

(2004) 05 RAJ CK 0010
In the Rajasthan High Court
Case No : Criminal Appeal No. 986 of 2001

Gaja Nand and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 18-05-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2005) 1 RLW 9

Hon'ble Judges : Sunil Kumar Garg, J;Prakash Tatia, J

Bench : Division Bench

Advocate : M.L. Garg, for the Appellant; D.D. Kalla, Public Prosecutor and Vineet Jain, for Sandeep Mehta, for the Respondent

Judgement

Garg, J.—The abovenamed eight accused appellants have preferred this appeal against the judgment and order dated 14.12.2001 passed by the learned Sessions Judge, Churu in Sessions Case No. 47/99 by which he convicted and sentenced the accused appellants in the following manner:-

-----	Name of accused
Convicted Sentence awarded to Appellants u/s each accused appellant	
-----	1. Gaja Nand 148 IPC
6 Months RI	2. Sukha Ram
3. Sita Ram	302/149 IPC Imprisonment for life
4. Sahi Ram and to pay fine of Rs.	5. DulaRam(r) 100/-, in default of Duli Chand
payment of fine, to	6. Lal Singh further undergo
3	7. Hukmi Chand@ months
imprisonment.	Hukma Ram
8.	Mahavir Singh

Both the substantive sentences were ordered to run concurrently.

2. It arises in the following circumstances:

On 8.8.1989 at about 8.30 PM, PW19 Nemaram lodged a written report Ex.P/43 before the Police Station Sardar Sahar District Churu stating inter-alia that his brother Nanuram (hereinafter referred to as the deceased) had come to Sardar

Sahar and at about 6.00 PM in the evening he has returning back to the village and as soon as he passed through the field of one Mota Ram, the accused appellants, namely, Gaja Nand, Sukha Ram, Sita Ram, Sahi Ram, Dula Ram (a) Duli Chand, Lal Singh, Hukmi Chand (a) Hukma Ram and Mahavir Singh, after intercepting deceased beat him with lathi and barchhi and at that time, accused appellants Sahiram and Mahaveer Singh were armed with barchhi and rest accused appellants were armed with lathi and the accused appellants Sahiram and Mahaveer Singh gave barchhi blows on the head of the deceased and rest accused appellants also beat deceased with lathi. It was further stated in the report Ex.P/43 that when accused appellants were beating deceased, Tejaram (PW2) and Dharma Ram (PW1) had witnessed the occurrence and when they objected why they were beating deceased, the accused appellants told them that if they come there," they would also be beaten and because of fear, PW1 Dharma Ram and PW2 Tejaram returned back to the village Bholusar where PW19 Nemaram used to live and at that time, PW19 Nemaram was not in the house as he had gone to field and thereafter, PW19 Nemaram was called from the field and whole incident was narrated to him. It was further stated in the report Ex.P/43 by PW19 Nemaram that when he started to go Police Station to give information, Mool Chand came in bullock cart alongwith dead body and he recognized that it was the dead body of his brother Nanuram (deceased) and at that time, deceased was having injuries on his head and hands and he asked Mool Chand to put the dead body at the same place from where it was taken by him. It was further stated in the report Ex.P/43 that all the accused appellants had caused the murder of the deceased as all of them had old enmity with deceased and PW19 Nemaram.

On this report Ex.P/43, PW2 O Udai Singh, who was at that time SI in the Police Station Sardar Sahar registered the case and chalked out regular FIR Ex.P/44 and thereafter, investigation was started.

During investigation, through arrest memos Ex.P/4 to Ex.P/11, the accused appellants Sahi Ram, Sitaram, Dulichand, Mahaveer Singh, Hukma Ram, Lal Singh Gajanand and Sukharam respectively were arrested on 11.8.1999 and at the information Ex.P/47 of accused appellant Sahiram, a Barchhi was got recovered through fard Ex.P/14 and similarly, at the information Ex.P/52 of accused appellant, a Barchhi was got recovered through fard Ex.P/16 and at the instance of rest accused persons, lathies were got recovered. The site plan is Ex.D/2 and the FSL report is Ex.P/58.

