Radha Mohan Singh @ Lal Saheb & Others vs State Of U.P on 20 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 951, 2006 (2) SCC 450, 2006 AIR SCW 421, 2006 (2) ALL LJ 242, 2006 (2) AIR JHAR R 92, (2006) 39 ALLINDCAS 31 (SC), 2006 (39) ALLINDCAS 31, 2006 (1) SCALE 369, 2006 ALL MR(CRI) 1172, (2006) 2 CTC 762 (SC), 2006 CRILR(SC MAH GUJ) 1 111, 2006 (1) SCC(CRI) 661, 2006 (2) CTC 762, 2006 (2) SRJ 561, (2006) 1 ORISSA LR 337, (2006) 1 RECCRIR 692, (2006) 1 SCALE 369, (2006) 1 SUPREME 371, (2006) 1 GCD 667 (SC), (2006) 1 CHANDCRIC 258, (2006) 2 EASTCRIC 63, (2006) 33 OCR 836, (2006) 3 SCJ 466, (2006) 2 BOMCR(CRI) 287, (2006) 54 ALLCRIC 862, (2006) 1 CRIMES 183, (2006) 2 ALLCRILR 214, (2006) 1 ALLCRIR 825, 2006 CRILR(SC&MP) 111, (2006) 37 ALLINDCAS 357 (CAL), (2006) SC CR R 1109, MANU/SC/589/2006, (2005) 3 CALLT 172, (2006) 1 CURCRIR 87, 2006 (2) ANDHLT(CRI) 93 SC, (2006) 2 ANDHLT(CRI) 93, 2006 (1) ALD(CRL) 414

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Bench: K.G. Balakrishnan, Arun Kumar, G.P. Mathur

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           CASE NO.:
Appeal (crl.)  1183-1185 of 2004

PETITIONER:
Radha Mohan Singh @ Lal Saheb & others

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 20/01/2006

BENCH:
K.G. BALAKRISHNAN, ARUN KUMAR & G.P. MATHUR

JUDGMENT:
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J U D G M E N T WITH CRIMINAL APPEAL NO. 1186 OF 2004 Kaushal Kishore Singh & another ... Appellants Versus State of U.P. ... Respondent G.P. Mathur, J.

These appeals by special leave have been preferred against the judgment and order dated 9.7.2004 of Allahabad High Court by which the appeal preferred by the appellants was dismissed and their conviction under Sections 147, 148 and 323, 324 & 302 all read with Section 149 IPC as recorded by

the learned Sessions Judge and the sentences awarded thereunder were affirmed. The appellants were awarded various terms of imprisonment on different counts including sentence of imprisonment for life under Section 302 read with Section 149 IPC.

2. According to the case of the prosecution the incident giving rise to the present appeals took place in Village Sivpur Deeyar Nai Basti in the district of Ballia. The first informant PW-1 Ganesh Singh was residing in the village while his elder brother Hira Singh (deceased) was carrying on business in Calcutta. Five days before the present incident, which took place on 14.3.1979, accused Radha Mohan Singh (A-1), Kaushal Kishore Singh (A-5) and some others had assaulted Udai Narain. PW-1 Ganesh Singh was a witness of the said incident and his statement had been recorded under Section 161 Cr.P.C. The deceased Hira Singh had come to his village home two days before the Holi festival which fell on 14.3.1979. A-1 and A-5 met the deceased and asked him to forbid his younger brother PW-1 Ganesh Singh from giving evidence against them in the criminal case relating to the assault made upon Udai Narain. The deceased, however, told them that as his brother had seen the incident, he would appear as a witness and would depose against them. The accused felt annoyed and threatened that they would teach him a lesson. On 14.3.1979, which was the Holi day, the first informant PW-1 Ganesh Singh and his brother deceased Hira Singh went to the houses of some people in the village for the purpose of 'Holi Milan', as was customary. By evening time they were going on the pathway in front of the house of Nand Kishore, when Radha Mohan Singh (A-1) armed with spear, Tej Bahadur Singh (A-2) and Kapil Dev Singh (A-3) armed with lathis, Devender Singh @ Mutuk Singh (A-4) armed with farsa and Kaushal Kishore Singh (A-5) armed with knife suddenly appeared there. A-1 assaulted Hira Singh with the spear and A-4 assaulted him with farsa and after receiving the injuries he fell down. When PW-1 Ganesh Singh tried to save him, A-2 and A-3 assaulted him with lathis. Two other persons who were also present there, namely, PW-3 Mohan Yadav and PW-6 Ram Pyari tried to intervene and save them but they were also assaulted by A-5 by knife and A-3 by lathi. The accused thereafter ran away from the seen of occurrence. Hira Singh was carried on a cot to the 'bandh', which was at the outskirts of the village and from there he was taken to the district hospital in a tempo where he was medically examined at 9.00 P.M. PW-1 Ganesh Singh was medically examined at 9.50 P.M. and the remaining two injured PW-6 Ram Pyari and PW-3 Mohan Yadav were examined at 11.30 A.M. on the next day. Ganesh Singh lodged a written report of the incident at 10.30 P.M. on the same night at P.S. Kotwali giving a complete version of the incident.

