 2009 and it was a non-MLC case and the registration time was 12.06 AM. The non-MLC registration record is taken by the patient himself. He produced the certificate from Dr. Adarsh Kumar at AIIMS (Ex.PW-12/A).

19. Dr. Dhruv Sharma (PW-27) conducted the FSL examination and prepared his report (Ex.PW-27/A & B) and found blood to be present on the *ustra*, bamboo stick recovered at the instance of appellant Sunil Pandey, carved stick recovered at the instance of Amit Pandey, as also the knives recovered at the instance of Amit Gulia @ Andal and Kuldeep Sherawat @ Kanjhi.

20. In their respective statements under Section 313 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), the appellants Bharat Bhardwaj, Amit

Gulia, Amit Pandey, Sunil Pandey, Shashikant Bhardwaj, Bhisham Sharma and Manoj Gulia stated that the opinion of the doctor conducting post-mortem was falsely obtained with the view to strengthen the prosecution case. They stated that they were falsely implicated and that they neither made any disclosure statement nor got anything recovered. Appellant Bharat Bhardwaj, Bhisham Sharma and Manoj Gulia further stated that they were forced to sign several papers and that they were not present at the spot at the time of incident. A quarrel took place between Vijender, Vikas and Mane and Akash and Mahesh also participated in the quarrel as a consequence of which, injuries were received by Vikas and Vijender and Mane was killed by Akash and Mahesh. A cross-FIR regarding the death of Mane was registered in which one Shekhar Chaudhary and Dhirender Gulia deposed to have seen Akash and Mahesh beating Mane with *danda* and iron rod and thus to save themselves, Mahesh and Akash have concocted a story to implicate the accused persons. Manoj Gulia also stated that family of Jai Bhagwan had a grudge against his family and therefore, finding an opportunity he had been named in the FIR. Further, Amit Pandey and Sunil Pandey also stated that on 28th June, 2009 police asked their father to bring them to the police station where they were forced to sign certain papers and were detained and implicated by the police in the present case.

21. Shekhar Chaudhary (DW-1) deposed that Sumit @ Mane was his cousin and on 26th June, 2009 when he was returning to his house after having dinner with his friend Dhirender near House No.710, Chirag Delhi he saw crowd gathered and noise of beating. Out of the crowd one Mukesh present there told him that a dispute had taken place between Mane, and Vikas and Vijender and they have been beating each other and Mane had

caused injuries to Vikas and Vijender by using *ustra* and thereafter Akash and Mahesh had come there and were beating Mane. One Sanju also told him that Mahesh and Akash were beating his brother on which, he crossed the crowd and saw Akash and Mahesh beating Mane with rod and *danda*. He also saw Vikas and Vipul lying at the ground and he also tried to stop Akash and Mahesh to save Mane but he was threatened by them. Next morning i.e. on 27th June, 2009 he came to know that Mane, Vikas and Vipul had died on which he went to PS Malviya Nagar where he got to know that FIR No.342/2009 regarding murder of Mane was already registered. His statement was recorded at the police station regarding involvement of Mahesh and Akash and statement of Dhirender was also recorded. When he went back to enquire about the status of investigation after a few days, he was threatened by the police. In his cross-examination he stated that he was not on talking terms with his cousin Mane and that he did not make any call to the police regarding the incident in the night of 26th June, 2009.

22. Challenge of learned counsels for the appellants to the case of the prosecution, primarily based on the evidence of the witnesses, is that the version of the eye-witnesses is not reliable, their presence at the spot is doubtful and there are inconsistencies in their statements. The prosecution has examined three eye-witnesses to the incident as noted above namely Ashok Shandilya (PW-1), Mahesh Kumar (PW-13) and Smt. Sunita Sharma (PW-14), the mother of the deceased. Ashok Shandilya was residing on the first floor of the house where the two deceased were residing and thus, was a natural witness. Soon after the incident, on his statement the FIR, was registered which named all the accused. Though challenge has been laid to