The post mortem of the dead body of the deceased was got conducted by the Medical Board consisting of two doctors, namely, PW14 Dr. Shankarlal and PW15 Dr. Sandeep Kumar Agarwal and the post mortem report is Ex.P/39.

After usual investigation, police submitted challan for the offence under Sections 302, 341, 147, 148, 149 IPC against the accused appellants in the Court of Magistrate and from where the case was committed to the Court of Session.

On 15.3.2000, the learned Sessions Judge, Churu framed charges for the offence under Sections 148 and 302/149 IPC against the accused appellants and the same were read over and explained to them and they denied the charges and claimed trial.

During the course of trial, the prosecution got examined as many as 21 witnesses and exhibited several documents. Thereafter, statements of the accused appellants u/s 313 Cr.P.C. were recorded. In defence, three witnesses were produced by the accused appellants.

After conclusion of trial, the learned Sessions Judge, Churu through impugned judgment and order dated 14.12.2001, after placing reliance on the two eye witnesses, namely, PW1 Dharma Ram and PW2 Tejaram and after application of Section 149 IPC, convicted the accused appellants for the offence under Sections 148 and 302/149 IPC and sentenced each of them in the manner as indicated above.

Aggrieved from the said judgment and order dated 14.12.2001 passed by the learned Sessions Judge, Churu, the accused appellants have preferred this appeal.

3. In this appeal, the following submissions have been made by the learned counsel for the accused appellants:-

(i) That the statements of alleged eye witnesses PW1 Dharma Ram and PW2 Tejaram should have not been believed by the learned Sessions Judge because of the following reasons:-

(a) That they are close relatives of PW19 Nemaram and the deceased;

(b) that they are not eye witnesses, but chance witnesses and their presence on the scene is very much doubtful.

(c) That their statements do not get corroboration from the medical evidence as they have stated that each and every accused appellant caused injury on the body of the deceased, but the post mortem report Ex.P/39, reveals that deceased received only five injuries while the accused appellants were 8 in number. If each and every accused appellant would have caused injuries to deceased, at least deceased must have received 8 injuries.

(d) That they have stated that accused appellants Sahiram and Mahaveer Singh had caused injuries on the head of the deceased with Barchhi while the post mortem report Ex.P/39 reveals that head injuries were caused by blunt object and therefore, these two witnesses have improved their statements when they were being examined in the Court and have stated that these two accused appellants Sahiram and Mahaveer Singh caused head injuries from back side of Barchhi.

(ii) That since each and every accused appellant had not caused injuries to the deceased, therefore, all accused appellants have been erroneously convicted with

the aid of Section 149 IPC. From this point of view also, the findings of the learned Sessions Judge are erroneous one and liable to be set aside.

(iii) That for the sake of argument, if accused appellants Sahiram and Mahaveer Singh had caused head injuries from the back side of Barchhi meaning thereby they had no intention to kill deceased and thus, their act does not amount to culpable homicide amounting to murder punishable u/s 302 IPC and they have committed the offence punishable u/s 325 IPC or at the most, punishable under 304 Part-II IPC.

4. On the other hand, the learned Public Prosecutor and the learned counsel for the complainant have supported the impugned judgment and order.

5. We have heard the learned counsel for the accused appellants, learned Public Prosecutor and the learned counsel for the complainant and gone through the record of the case.

6. Before proceeding further, first medical evidence of this case has to be seen.

7. The post mortem report of the deceased is Ex.P/39 and for proving the same, the prosecution has produced PW14 Dr. Shankarlal and PW15 Dr. Sandeep Kumar Agarwal.

8. PW14 Dr. Shankarlal and PW15 Dr. Sandeep Kumar Agarwal in their statements recorded in Court have stated that on 9.8.1999 they were Medical Officers in the Government Hospital, Sardarsahar and on that day at about 10.00 AM, they conducted the post mortem of the dead body of the deceased and found the following injuries on his body:-

(i) A lacerated wound 6cm x 2cm x bone deep on occipito parietal region at middle oblique direction with multiple fracture of both parietal bones and occipital bone. Skull is depressed at the site of wound. Blunt weapon-dangerous.