3. After completion of investigation charge sheet was submitted against all the five accused and the case was committed to the court of sessions. The learned Sessions Judge framed charges under Sections 147, 148 and 323, 324 and 302 all read with Section 149 IPC against the accused persons. The accused pleaded not guilty and came to be tried. In order to establish its case prosecution examined five eye witnesses, namely, PW-1 Ganesh Singh, PW-3 Mohan Yadav, PW-4 Ramji Singh, PW-5 Nand Kishore and PW-6 Ram Pyari. PW-1 Ganesh Singh, who is the first informant and had received injuries in the incident, gave complete version of the incident in his deposition in Court. His testimony was fully corroborated by PW-4 Ramji Singh, who was also named as an eye witness of the incident in the FIR. PW-3 Mohan Yadav, an injured witness, supported the prosecution case in his examination-in-chief and in cross-examination. As his cross-examination could not be completed it was continued on the next day when he stated that on account of darkness he could not

identify anyone. On the request of the learned State counsel, he was permitted to be cross examined. PW-5 Nand Kishore and PW-6 Ram Pyari did not support the case of the prosecution and they were declared hostile.

4. The learned Sessions Judge, after thorough examination of the evidence on record, held that the prosecution had succeeded in establishing the charges leveled against all the accused and accordingly convicted them under Sections 147, 148 and 323, 324 and 302 all read with Section 149 IPC and imposed sentence of various terms of imprisonment including life imprisonment under Section 302 read with Section 149 IPC. The appeal preferred by the appellants was heard by a Division Bench consisting of Hon'ble S.K. Agarwal and Hon'ble K.K. Misra, JJ. There was a difference of opinion between the two learned Judges. Hon'ble S.K. Agarwal, J. was of the opinion that the appeal should be allowed and the conviction of the appellants and the sentences imposed thereunder were liable to be set aside. Hon'ble K.K. Misra, J. was of the opinion that the appeal was liable to be dismissed and the conviction of the appellants and the sentences imposed by the learned Sessions Judge deserved to be upheld. In view of difference of opinion the appeal was placed for hearing before Hon'ble U.S. Tripathi J., who came to the conclusion that the appeal deserved to be dismissed. In accordance with the opinion of the learned third Judge the appeal was dismissed and the conviction and sentences imposed upon the appellants by the learned Sessions Judge were affirmed by the High Court.

5. During the pendency of the appeal in this Court Tej Bahadur Singh (A-2) died and his appeal has accordingly abated.

6. Dr. J.N. Dubey, learned senior counsel for A-4 and A-5, has submitted that the incident had taken place in darkness and the assailants could not be identified or seen by the prosecution witnesses and, therefore, the conviction of the appellants cannot be sustained. Learned counsel has submitted that PW-3 Mohan Yadav, who had received injuries in the incident, had admitted the said fact in his cross-examination and two other eye witnesses, viz., PW-5 Nand Kishore and PW-6 Ram Pyari had also not supported the prosecution case in their examination-in-chief itself and in such a situation no reliance could be placed on the testimony of the remaining eye witnesses to uphold the conviction of the appellants.

7. It is well settled that while hearing an appeal under Article 136 of the Constitution this Court will normally not enter into reappraisal or the review of evidence unless the trial court or the High Court is shown to have committed an error of law or procedure and the conclusions arrived at are perverse. The Court may interfere where on proved facts wrong inference of law is shown to have been drawn (see Duli Chand vs. Delhi Administration (1975) 4 SCC 649, Mst. Dalbir Kaur and others vs. State of Punjab (1976) 4 SCC 158, Ramanbhai Naranbhai Patel and others vs. State of Gujarat (2000) 1 SCC 358 and Chandra Bihari Gautam and others vs. State of Bihar JT 2002 (4) SC

