

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.**

**Cr. Appeal No. 4139 of 2013 with Cr. Appeal  
Nos. 4173, 4197 of 2013 & 283 of 2014.**

**Reserved on: July 30, 2015.**

**Decided on: July 31, 2015.**

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**1. Cr. Appeal No. 4139 of 2013**

Hem Raj .....Appellant.  
Versus  
State of H.P & ors. ....Respondents.

**2. Cr. Appeal No. 4173 of 2013**

Ravinder Kumar alias Ravi & ors. ....Appellants.  
Versus  
State of H.P. ....Respondent.

**3. Cr. Appeal No. 4197 of 2013**

Sanjeev Kumar .....Appellant.  
Versus  
State of H.P. ....Respondent.

**4. Cr. Appeal No. 283 of 2014**

Pane Ram .....Appellant.  
Versus  
State of H.P. ....Respondent.

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*Coram*

***The Hon'ble Mr. Justice Rajiv Sharma, Judge.***

***The Hon'ble Mr. Justice Sureshwar Thakur, Judge.***

***Whether approved for reporting? <sup>1</sup> Yes.***

**For the appellant(s):** M/S. J.L.Bhardwaj, Anup Chitkara and Vivek Sharma,  
Advocates for respective appellants.

**For the respondent/State:** Mr. Ramesh Thakur, Asstt. Advocate General.

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**Justice Rajiv Sharma, J.**

Since all the appeals have arisen from a common judgment, the same were taken together for hearing and are being disposed of by a common judgment.

2. These appeals are directed against the common judgment and order dated 3.8.2013 & 20.8.2013, respectively, rendered by the learned

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**1** <sup>1</sup> Whether reporters of the local papers may be allowed to see the judgment?

Addl. Sessions Judge(I), Mandi, H.P., in Sessions Trial No. 28 of 2011, whereby the appellants-accused (hereinafter referred to as “accused”), who were charged with and tried for offences punishable under Sections 341, 323, 506, 427, 147, 148, 149, 364, 302 and 201 IPC and Section 25 of Arms Act, each of them were convicted and sentenced to undergo sentence for life imprisonment and to pay fine of Rs. 5,000/- for the offence under Section 302 read with Section 149 IPC; simple imprisonment for one year and fine of Rs. 1,000/- each for offence under Section 148 IPC read with Section 149 IPC; simple imprisonment for six months under section 341 IPC read with section 149 IPC; simple imprisonment for ten years and fine of Rs. 1,000/- each for offence under section 364 IPC read with Section 149 IPC; simple imprisonment for two years under Section 506 read with Section 149 IPC. Accused Hem Raj was also sentenced to undergo simple imprisonment for three months and to pay fine of Rs. 500/- for the offence under Section 25 of the Arms Act. In the case of default of payment of fine, each of the accused was further ordered to undergo simple imprisonment for six months. The substantive sentences were ordered to run concurrently. The period of detention undergone by each of the convict was set off as per the provisions of Section 428 Cr.P.C.

3. The case of the prosecution, in a nut shell, is that on 14.7.2011, information was given by unknown person to the Police Station Aut, to the effect that a quarrel was going on at place rafting point at Jhiri. The police went to the spot. HC Raj Mal, recorded the statement of the complainant

Ravi Kumar son of Daya Nand. According to the complaint, on 14.7.2011, he alongwith Parvesh Kumar and Kala-Hunny came from Vor Majara from the house of Hunny in his vehicle bearing registration No. HR-12-R-5533 in the morning at 3:00 AM. At 2:00 PM, when they reached near Jhiri Rafting point, they stopped their vehicle and some boys came in front of their vehicle and started dancing. They wrongfully restrained them and gave them beatings. Hunny took the vehicle towards Kullu and thereafter his vehicle was chased by accused persons in vehicle No. HP-33-T-9658, in which 4-5 persons were sitting. They brought back Hunny alongwith his vehicle to Rafting point, where one boy attacked Hunny with sword. Hunny ran towards river and they remained hiding in the bushes. FIR No. 99/11 dated 14.7.2011 was registered for the offence under Sections 341, 323, 506 read with Section 34 IPC. Accused Sarvan Kumar, Sanjeev Kumar and Ravinder Kumar were arrested on 14.7.2011 at Jhiri. Hunny succumbed to his injuries in R.S. Hospital, Kullu. The post mortem was got conducted. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 20 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, these appeals on behalf of the accused persons.