(ii) Lacerated wound 6cm x 2cm x bone deep on Right Parietal region, verticle direction just above the right ear with fracture of right parietal bone.-Blunt-dangerous.

(iii) Lacerated wound 4cm x 2cm x 1 cm with fracture of right humerus at lower 1/3rd, on posterior aspect of right upper arm at lower 1/3rd region-Blunt weapon-Grievous.

(iv) Bruise 4cm x 4cm on posterior aspect of lower 1/3rd of left forearm with fracture of both bones, radius and ulna at lower 1/3rd region. Blunt-Grievous.

(v) Bruise 4cm x 4cm on anterior lateral aspect of lower 1/3rd of left leg near ankle joint with fracture of both tibia and fibula bones. Blunt-Grievous.

They have opined the cause of death of the deceased in the following manner:-

"From the above post mortem examination, we are of the opinion that the deceased had died due to shock caused by excessive injuries as mentioned

above duration of death is within 24 hours."

They have proved the post mortem report Ex.P/39.

Furthermore, PW 14 Shankarlal has categorically stated that the injuries on the body of the deceased were caused by blunt object.

9. Thus, from the statements of PW14 Dr. Shankarlal and PW15 Dr. Sandeep Kumar Agarwal, it is very much clear that the deceased received five injuries as mentioned above and the same were caused by blunt object and not by sharp edged weapon and the deceased died due to shock caused by excessive injuries and thus, the death of the deceased may be classified as homicidal.

10. The question is whether the above injuries to the deceased were caused by the accused appellants or not and for that, we have to see the oral evidence produced in this case.

11. In this case, PW1 Dharma Ram and PW2 Tejaram have been produced as eye witnesses of the occurrence and PW19 Nenaram is that person, who lodged the report Ex.P/43 and he was informed about the whole incident by PW1 Dharma Ram and PW2 Tejaram and therefore, first it is to be seen whether PW1 Dharma Ram and PW2 Tejaram can be regarded as eye witnesses of the occurrence or not or whether they can be regarded as chance witnesses or not.

12. Before proceeding further, what is meant by "chance witness" has to be mentioned here.

13. The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual to discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence. Murder when is committed in dwelling house, the inmates are natural witnesses and if the murder so committed in street passers by are natural witness. Their evidence cannot be brushed aside on the ground that they are mere chance witnesses. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses, If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passers-by shall be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". In this respect, the decision of the Hon"ble Supreme Court in Rana Partap and Others Vs. State of Haryana, may be referred to.

14. It may be stated here that where a witness is referred to as eye witness in FIR and his evidence is corroborated by another eye witness and when the entire episode is seen in strong light, in such a situation, he cannot be branded as a

chance witness and conviction on the basis of evidence of such type of witness is legal.

15. Before discussing the evidence of alleged eye witnesses PW1 Dharma Ram and PW2 Tejaram, the other evidence, which has got very much reference/has to be seen first.

16. PW17 Rajesh Kumar Sharma is a police official, who was at the relevant time CO, Churu and he investigated the case. In his statement recorded in Court, he has stated:-

(i) That he visited the place of occurrence, but he was not told by anybody that on that place, incident took place.

(ii) That he could not come to know from which shop PW1 Dharma Ram, PW2 Tejaram and deceased had purchased goods.

(iii) That it is correct to say that in the alleged incident, accused appellants Lal Singh, Gajanand and Hukamchand had not taken any part.

(iv) That it has come in the investigation that Moolchand had brought the dead body of the deceased after putting it in the bullock cart, but as per directions of PW1 Dharma Ram, PW2 Tejaram and PW19 Nemaram, Moolchand put the dead body at the same place from where it was brought by him.

(v) That it is also correct to say that during investigation, it was came to his knowledge that the accused appellants Sahiram and Mahaveer Singh were armed with lathi and not barchhi.

17. PW19 Nemaram is that witness, who lodged the report Ex.P/43. A bare perusal of the report Ex.P/43 reveals that he was not eye witness and he has lodged the report as per saying of PW1 Dharma Ram and PW2 Tejaram. However, in his statement recorded in Court, he has stated:

(i) That he did not give report in writing, but the report Ex.P/43 was got written by the police in the Police Station and it bears his signatures.