the injuries received by Akash on the ground that they were examined late, however, Rajender (PW-12) proved the treatment record of Akash who was treated as a non-MLC case. Further, Smt. Sunita was also a natural witness being the mother of the two deceased and stated that when these assailants came, she was cooking in the kitchen and had witnessed the incident. Mahesh was residing in the neighborhood and was also the one with whom Amit Gulia and Nikku had misbehaved on the day prior to the incident. Further, PW-1 and PW-13 had deposed about the threat given by Amit Gulia and Nikku on 25th June, 2009 when they were moved out from the engagement function where both Amit Gulia and Nikku in drunken condition were misbehaving with the guests. In the *rukka*, Akash stated that Manoj had *katta*; Nikku and Amit had knives (*chhurre*); Mane had *ustra*; Sonu, Monu, Kapil had *dandas*; and Bhisham and Sonu Mundewala had iron rods. Even in his testimony before the Court he deposed about the same weapons being carried by the appellants except the only variation between the *rukka* and the testimony before the Court was that in the *rukka* he did not state that Shashikant Bhardwaj @ Kaku and Kuldeep Sherawat @ Kanjhi were having weapon, whereas in the deposition before the Court he stated that Shashikant Bhardwaj had wooden stick whereas Kuldeep had a knife. Even in the testimony of Akash (PW-13), there is no variation in any role attributed to what was stated by him under Section 161 Cr.P.C. except that he additionally stated that Mane had knife. Further, even in the roles attributed to the appellants, statement of PW-1 is consistent in his deposition before the Court as also to the police he stated that Nikku and Amit Gulia pushed Vikas on the ground and gave him knife blows and the remaining assailants dragged Vijender @ Vijay out of the house while beating with

legs and with the foot. He is also consistent that Mane gave razor blow on the stomach of Vijender @ Vijay on the left side of his stomach which is corroborated by the medical evidence of the post-mortem report of Vijender @ Vijay. He attributed an iron rod blow to Vijay from Bhisham Sharma which is also corroborated by the post-mortem report. Akash also stated that one of the assailants gave him a teeth bite on his left shoulder and broke his gold chain having a locket of 'OM' written on it and his medical which was conducted at the night teeth bite was found on the left shoulder.

23. Deposition of Akash is also challenged on the ground that the marriage being of a relative he could not have been possibly at the home. It is not uncommon that even in relations all the family members do not go at one time and the witness has explained that since threat was extended to the two deceased i.e. Vikas and Vijender on the prior day they did not go to the wedding. Further, Mane, one of the assailants was beaten by the public and he also died as a consequence of the beatings received. Version of Akash and Mahesh is duly corroborated by PW-14, the mother of the two deceased who was a natural witness at the home who stated that at about 10.30 PM she was cooking in the kitchen when 8-10 persons pushed the door of the house and entered forcefully. Vikas and Vijay were at the house. These 8-10 persons caught hold of Vikas, laid him on the ground and started giving him blows by *danda*, *chakoo* and iron rods. When her son Vijay came to rescue, he was also dragged out of the house and beaten. She raised an alarm and, in the meantime, Akash had come from the first floor and Mahesh from the neighbourhood. However, those people started beating them also. Testimony of relation witnesses or neighbours who are bound to

be present at the spot cannot be discarded on the ground that they are interested witnesses.

24. Hon'ble Supreme Court in the decision reported as Annareddy Sambasiva Reddy (supra) dealing with the testimony of the injured eye-witness noted as under:

"26. PW 1 in his testimony before the court has given the account of the incident. He testified that A-1, A-2, A-10 and A-12 were armed with axes and the remaining eleven accused were armed with eathapululu (sickle). A-1 to A-9 hacked D-1 with their weapons. A-3, A-6, A-7, A-10 to A-13 hacked D-2 with their respective weapons. A-1, A-3, A-6, A-7 and A-10 to A-13 hacked him with their respective weapons. A-7, A-9, A-10 and A-14 hacked PW 3 and R. Narayanareddy with their respective weapons. D-1 and D-2 died on the spot.

27. In his cross-examination, PW 1 admitted that he did not state in Ext. P-1 that they (PW 1 and D-1) obtained a loan of Rs 6000 from the bank. He also admitted in Ext. P-1 that he did not state that A-1, A-2, A-10 and A-12 were armed with axes and the remaining accused with eathapululu (sickle). He also admitted that he did not state in Ext. P-1 that A-1 to A-9 hacked D-1; A-3, A-6, A-10 to A-13 hacked D-2 and that he was attacked by A-1, A-3, A-6, A-7, A-10 to A-13 and that A-7, A-9, A-10 and A-14 attacked PW 3 and R. Narayanareddy.

28. These omissions do not affect the credibility of his evidence since at the time of recording of Ext. P-1, PW 1 was in an injured condition. It was not expected of him to give a detailed version in that condition, more so when so many accused were involved. But despite that, in Ext. P-1, he has given names of all the accused persons.