5. M/S. J.L.Bhardwaj, Anup Chitkara and Vivek Sharma, Advocates for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt AG, for the State has supported the judgment of the learned trial Court dated 3/20.8.2013.

6. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

7. PW-1 Dr. R.M.Gautam has conducted the medical examination of Hunny son of Balraj on 14.7.2011. He noticed the following injuries on his person:

“1. Stab injury on the left thigh 10 cm above knee joint through and through posterior to anterior object caused by sharp weapon.

2. Patient complained of pain in the abdomen. Focus abdominal sonography for trauma showed minimum fluid collection in right hepatorenal pouch.”

According to his opinion, the injuries were grievous and dangerous to life. He issued MLC Ext. PW-1/B. According to his final opinion, the patient died due to excessive bleeding leading to hemorrhagic shock, injury to intestines and hypothermia. In his cross-examination, he deposed that the patient was not in a position to walk or talk. The loss of blood was to the extent of two liters. One large artery and 2-3 adjoining veins were also cut.

8. PW-2 Ganga Ram deposed that Dr. Nidhi Sharma had sealed the clothes, namely, jean pant, shirt and undershirt of Hunny in his presence in a cloth parcel with seal 'BEMCO' on 14.7.2011. These were handed over to the police vide memo Ext. PW-2/A.

9. PW-4 Mani Devi deposed that she went to the spot alongwith Patwari Hem Singh, police, Sanjay and Hem Raj on 17.7.2011. The place was identified by Sanjay and Hem Raj.

10. PW-5 Hem Singh has issued copies of jamabandi Ext. PW-5/D and Ext. PW-5/E. The police had picked up blood from the stones and grass (moss) with the help of cotton and water vide seizure memo Ext. PW-5/A. He also prepared the spot map vide Ext. PW-5/B and PW-5/C.

11. PW-7 Dr. Rakesh Thakur has conducted the post mortem of the deceased on 15.7.2011 at 2:00 PM. According to him, injury No. 1 was incised wound on left side thigh and injury No. 2 was incised wound on left thigh posterior aspect at lower 1/3<sup>rd</sup>. In their opinion, the person died due to excessive blood loss leading to shock and death. The time between injury and death was 10-12 hours and between death and postmortem was 12 hours. The post mortem report is Ext. PW-7/B. An application vide Ext. PW-7/C was filed for seeking his opinion whether the injury noticed by them could be caused by weapon of offence. According to him, the injuries mentioned in the report were possible with the sword shown to him. In his cross-examination, he deposed that the injury noticed by him was ante

mortem and operative injury. He has noticed two incised wounds on the thighs.

12. PW-8 HHC Suresh Kumar deposed that a vehicle bearing regn. No. HR-12-R 5533 was parked on the spot. It was damaged. There were blood stains on the left and right side. Hem Raj, one of the accused made statement under Section 27 of the Indian Evidence Act that he could get the sword recovered from Jhiri, which was concealed by him in the bushes above NH-21. It was taken into possession vide memo Ext. PW-8/E. Pane Ram produced the shirt worn by him before the SHO on 16<sup>th</sup> and disclosed that it belongs to Sanjeev Kumar. It was stained with blood. Sanjeev Kumar and Hem Raj were taken to Rafting point on 17<sup>th</sup>. Sanjeev Kumar disclosed that he could get recover the stick from the bushes. Police officials searched for it in the bushes. The stick was recovered from the bushes. It was taken into possession vide seizure memo Ext. PW-8/K. Ravinder alias Ravi made a statement before the SHO on 18<sup>th</sup> that he had washed the vehicle at Rafting point. He showed the place and site plan was prepared. The blood from the spot was preserved. The team of RFSL also preserved the blood from the Van HP-33(T) 9658. The pieces of floor mat were also cut by them. These were taken into possession vide memo Ext. PW-8/O. Pane Ram made statement before the SHO that he could show the place from where shirt was thrown in the river. Accused showed the place where he had thrown the shirt. He identified sword Ext. P-2.

13. PW-9 Const. Desh Raj has taken photographs Ext. PW-9/A-1 to Ext. PW-9/A-7.

14. PW-11 HC Khem Chand deposed that a telephonic call was received from Jhiri Rafting point at about 3:30 PM that a quarrel was taking place. He sent HC Raj Mal, PSI Chand Kishore, HHC Suresh Kumar and Const. Prem Kumar to the spot for verification. FIR Ext. PW-11/A was recorded. The case property was handed over to him. The case property was sent for chemical examination.