(ii) That it is correct to say that in the report Ex.P/43, the fact that accused appellants Sahiram and Mahaveer Singh caused injuries on the head of the deceased from the back side of Barchhi was not mentioned.

(iii) That PW1 Dharma Ram and PW2 Tejaram informed him that the accused appellants had caused the murder of the deceased and upon this, he went to the police directly and not to the field.

(iv) That it is correct to say that the field of accused appellant Hukami Chand is adjacent to his field.

(v) That it is also correct to say that some criminal cases are pending in which he and the accused appellants are involved.

(vi) That it is also correct to say that PW1 Dharma Ram and PW2 Tejaram are close relatives of each other.

18. PW20 Udai Singh is another police official and at the relevant time, he was SI in the Police Station Sardar Sahar and before whom, report Ex.P/43 was lodged by PW19 Nemaram. In his statement recorded in Court, he has stated:-

(i) That PW19 Nemaram came in the police station alongwith the report Ex.P/43 and when he asked him from where he got it written, PW19 Nemaram informed him that it was got written by his relative.

(ii) That he got prepared site plan Ex.D/2 as per saying of PW1 Dharma Ram.

(iii) That it is correct to say that Mool Chand was the first person, who lifted the dead body of the deceased from the place of occurrence, but he did not investigate that matter in to that light as Mooichand had come to give statement in the police station.

(iv) That during investigation, it was found that accused appellants had a strong enmity with the deceased as well as PW19 Nemaram.

19. Now, in the light of the above evidence, the statements of alleged eye witnesses PW1 Dharma Ram and PW2 Tejaram are being examined.

20. It may be stated here that report Ex.P/43 was lodged by PW19 Nenaram just after the occurrence and within three hours of the incident. The incident took place on 8.8.1999 at about 6.00 PM and the report Ex.P/43 was lodged at about 8.30 PM. A perusal of the report Ex.P/43 reveals that the names of PW1 Dharma Ram and PW2 Tejaram were mentioned as eye witnesses and it was also mentioned that the accused appellants Sahiram and Mahaveer Singh gave barchhi blows on the head of the deceased and other parts, but the fact that they caused injuries on the head of deceased from back side of the barchhi had not been mentioned.

21. PW1 Dharma Ram in the examination-in-chief has stated that on the date of occurrence, he and PW2 Tejaram were going to village Bholusar from Sardar Sahar and when they reached near the field of Motaram, they saw deceased, who was about 200 pawra ahead and all the accused appellants were there and at that time, accused appellants Sahiram and Mahaveer Singh were armed with barchhi and rest accused appellants were armed with lathies and at that time, accused appellants Sahiram and Mahaveer Singh gave barchhi blows from its back side on the head of the deceased, as a result of which he fell down on the earth and thereafter, all accused beat him, but he cannot say which particular injury was caused by which accused appellant. He has further stated that he and PW2 Tejaram resisted, but they were threatened by the accused appellants. He has further stated that on being enquired, he came to know that PW19 Nemaram had gone to field and thereafter, PW19 Nemaram was called by sending PW2 Tejaram and thereafter, whole incident was narrated to PW19 Nenaram.

In cross-examination, he has admitted the following facts:-

- (i) That he has no relationship with the deceased, but both he and deceased hail from the same village.
- (ii) That it is correct to say that Heeraram and Bhagwanaram are real brothers and his father's name is Surjaram and his father Surjaram and Mohanram are real brothers.
- (iii) That the way, which was in the field of Motaram, was not a straight one.
- (iv) That alleged incident took place on the way.
- (v) The first accused appellants Sahiram and Mahaveer gave barchhi blows from its back side on the head of the deceased, as a result of which, he fell down on the earth and thereafter, all accused appellants beat him.
- (vi) That accused appellants Sahiram and Mahaveer Singh further beat deceased when he was lying on the earth.
- (vii) That each accused appellant had given one-one blow atleast and thereafter, they had run away from the scene.
- (viii) That it is correct to say that litigation was going on between the deceased and the accused appellants.
- (ix) That in the police statement Ex.D/1, the fact that accused appellants Sahiram and Mahaveer Singh caused injuries from back side of the barchhi had not been mentioned.