29. The testimony of PW 1 is corroborated by medical evidence.

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33. PW 1 and PW 3 are injured witnesses. As a matter of fact, PW 1 suffered a grave injury on his head. Two of their family members died. Why should he and PW 3 let the real culprits go

scot-free? It is most unlikely that they would have spared the actual assailants and falsely implicated these appellants merely because there is political rivalry between them.

34. The omissions and discrepancies pointed out in the evidence of PW 1 and PW 3 are only minor and do not shake their trustworthiness. It is true that neither PW 1 nor PW 3 assigned specific injuries or specific overt acts attributed to the accused individually but looking to the nature of the incident where a large number of persons attacked D-1, D-2, PW 1, PW 2 and PW 3, it would not have been possible for PW 1 or PW 3 to attribute specific injury individually to each accused. How could it be possible for any person to recount with meticulous exactitude the various individual acts done by each assailant? Had they stated so, their testimony would have been criticised as highly improbable and unnatural. The testimony of the eyewitnesses carries with it the criticism of being tutored if they give graphic details of the incident and their evidence would be assailed as unspecific, vague and general if they fail to speak with precision. The golden principle is not to weigh such testimony in golden scales but to view it from the cogent standards that lend assurance about its trustfulness.

35. In our view, the testimony of PW 1 and PW 3 is of credence and does not deserve to be discarded on the ground of non-mentioning of specific overt acts. The trial court and the High Court have given cogent and convincing reasons for accepting the evidence of PW 1 and PW 3. We concur. Merely because A-14 and A-15 got acquittal, in our view, credibility of deposition of PW 1 and PW 3 is not affected."

25. Further, version of these eye-witnesses is corroborated by Amit Sharma (PW-16) who was the neighbor, who had taken both the injured victims to the hospital along with PW-1. Further the MLC of Vikas and Vijay notes them to be admitted in the hospital on 26th June, 2009 at 23.27 PM and 23.29 PM and brought by brother i.e. PW-1 with alleged history of stab injury at around 10.30 PM. Both Vijay and Vikas were declared dead on 26th June, 2009 at 7.00 AM and 7.40 AM.

26. Further, the weapons have been recovered from all the assailants and the post-mortem doctor opined that the stab injuries suffered by the two deceased could be produced by thrusting impact by the said knives.

27. Evidence of the mother Smt.Sunita Sharma, the mother of the two deceased is assailed on the ground that she did not name the accused and thus, identified for the first time in the Court. This witness clearly stated that she did not know the names of the accused but stated that she could identify them as she had seen them entering her house and beating and dragging her sons. Further, since PW-1 had named the accused in the FIR itself, the TIP proceedings to be conducted qua the mother would have been meaningless and her identification in the Court for the first time can be validly relied upon.

28. Mr.Vikas Arora, learned counsel appearing on behalf of all the other appellants except Amit Gulia and Nikku has claimed that the other five appellants cannot be implicated with the aid of Section 149 IPC. It may be noted that Amit Gulia and Nikku have been convicted for offence punishable under Section 302/34 IPC and other seven appellants have been acquitted of the said charge. There is no State appeal against the same however, they have been convicted for offence punishable under Section 326 read with Section 149 IPC and Sections 147/148 read with Section 149 IPC. From the evidence of the eye-witnesses, it is clear that the appellants were the aggressors as they came and trespassed into the house of the two deceased Vikas and Vijay. All the appellants were armed with weapons as noted above and thus, the common object of the unlawful assembly to cause grievous injuries to the two deceased can be inferred from the manner in which they entered the house at around 10.00 PM and dragged the two

victims and also beat them. For the reason that infliction of single stab injury by Nikku and Amit Gulia could not be proved to be the part of common object by the unlawful assembly, the other five appellants have not been convicted for offence punishable under Sections 302/149 IPC.

29. Learned counsel for the appellant has relied upon the decision reported as (1991) Supp. 2 SCC 437 Sherey & Ors. vs. State of Uttar Pradesh wherein the Supreme Court held that when specific overt acts were attributed to appellants 1, 4, 5, 7 8, 10, 17, 22 and 25 therein and these accused were armed with deadly weapons and were seen assaulting the deceased and others it is required to be held that they were the members of unlawful assembly with a common object of committing murder and other offence with which they were charged. The appeals were consequently dismissed by the Supreme Court. Even in the decision reported as (2003) 2 SCC 257 Rajendra Shantaram Todankar vs. State of Maharashtra & Ors. relied upon by learned counsel for the appellants, the Hon'ble Supreme Court held that it is difficult indeed, though not impossible, to collect direct evidence of such knowledge and an inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and behavior of the members soon before, at or after actual commission of the crime. From the evidence of the three eye-witnesses it is clearly evident that all the appellants were present in the unlawful assembly and shared the common object thereof. It was held:

“14. Section 149 of the Penal Code, 1860 provides 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. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 — either clause — is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act. These principles are settled. Applying these tests to the facts found proved beyond reasonable doubt, Accused 1 to 5 can be held liable for the offence under Sections 302/149 IPC for the assault resulting in the death of Gopikrishna while Accused 6

and 7 can be held liable for their individual acts of assault committed on Sanjay Patil.

30. In the decision reported as (2008) 11 SCC 631 Shivjee Singh & Ors. vs. State of Bihar, Supreme Court laid down the difference between the concept of common object and common intention as under:

10. A plea which was emphasised by the appellants relates to the question whether Section 149 IPC has any application for fastening the constructive liability which is the sine qua non for its operation.

“12. ... The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word ‘object’ means the purpose or design and, in order to make it ‘common’, it must be shared by all. In other words, the object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The

expression 'in prosecution of common object', as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

13. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and the language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled,

may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot eo instanti.

14. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. 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 part. The distinction between the two parts of Section 149 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 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. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda v. State of Mysore [AIR 1956 SC 731].)

15. In State of U.P. v. Dan Singh [(1997) 3 SCC 747:1997 SCC (Cri) 469] it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji v. State of U.P. [(1989) 1 SCC 437: 1989 SCC (Cri) 211] where it was observed that: (SCC p. 442, para 9)

‘9. ... While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149.’” [Ed.: Quoting from State of Maharashtra v. Kashirao, (2003) 10 SCC 434, pp. 441-43, paras 12-15.]

This position has been elaborately stated by this Court in Gangadhar Behera v. State of Orissa [(2002) 8 SCC 381: 2003 SCC (Cri) 32].

31. From the evidence as noted above, it is clear that all the appellants came with the common object as an unlawful assembly for causing injuries to Vikas and Vijay and teaching them a lesson and during that period Nikku

and Amit Gulia inflicted stab injuries. Hence, this Court finds no error in the impugned judgment convicting all the appellants for offence punishable under Section 326 IPC read with Section 149 IPC and Sections 147/148 IPC read with Section 149 IPC.

32. This takes us to the last submission on behalf of appellants Nikku and Amit Gulia that since single stab blows were given, the offence would at best be under Section 304 IPC and not under Section 302 IPC. In the decision reported as (2022) SCC OnLine SC 842 Ajmal vs. State of Kerala relied upon on behalf of the appellant by Mr.B. Badrinath, Advocate on behalf of Amit Gulia, one of the important circumstances was that there was no premeditation of committing the murder, the accused, when they accosted the vehicle and pulled the deceased and the injured to come out of the vehicle, were not armed with any weapon. In the present case all the accused came with a premeditation and out of them Amit Gulia and Nikku were armed with deadly weapons i.e. knives which they inflicted. Hence, the decision in Ajmal (supra) would not have any application to the facts of the present case.

33. Supreme Court in the decision reported as (2006) 11 SCC 444 Pulicherla Nagaraju @ Nagaraja Reddy vs. State of Andhra Pradesh laid down the criteria to ascertain whether the offence falls under Section 302 IPC or Section 304 Part-I or Part-II IPC as under:

“29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed,

jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

34. In the present case, from the evidence as noted above, it is evident that the accused Amit Gulia and Nikku had a motive to commit the offence as they had been pushed out of the engagement ceremony the day prior by Vikas and Vijay along with Shivhari and they had extended a threat at that time. On next date i.e. 26th June, 2009 Nikku and Amit Gulia armed with knives along with other co-accused who were armed with weapons i.e. sticks, knife, *ustra*, gun etc. came as aggressors to the house of the deceased

and when the eye-witness tried to save them they pushed them aside. Further even though single stab injuries were inflicted, the same were at vital portions and by a thrusting impact of the weapons recovered. Hence, this Court finds no ground to modify the conviction of the appellants Nikku and Amit Gulia to one under Section 304 Part-I/34 IPC.

35. In view of the discussion aforesaid, the appeals are dismissed.

36. Judgment be uploaded on the website of this Court and the copy of the same be sent to the Superintendent, Tihar Jail for updation of record and intimation to the appellants.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

MARCH 27, 2023
‘vn’