15. PW-13 HHC Uday Chand has taken the case property to RFSL, Gutkar.

16. PW-15 Ravi Kumar is the material witness. He testified that at 2:00 PM they reached at Jhiri Rafting point. They stopped there. The music was on. 5-6 local boys came there and started dancing in front of their vehicle. They insisted to play music of their choice. When they objected, the local boys started quarreling and gave beatings to them. They tried to leave the place and Hunny was driving the vehicle but those boys again gave beatings to Hunny. Hunny left the place with vehicle. They came on foot towards Kullu. Those boys chased Hunny towards Manali in vehicle No. HP-33-T-9658. They caught hold of Hunny and brought him back to the same place. In the meantime, Hem Raj came there running in addition to 5-6 boys and he gave sword blow on thighs of Hunny. Hunny, out of fear, ran towards the river. He jumped into the river. They remained hiding in the bushes. Sanjeev came with the vehicle at Jhiri rafting point. Pane Ram

started quarrel and Ravinder, Raju, Dinesh and one other boy was helping them. Local people took Hunny out of the river. He was unconscious. He was taken to hospital. His statement was recorded by the police vide memo Ext. PW-8/D. The sword was recovered at the instance of the accused. The cover of the sword was also recovered. In his cross-examination, he admitted that he did not know the accused nor there was any enmity between them. He also admitted that when the person came with sword, they made no efforts to stop him. 10-15 persons were witnessing the incident.

17. PW-16 Sujeet Kumar has corroborated the statement of PW-15 Ravi Kumar. According to him, they came to Manali for sightseeing. They reached Jhiri at 2. Some boys were dancing and they started quarreling with them. When Hunny went towards Manali, the boys chased him. They brought back Hunny. The vehicle was driven by Sanjeev Kumar. Hem Raj came there and took out sword which he had hidden under shirt of his back and gave blow on thigh of Hunny. He identified accused in the Court. The other co-accused gave beatings to Hunny. Hunny jumped into the river. The police came on the spot after 15-20 minutes. The vehicles were taken into possession. The blood stained pieces of seat cover from the vehicle of Hunny were taken into possession vide memo Ext. PW-8/B. Hem Raj gave statement about hiding of sword. Sword was recovered at the instance of accused. It was taken into possession vide memo Ext. PW-8/E. In his



cross-examination, he admitted that earlier to the alleged date of occurrence, accused were not known to him.

18. PW-19 HC Rajmal has recorded the statement of Ravi Kumar under Section 154 Cr.P.C. vide memo Ext. PW-15/A. In sequel to Ext. PW-15/A, FIR Ext. PW-11/A was registered. Vehicle bearing regn. No. HR-12 R 5533 was taken into possession by the police. Blood stains, with the help of blade lying on the back seat of the vehicle, were taken into possession by the police in the presence of witnesses HHC Suresh Kumar and Ravi Kumar. Vehicle bearing regn. No. HP-33 T 9658 was also taken into possession.

19. PW-20 SI Ranjeet Singh deposed that on 15.7.2011, Hem Raj gave statement under Section 27 of the Indian Evidence Act and disclosed about the sword which he had kept in the bushes near upper side of the road. Hem Raj got the sword recovered. Rough sketch of sword Ext. PW-8/F was prepared. He handed over the case property to MHC. The accused were interrogated and on the basis of which, the police recovered the blood stained clothes of the accused. Accused Sanjeev Kumar got recovered stick (danda) from the bushes. The accused were arrested by the police.

20. The case of the prosecution, precisely, is that PW-15 Ravi Kumar and PW-16 Sujeet Kumar along with Parvesh were going to Manali. They had stopped at Rafting point at Jhiri. They were playing music. The local boys started dancing in front of their vehicle. They insisted that the music of their choice be played. It led to quarrel. Hunny (deceased) went in his vehicle towards Kullu. He was chased by the accused and brought back

to the same spot in the vehicle by Sanjeev Kumar. In the meantime, accused Hem Raj also reached on the spot with sword. He inflicted sword blows on the thighs of the deceased. The deceased ran towards the river and jumped into it. He was taken out from the river by local people. He was also taken to hospital where he succumbed to his injuries.