22. PW2 Tejaram is another alleged eye witness, who has stated the same thing as stated by PW1 Dharma Ram and in cross-examination, he has further admitted that PW1 Dharma Ram is his nephew in relation. He has further admitted that when he went to call PW19 Nemaram from the field, he told the whole incident to PW19 Nemaram in the field and at that time, PW19 Nemaram was alone in the field.

23. it may be stated here that evidence of interested witnesses cannot be discarded on the sole ground of interestedness, but their evidence should be subjected to a close scrutiny. Interested witnesses are not necessarily false witnesses.

24. Whether a particular witness is an eye witness or not, the Court has to adhere to the following two principles, as held by the Hon'ble Supreme Court in State of U.P. Vs. Smt. Noorie alias Noor Jahan and others,

- (i) Whether it was possible for witnesses to be present, and
- (ii) whether there was anything inherently improbable or unreliable.

In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise

their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence.

25. In the present case, since the names of PW1 Dharma Ram and PW2 Tejaram were mentioned in the report Ex.P/43, which was lodged by PW19 Nemaram within three hours of the alleged occurrence, therefore, to say that their names have been falsely mentioned as eye witnesses only with a view to falsely implicate the accused appellants, cannot be accepted.

26. Apart from this, from reading the statements of PW1 Dharma Ram and PW2 Tejaram, their presence at the place of occurrence appears to be natural one and there was nothing to suggest that they were not eye witnesses. Furthermore, their statement on the point that the accused appellants Sahiram and Mahaveer Singh caused injuries to the deceased from back side of barchhi, as a result of which he fell down on the earth and thereafter, they also beat him gets corroboration from the medical evidence and other evidence.

27. Thus, the statements of PW1 Dharma Ram and PW2 Tejaram on the point that the accused appellants Mahaveer Singh and Sahiram caused injuries on the head and other parts of body of deceased from back side of barchhi appear to be straight forward, reliable and trustworthy as it gets corroboration from medical and other evidence.

28. No doubt in the report Ex.P/43 lodged by PW19 Nemaram, it was not mentioned that accused appellants Sahiram and Mahaveer Singh caused injuries from the back side of barchhi, but since that report Ex.P/43 was lodged by PW19 Nenaram and not by PW1 Dharma Ram and PW2 Tejaram and they have categorically stated that the accused appellants Sahiram and Mahaveer Singh caused injuries on the head of the deceased from back side of the barchhi, as a result of which he fell down on earth and thereafter, they also beat him and that part of their statements gets corroboration from medical evidence and other evidence, therefore, in these circumstances, if it was not mentioned in the report Ex.P/43 that the accused appellants Sahiram and Mahaveer Singh caused injuries to the deceased from the back side of barchhi and only it was mentioned that the accused appellants Sahiram and Mahaveer Singh caused injuries to the deceased by barchhi, it would not affect the testimony of PW1 Dharma Ram and PW2 Tejaram on the point that the accused appellants Sahiram and Mahaveer Singh caused injuries on the head and other parts of body of deceased from back side of barchhi, as that part of their statements gets corroboration from medical as well as other evidence.

29. Thus, the argument that PW1 Dharma Ram and PW2 Tejaram should not be regarded as eye witnesses stands rejected and from their statements, it is well established that the accused appellants Sahiram and Mahaveer Singh caused main injuries on the head and other parts of the body of the deceased, which resulted in various fractures.

30. Therefore, the participation of accused appellants Sahiram and Mahaveer

Singh in causing injuries to the deceased on head and other parts of body is well proved by the prosecution.

Cases of rest accused appellants, namely, Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand.

31. From the statements of eye witnesses PW1 Dharma Ram and PW2 Tejaram, it is not clear as to on which part of the body of the deceased, these accused appellants, who are six in number, caused injury and their statements are omnibus on the point that these six accused appellants caused injuries to the deceased and if these six accused appellants would have caused injuries on the body of the deceased, atleast there must have been eight injuries, but as per post mortem report, deceased received 5 injuries meaning thereby these six accused appellants did not cause injury to the deceased.