21. PW-1 Dr. R.M.Gautam, deposed that the injuries received by the deceased were grievous and dangerous to life. He issued MLC Ext. PW-1/B. According to him, injury No. 1 was possible by piercing sword Ext. P-2 in thigh and injury No. 2 could be caused with a blunt weapon like fist blows. PW-7 Dr. Rakesh Thakur has also noticed two injuries while conducting the post mortem. According to him injury No. 1 was incised wound left side thigh and injury No. 2 was incised wound left thigh posterior aspect at lower 1/3<sup>rd</sup>. He also noticed small punctured wound on right side of the chest. According to his opinion, the person died due to excessive blood loss, leading to shock and death. PW-7 Dr. Rakesh Thakur also deposed that one of the tributaries of an artery was bleeding even after surgery. The injuries received by the person were ante mortem. According to him, the injuries noticed by them in the post mortem report could be caused by sword Ext. P-2 and the injury noticed on the stomach was possible with blunt object hit forcefully. Accused Hem Raj has made disclosure statement vide Ext. PW-8/E. He got the sword recovered. The police has taken into possession other case property, including two vehicles bearing registration Nos. HR-12-R-5533 and HP 33-T-9658. The blood samples were also taken. The case

property was handed over to PW-11 HC Khem Chand. He sent the same to RFSL, Gutkar, Mandi, through PW-13 HHC Uday Chand.

22. PW-15 Ravi Kumar and PW-16 Sujeet Kumar are the eye witnesses. They have categorically deposed that quarrel had taken place at Jhiri. Hunny took the vehicle towards Kullu. He was chased by the accused persons. He was brought back to Jhiri. Hunny was given beatings by the accused. Hem Raj also gave sword blows on the thighs of Hunny. Hunny ran towards the river. He jumped into the river. They were hiding in the bushes. Hunny was taken out from the river by the local people. He was then taken to hospital. However, both of them had deposed that they did not know the accused before the incident.

23. It has come in the statements of PW-1 Dr. R.M.Gautam and PW-7 Dr. Rakesh Thakur that Hunny died due to excessive loss of blood. According to PW-7 Dr. Rakesh Thakur, injury No. 1 could be caused with the sword Ext. P-2. Injury No. 2 could be caused with fist blows, as per PW-1 Dr. R.M. Gautam. According to PW-7 Dr. Rakesh Thakur, the injury on the stomach could be caused with blunt object, if hit forcefully. We have already noticed that besides the sword blows given by Hem Raj on the thigh of deceased, all the accused have beaten Hunny (deceased) leading to his death. The accused were identified by PW-15 Ravi Kumar and PW-16 Sujeet Kumar. The recovery of the sword was effected on the basis of disclosure statement made by Hem Raj accused. The same was also having blood stains as per the FSL report. The human blood was found on Ext. 5a (vest

of Hunny), Ext. 9 (shirt), Ext. 10b (moss lifted from stone on the bank of river) but the results were inconclusive in respect of blood groups. The blood was also found in traces on the resin seat cover of the vehicle but was insufficient for further examinations.

24. The accused persons chased the deceased and brought him back to the same place where he was beaten up and accused Hem Raj gave sword blows on his thighs. He was brought back to the same place where he was beaten up by the accused. Their lordships of the Hon'ble Supreme Court in the case of ***State of West Bengal vrs. Mir Mohammad Omar and others etc. etc.***, reported in ***AIR 2000 SC 2988***, have held that repeated chase given by abductors to victim would bring the case within the ambit of Section 364 IPC, more particularly, with the temper which abductors exhibited while searching the accused broadly indicative of fact that they went at that place with some definite purpose. It has been held as follows:

“15. First is, even in the FIR PW-5 had quoted those words as spoken to by A-1. It must be noted that when FIR was given PW-5 had no reason to believe that Mahesh was not alive. If Mahesh had come back alive it is doubtful whether police would have seriously followed up the FIR. Next is, the temper which the assailants exhibited in the house of the deceased's sister (when she was the sole inmate present therein), is broadly indicative of the truculence of the intruders that they went there with some definite purpose. Mahesh was once caught by them on that night itself by PW-4 and then he was badly handled by them. If their intention was only to inflict some blows on the victim they would have stopped with what they did to him at that stage. But when Mahesh struggled and extricated himself from their clutches and escaped to another place at Giri Babu Lane these accused did not stop and they persisted in prowling for their prey and succeeded in tracing him out from that different area and hauled him out violently. Such repeated chase for Mahesh could, in all probabilities, be for his blood. Thus, all the broad features of this case eloquently support the version of the

witnesses to conclude that the words attributed to the accused were really uttered by them.