32. Apart from this, even PW17 Rajesh Kumar Sharma, who was 10 in this case, has further admitted that it was correct to say that accused appellants Lal Singh, Gajanand and Hukamchand did not take part in beating deceased.

33. Therefore, the statements of PW1 Dharma Ram and PW2 Tejaram on the point that these six accused appellants also caused injuries to the deceased cannot be accepted.

34. It may be stated here that the maxim "falsus in uno falsus in omnibus" has not received general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony may be disregarded and not that it must be disregarded.

35. The maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) is neither a sound rule of law nor a rule of prudence. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinize the evidence carefully and in terms of the felicitous metaphor, separate the grain from the chaff.

36. Thus, it is well settled that evidence of a witness need not necessarily be true in all respects. It may be partly true and partly untrue and the said maxim "falsus in uno falsus in omnibus" is not applicable in India and it is open to the Court in India to accept a part of evidence of a witness while rejecting the rest of it,

37. Thus, while accepting that part of the statements of eye witnesses PW1 Dharma Ram and PW2 Tejaram in respect of accused appellants Sahiram and Mahaveer Singh being corroborated by medical and other evidence, their remaining part of statements with respect of rest accused appellants is rejected and it is held that the accused appellants, namely, Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand did not cause any injury of the body of the deceased.

38. Now the question for consideration is whether in view of the fact that though the names of accused appellants, namely, Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand are found in the report Ex.P/43 lodged by PW19 Nemaram, but actually they did not beat and cause any injury on the body of the deceased, in such a situation, they could be convicted for the offence u/s 302 IPC with the aid of Section 149 IPC or not or whether before accused appellants Sahiram and Mahaveer Singh gave barchhi blows from its back side on the head and other parts of the body of deceased, they had formed unlawful assembly, the common object of which, was to murder deceased or not.

39. Before recording a conviction u/s 147 or 148 IPC and applicability of Section 149 IPC, the following essential ingredients must be satisfied by the prosecution:-

- (i) That five or more persons were assembled.
- (ii) That such assembly was unlawful when it was convened or subsequently became unlawful, having any one of the five objects specified in Section 141.
- (iii) That such object was the common object of those composing such assembly.
- (iv) That the accused, or any member of such unlawful assembly, used force or violence.
- (v) That such force or violence was used in the prosecution of such common object.
- (vi) That the accused was armed with a deadly weapon, or with something which was likely to cause death, when used as a weapon of offence.

40. Section 149 IPC creates a specific offence and deals with the punishment of that offence. Section 149 IPC makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. The section creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly.

41. It is well settled that mere presence of persons does not make them members of unlawful assembly. For that two decisions of the Hon''ble Supreme Court in Baladin and Others Vs. State of Uttar Pradesh, and Bishambher Bhagat and Others Vs. State of Bihar, may be referred to.

42. When there is unlawful assembly, at that time, it becomes difficult for the witnesses to describe accurately the part played by each one of the assailants and thus, in such cases, criminal courts have to do their best in dealing with such cases and duty is cast upon the criminal court to sift the evidence carefully and decide which part of it is true and which is not. For that, the decision of the Hon''ble Supreme Court in Masalti Vs. State of U.P., may be seen.

43. Before recording conviction with the aid of Section 149 IPC, act done by each of the accused must be shown to have been committed to accomplish common

object. For that the decision of the Hon''ble Supreme Court in Allauddin Mian and Anr. v. State of Bihar : AIR 1989 SC 1456, may be seen. Thus, if there is no participation, then no liability can be fastened.

44. For the purpose of application of Section 149, the prosecution has to prove the presence and participation of each of the accused in unlawful assembly, as held by the Hon''ble Supreme Court in Nallamsetty Yanadaiah and others Vs. State of Andhra Pradesh,

45. It is settled law that mere presence of a person at the place where the members of unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion. Whether a person was or was not a member of unlawful assembly is a question of fact.