16. For the aforesaid reasons, we have no difficulty to conclude that all the accused abducted Mahesh in order to murder him.”

25. The prosecution has proved that the accused persons formed unlawful assembly and in prosecution of the common object of their unlawful assembly had wrongfully restrained Hunny. He was wrongfully restrained by the accused from moving towards Kullu. The accused have voluntarily obstructed him going towards Kullu. He was prevented from moving towards Kullu though he had a right to go towards Kullu. They have chased him in their Van and brought him back to Jhiri, where he was given sword blows by accused Hem Raj. Hunny was brought back to the spot by other boys in the vehicle which was driven by Sanjeev Kumar accused. The accused persons after forming the unlawful assembly with common object gave beatings to the deceased. The accused have threatened and beaten up the deceased and he jumped into the river. Threats were advanced by the accused persons to cause death/grievous hurt. It is not that the accused have given threats but infact have caused death of Hunny.

26. Their lordships of the Hon’ble Supreme Court in the case of ***Lalji and others vrs. State of U.P.***, reported in **(1989) 1 SCC 437**, have held that when the ingredients of Section 149 IPC are established, corroboration as to overt act or active participation of an accused-member of the unlawful assembly is not required. Their lordships have further held that for conviction under Section 302 IPC with the aid of Section 149, the relevant question to be examined by Court is whether the accused was a

member of unlawful assembly and not whether he actually took active part in the crime or not. Their lordships have further held that common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It has been held as follows:

“8. [Section 149](#) I.P.C. 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 the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in [Section 141](#) I.P.C., an assembly of five or more persons is designated an 'Unlawful Assembly', if the common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth', and 'Fifth' of that section. An assembly, as the explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm person of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in

prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in [Section 141](#) I.P.C. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. [Section 149](#) makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created 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. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person fails within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. 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](#). It must be noted that the basis of the constructive guilt under [section 149](#) is mere membership of the unlawful assembly, with the requisite common object or knowledge.

10. Thus, once the Court hold that certain accused persons formed in unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

13. In an appeal by persons convicted under [Section 302](#) with the aid of 149 [I.P.C.](#), the question whether a particular person was a member of that unlawful assembly at the relevant time may of course be examined; and if it is found from the evidence on record that he was not a member of the unlawful assembly, he could not be convicted with the aid of [section 149](#). The question to be examined by us in the instant case is whether Milkhi and Bhagwati were members of the unlawful assembly at the relevant time and not whether there was enough corroboration for their individual participation in the commission of the offence.

15. From the above evidence on record it could not be held that Milkhi and Bhagwati were not members of the unlawful assembly at the relevant time. Whether any specific injury could individually be attributed to them or not could not at all be material. The submission that the two be acquitted on ground of lack of corroboration has, therefore, to be rejected.”



27. In the instant case also, the accused formed the unlawful assembly and the object of the unlawful assembly was to commit the murder of Hunny. Accused chased Hunny and he was kidnapped and brought back to Jhiri. In the meantime, the accused have also informed Hem Raj to come to the spot. Hem Raj came to the spot with sword. Thus, the accused had kidnapped Hunny by bringing him back to the spot in order to kill him.

28. Their lordships of the Hon'ble Supreme Court in the case of ***Kaki Ramesh and others vrs. State of A.P.***, reported in **(1994) 4 SCC 397**, have held that for fastening of liability with the aid of Section 149 of the Penal Code, commission of overt act is not necessary. It has been held as follows:

“9.Both these submissions have no cutting edge. This is for the reason that for fastening of liability with the aid of [Section 149](#) of the Penal Code, commission of overt act is not necessary. This proposition in law is well settled. Even so, we would refer to the decision of this Court in [Sherey v. State of U.P.](#)<sup>1</sup> in which on the facts of that case this Court desired evidence of overt act to satisfy its mind about the involvement of appellants before it. The perusal of that judgment shows that this was felt necessary because the court was concerned with as many as 25 appellants who had been convicted under [Section 302](#) with the aid of Section 149. The genesis of the occurrence was a dispute between Hindus and Muslims relating to a place which the Hindus claimed as a cremation ground; whereas according to the Muslims, the same was their graveyard. On a Hindu dying his dead body was carried to the aforesaid place when the 25 appellants along with another came armed with lathis and assault took place. It was observed that in such a case to assure the mind of the court about presence of the person concerned as

a member of unlawful assembly, attribution of overt act 'is necessary. We do not read decision in *Sherey*<sup>1</sup> to have laid down that in every case under [Section 149](#) overt act has to be established.

11.As regards the two other appellants, we would observe the mere fact that only in the course of trial they had been named as those who had dragged the deceased out from inside the room, cannot create reasonable 1 1991 Supp (2) SCC 437 : 1991 SCC (Cri) 1059 401 doubt about these appellants having really done so on the face of clear statement in the FIR about dragging the deceased and naming of these two appellants also in the FIR as members of the unlawful assembly; who in particular had dragged the deceased was not required to be stated in the FIR.”

29. In the case of ***Ranbir Yadav vs. State of Bihar***, reported in **(1995) 4 SCC 392**, their lordships of the Hon'ble Supreme Court have held that it is sufficient if it is proved that the accused persons shared the common objects of the unlawful assembly and in furtherance of those common objects some members of that unlawful assembly committed offences attributed to them. It has been held as follows:

“46. In view of the above, interpretation given to [Section 149](#) IPC we need not delve into or decide the contention raised by Mr. Jethmalani that the evidence regarding the specific overt acts ascribed to each of the three appellants herein is not reliable, for the Courts below considered and accepted conclusively prove that all the three appellants shared the common object of the unlawful assembly to commit the offences of loot arson and murder and causing the disappearance of the evidence of murder and that in furtherance of those common objects some members of that unlawful assembly committed those offences for which the appellants are also liable to the convicted under [section 149](#)IPC. Even if we leave aside the evidence of Suresh Singh (P.W.46) who testified about the overt acts committed by all the three appellants,

of P.C. P.W.2 who spoke about the overt acts of appellants Pandav Yadav and Sukhdeo Yadav and of P.C. P.W.1 and P.W. 19 who deposed about the overt acts of Sukhdeo Yadav there are the testimonies of the other eye-witnesses, to whom reference has already been made, and found to be trustworthy, who identified the three appellants, besides others, as having been members of the unlawful assembly. Having sifted their evidence and considered the same in the backdrop of the events proceeding the incident that took place in the afternoon of 11.11. 1985 we find that the following conclusions are inevitable: (1) a mob of 500/600 people, most of whom belonged to Yadav community and were residents of different villages came to and attacked the neighbouring village Laxmiour Taufin Bind Toli to exterminate the Bind community :(ii) the three appellants who belong to Yadav community and are residents of three separate adjoining villages came on horse back armed with fire arms, and led the mob along with some, others; and(iii) the appellants were also amongst the rioters who chased the villagers and committed the murders at Tisrasia Dhad and the bank of the River.

47.In drawing the above conclusions we have taken note of the following passage from the judgment of this Court in., [Bajwa & Ors. v. State of UP](#). (1973) 3 S.C.R. 571 to which our attention was drawn by Mr. Jethmalani.

"The evidence through which we have been taken by the learned counsel at the bar has been examined by us with care and anxiety because in cases like the present where there are party factions, as often observed in authoritative decisions there is a tendency to include the innocent within the guilty and it is extremely difficult for the Court to guard against such a danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the Court. ([See Kashmira Singh vs. State of M.P.](#) and [Bhaban Sahu vs. The King](#)). In the case in hand, Do doubt the prosecution witnesses claiming to have seen the occurrence

have named all the appellants and the approver has even named those acquitted by the High Court., but in our view it would be safe only to convict those who are stated to have taken active part and about whose. identity there can be no reasonable doubt"

30. In the case of ***Yunis alias Karia etc. vrs. State of Madhya Pradesh***, reported in ***AIR 2003 SC 539***, their lordships of the Hon'ble Supreme Court have held that the presence of accused as part of unlawful assembly is sufficient for conviction. The fact that accused was a member of unlawful assembly and his presence at the place of occurrence has not been disputed, it is sufficient to hold him guilty even if no overt act is imputed to him. It has been held as follows:

"9. The learned counsel appearing for appellant - Liyaquat argued that no overt act is imputed to his client and he was being implicated only on the basis of [Section 149](#) IPC. This argument, in our view, has no merit. Even if no overt act is imputed to a particular person, when the charge is under [Section 149](#) IPC, the presence of the accused as part of unlawful assembly is sufficient for conviction. The fact that Liyaquat was a member of the unlawful assembly is sufficient to hold him guilty. The presence of Liyaquat has not been disputed."