46. When no party attacks the members of the opposite party at the commencement of the occurrence and there is no evidence regarding formation of unlawful assembly with a particular common object and the fight takes place without premeditation, it can be said to be a sudden fight and no unlawful assembly can be said to have been formed in such cases and the accused cannot be convicted u/s 149 IPC. All the persons must be held responsible for their individual acts and not vicariously liable for acts of others.

47. In the case of groups rivalries and enmities it often happens that there is a general tendency to rope in as many persons as possible as having participated in an assault. The courts have, therefore, to be very careful and if after a close scrutiny of the evidence, a reasonable doubt arises with regard to the participation of any of those who have been roped in, the courts should give the benefit of doubt to them.

48. Keeping the above principles in mind, the present case is being critically examined on the point whether Section 149 IPC has been rightly applied by the learned trial Judge or not or whether each accused appellant was a member of unlawful assembly, the common object of which, was to murder deceased or not.

49. It may be stated here that in the present case, from the evidence on record, it appears that there is enmity between the accused party and the complainant party. In a case where there is enmity between two factions, then there is a tendency on the part of the aggrieved victim to give an exaggerated version and to rope in even innocent member of opposite faction in a criminal case. Therefore, duty is cast on the court to sift the evidence carefully and convict only those persons against whom prosecution witnesses can be safely relied, upon without raising any element of doubt.

50. In our considered opinion, looking to the entire facts and circumstance of the case, just stated above, the finding of the learned trial Judge that Section 149 IPC was applicable in the present case does not appear to be correct one as all the accused appellants might be present on the scene, but only two accused

appellants, namely, Sahiram and Mahaveer Singh caused injuries to the deceased on the head and other parts of the body from back side of barchhi and the rest accused appellants, namely, Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand did not take part in the alleged incident and did not cause any injury on the body of the deceased and therefore, participation of each accused appellant was missing in the present case and when this being the position, it cannot be said that they formed unlawful assembly, the common object of which was to murder deceased.

51. In *Sukhan Raut and Others Vs. State of Bihar*, the Hon"ble Supreme Court observed that only accused who caused the injury and the one who instigated him to inflict injury can be held to share a common intention and not other persons.

52. In the present case, the fact that the accused appellants Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand instigated accused appellants Sahiram and Mahaveer Singh to inflict injury on the deceased was also missing. Therefore, from every point of view, mere presence or existence of accused appellants Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand at the place of occurrence would not make them members of unlawful assembly, the common object of which, was to murder deceased and thus, the charge for the offence u/s 149 IPC cannot be said to be have been proved by the prosecution as prosecution has failed to prove that there was unlawful assembly, the common object of which was to murder deceased and therefore, the accused appellants cannot be convicted with the help of Section 149 IPC and consequently, they are also entitled to acquittal for the offence u/s 148 IPC. Thus, each accused appellant would be liable for the injury caused by him.

53. Hence, the findings of the learned Trial Judge convicting the accused appellants with the help of Section 149 1PC cannot be sustained and further, the findings of conviction recorded by the learned trial Judge for the offence under Sections 302/149 and 148 IPC against the accused appellants Gajanand, Sukha Ram, Sita Ram, Dula Ram, Lal Singh and Hukmi Chand and for the offence u/s 148 IPC against the accused appellants Sahiram and Mahaveer Singh cannot be sustained and liable to be set aside and they are entitled to acquittal for the said offences.

54. So far as the accused appellants Sahiram and Mahaveer Singh are concerned, there is ample evidence in this case that they were present on the scene, their names were found in the report Ex.P/43 and both the star eye witnesses, namely, PW1 Dharma Ram and PW2 Tejaram have also narrated their names and not only this, they have categorically stated that they caused injuries on the head of the deceased and other parts from the back side of barchhi. Therefore, presence of the accused appellants Sahiram and Mahaveer Singh on the scene cannot be doubted in any manner and the prosecution has been able to prove the fact that the injuries to the deceased as mentioned in the post

mortem report Ex.P/39 were caused by the accused appellants Sahiram and Mahaveer Singh.

55. The next question for consideration is whether by giving barchhi blows from back side on the head of the deceased and other parts of body, the accused appellants Sahiram and Mahaveer Singh have committed the offence punishable u/s 302 IPC or not.

56. In our considered opinion, looking to the entire facts and circumstances of the case and the facts that the accused appellants Sahiram and Mahaveer Singh gave barchhi blows from back side on the head of the deceased, which is a vital part of the body and as a result of which he fell down on the earth and thereafter, they also beat him, as a result of which, deceased received various fractures including on head, it can reasonably be presumed or gathered that the accused appellants Sahiram and Mahaveer Singh were having no other intention except to cause murder of the deceased and therefore, the act of the accused appellants Sahiram and Mahaveer Singh would amount to culpable homicide amounting to murder punishable u/s 302 IPC and thus, they are liable to be convicted for the offence u/s 302 IPC instead of 302/149 IPC and therefore, the findings of the learned trial Judge convicting the accused appellants Sahiram and Mahaveer Singh are liable to be altered in the manner that they are liable to be convicted u/s 302 IPC instead of 302/149 IPC.

57. It maybe stated here that no doubt there was a constructive charge against all the accused appellants including the accused appellants Sahiram and Mahaveer Singh for the offence u/s 302 read with Section 149 IPC, but since the accused appellants Sahiram and Mahaveer Singh inflicted the injuries on the head and other parts of body of deceased, therefore, the accused appellants Sahiram and Mahaveer Singh could be convicted u/s 302 IPC simplicitor while acquitting other accused appellants for the offence u/s 149 IPC and for that, the decision of the Hon''ble Supreme Court in Hem Raj Vs. The State (Delhi Administration), may be referred to.

58. The argument that the act of the accused appellants Sahiram and Mahaveer Singh does not travel beyond the offence u/s 325 or at the most 304 Part-II IPC cannot be accepted as they caused grievous injuries on the head of the deceased, which is a vital part of the body and thereafter, when deceased fell down on the ground, they also beat him, as a result of which, deceased received various fractures including on head and these facts clearly reveal that the accused appellants Sahiram and Mahaveer Singh were having intention to cause murder of deceased.

59. For the reasons stated above, the findings of conviction recorded by the learned Sessions Judge for the offence under Sections 302/149 and 148 IPC against the accused appellants Gajanand, Sukha Ram, Sita Rani, Dula Ram, Lal Singh and Hukmi Chand cannot be sustained and further, the findings of conviction for the offence u/s 148 IPC against the accused appellants Sahiram

and Mahaveer Singh cannot be sustained and the findings of conviction for the offence u/s 302/149 IPC against the accused appellants Sahiram and Mahaveer Singh are liable to be altered in the manner that they are liable to be convicted u/s 302 IPC simplicitor instead of 302/149 IPC and this appeal deserves to be partly allowed,

60. Accordingly, this appeal filed by the accused appellants is partly allowed in the following manner:-

(1) That the convictions and sentences of the accused appellants Gajanand, Sukha Ram, Sita Ram, Dula Ram @ Duli Chand, Lal Singh and Hukmi Chand @ HukmaRam for the offences under Sections 148 and 302/149 IPC passed by the learned Sessions Judge, Churu through impugned judgment and order dated 14.12.2001, are set aside and they are acquitted of the said charges. Since they are in jail, they be released forthwith, if not required in any other case.

(2) That the conviction and sentence of the accused appellants Sahiram and Mahaveer Singh for the offence u/s 148 IPC passed by the learned Sessions Judge, Churu through judgment and order dated 14.12.2001 are set aside and they are acquitted of the said charge. But, so far as their conviction for the offence u/s 302/149 IPC recorded by the learned Sessions Judge through impugned judgment dated 14.12.2001 is concerned, the same is altered in the manner that they are convicted u/s 302 IPC in place of 302/149 IPC, but the sentence of imprisonment of life imposed upon them by the learned Sessions Judge through order of sentence dated 14.12.2001 is maintained. The judgment and order dated 14.12.2001 passed by the learned Sessions Judge, Churu stand modified accordingly to the extent indicated above.