31. Their lordships of the Hon'ble Supreme Court in the case of ***Amerika Rai and others vrs. State of Bihar***, reported in ***(2011) 4 SCC 677***, have held that even presence in unlawful assembly but with an active mind to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly under Section 149 IPC. It has been held as follows:

“13. The law of vicarious liability under [Section 149](#) IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. In that light, when the evidence is examined, it is obvious that Amerika Rai (A-1) who was the elder in the family and father of Darbesh Rai (A-2), Mithilesh Rai (A-4) and Chulhan Rai (A-3), instead of acting in a responsible manner and preventing any unpleasant incident, exhorted the accused persons to bring the gun. The guns are normally not brought for making a show. The exhortation to bring the gun definitely speaks about the guilty mind of Amerika Rai (A-1), so also the use of guns by Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6) is very clear that they also had guilty mind. Mithilesh Rai (A-4) went to the extent of injuring Dineshwar Rai (PW-7). Therefore, even their presence and part played by them was obviously pointing towards the common object of committing murder of Shankar Rai. Unfortunately, Shankar Rai became the victim of the circumstances. The accused persons had nothing to do with Shankar Rai. Their main ire was directed at Ram Babu (PW-6). But, perhaps because Shankar Rai took side of Ram Babu (PW-6), he became the victim of circumstances and had to pay with his own life. Therefore, at least insofar as these persons are concerned, their presence and their active participation would make them guilty under [Section 149](#) IPC, though the author of the injury to Shankar Rai was Chulhan Rai (A-3) whose appeal has already been dismissed.”

32. In the case of ***Waman and others vrs. State of Maharashtra***, reported in **(2011) 7 SCC 295**, their lordships of the Hon’ble Supreme Court have held that if members of unlawful assembly knew or were aware of likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149 IPC.

33. In the instant case, the accused after forming the unlawful assembly have restrained Hunny. They have kidnapped him by chasing him and bringing him back in the Van to Rafting point, Jhiri. He was criminally intimidated by the accused. The accused have constituted unlawful assembly in furtherance of common object and have beaten Hunny resulting

into his death. Accused Hem Raj has rightly been convicted under Section 25 of the Arms Act, being in possession of the sword.

34. Now, the moot question to be decided by this Court is whether the accused, more particularly accused Hem Raj, had the intention to kill the deceased. Accused Hem Raj has given sword blows on the thighs of the deceased, resulting into the injuries. The other accused have also beaten him up which resulted in injury on stomach of the deceased. However, it cannot be said that Hem Raj had intention to kill the deceased and if he had the intention to kill him, he would have given sword blow on the vital part of the body of the deceased instead of hitting him on the thighs. The other co-accused except Sanjeev Kumar were not armed with any weapon. Sanjeev Kumar was armed with stick which he got recovered. He has also not given any blow on the vital part of the body of the deceased. However, the fact of the matter is that all the accused had the knowledge that Hunny would die if he was collectively beaten up by them and the blow of sword could have caused grievous injuries. Thus, the case would fall under Section 304 (Part II) IPC read with Section 149 IPC, instead of Section 302 IPC read with Section 149 IPC.

35. In view of the observations and analysis made hereinabove, the appeals are partly allowed. The accused are convicted under Section 304 (part II) read with Section 149 IPC instead of Section 302 IPC read with Section 149 IPC. Their conviction and sentence under Section 148 IPC read with Section 149 IPC, 341 IPC read with Section 149 IPC, under Section 364

IPC read with Section 149 IPC and under Section 506 IPC read with Section 149 IPC and conviction of Hem Raj under Section 25 of the Arms Act are upheld. The accused be heard on the quantum of sentence for offence under Section 304 (part II) read with Section 149 IPC on 7.8.2015. The Registry is directed to prepare the production warrants and send the same to the concerned Superintendent of Jail for production of the accused on 7.8.2015.

( Rajiv Sharma ),  
Judge.

July 31, 2015,  
(karan)

( Sureshwar Thakur ),  
Judge.