62). Though the legal position is quite clear still we have gone through the evidence on record in order to examine whether the findings recorded against the appellants suffer from any infirmity. The testimony of PW-1 Ganesh Singh, who is an injured witness, and PW-4 Ramji Singh clearly establishes the guilt of the accused. According to the case of the prosecution the incident took place

shortly after sunset. The eye witnesses have deposed that after the incident the deceased Hira Singh was carried on a cot to the 'bandh', which is on the outskirts of the village. As no conveyance was available, the first informant had to wait for quite some time and thereafter a tempo was arranged on which the deceased was taken to the district hospital where he was medically examined by PW-2 Dr. Siddiqui at 9.00 P.M. It has come in evidence that the village is at a distance of six miles from police station Kotwali, Ballia. The non- availability of any conveyance is quite natural as it was Holi festival. Even PW-3 Mohan Yadav fully supported the prosecution case in his examination-in-chief. In his cross-examination, which was recorded on the same date, he gave details of the weapons being carried by each of the accused and also the specific role played by them in assaulting the deceased and other injured persons. As his cross-examination could not be completed it was resumed on the next day and then he gave a statement that he could not see the incident on account of darkness. His testimony has been carefully examined by the learned Sessions Judge and also by two learned Judges of the High Court (Hon'ble K.K. Misra,J. and Hon'ble U.S. Tripathi, J.) and they have held that the witness, on account of pressure exerted upon him by the accused, tried to support them in his cross-examination on the next day. It has been further held that the statement of the witness, as recorded on the first day including his cross-examination, was truthful and reliable. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. (See Bhagwan Singh v. State of Haryana AIR 1976 SC 202, Rabinder Kumar Dey v. State of Orissa AIR 1977 SC 170, Syed Akbar v. State of Karnataka AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh AIR 1991 SC 1853). The evidence on record clearly shows that the FIR of the incident was promptly lodged and the testimony of PW-1 Ganesh Singh, PW-4 Ramji Singh and also PW-3 Mohan Yadav finds complete corroboration from the medical evidence on record. We find absolutely no reason to take a different view.

8. Dr. J.N. Dubey, learned senior counsel for A-4 and A-5 has submitted that there was a difference of opinion between the two learned judges who had heard the appeal and Hon. S.K. Agarwal, J. was of the opinion that the prosecution had failed to establish the guilt of the accused and they were entitled to be acquitted. In these circumstances, the learned third Judge, to whom the appeal had been referred, should have leaned in favour of the view taken by Hon. S.K. Agarwal, J. as a rule of prudence and should not have differed from the findings recorded by His Lordship unless the same were perverse or there were strong and weighty reasons for doing so. We are unable to accept the contention raised. Section 392 Cr.P.C. lays down that when an appeal under Chapter XXIX is heard by a High Court before a Bench of judges and they are divided in opinion, the appeal with their opinions, shall be laid before another Judge of that Court, and that judge, after such hearing as he thinks fit, shall deliver his opinion and the judgment and order shall follow that opinion. In Babu & Ors. v. The State of Uttar Pradesh AIR 1965 SC 1467, Hidayatullah, J. (as His Lordship then was) speaking for the Constitution Bench held that Section 429 Code of Criminal Procedure, 1908 (which is same as Section 392 Code of Criminal Procedure, 1973) contemplates that it is for the third judge to decide on what point he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In Hethubha v. State of Gujarat AIR 1970 SC 1266, it was held that the whole case is to be dealt with by the third judge and not merely the difference

between the two judges comprising the Court of appeal and the third judge was free to resolve the differences as he thought fit. In State of Andhra Pradesh v. P.T. Appaiah AIR 1981 SC 365, there was a difference of opinion between two learned judges of the High Court on the nature of the offence committed by the accused. One learned judge held that the accused did not intend to cause death and consequently the offence committed by him was culpable homicide not amounting to murder punishable under Section 304 Part I IPC. The other learned judge held that the offence committed by the accused fell under clause Thirdly of Section 300 IPC and the accused was liable to be convicted under Section 302 IPC. The third learned judge, after examination of entire evidence on record, came to the conclusion that the same was doubtful and suspicious in character and accordingly acquitted the accused. In appeal filed by the State, it was contended before this Court that it was not open to the learned third judge to have acquitted the accused when both the learned Judges who heard the appeal initially were of unanimous opinion that the accused was guilty of having committed the offence and they had merely differed on the nature of offence committed by the accused. It was held that having regard to the language used in Section 429 Code of Criminal Procedure, 1908, the third judge to whom the case was referred did not over step the limits of his jurisdiction in acquitting the accused merely because there was concurrent finding of both the judges composing the Division Bench that the accused was guilty of some offence or that the difference between the two judges of the Division Bench was confined to the nature of the offence only.

9. A similar contention that the learned third judge should as a rule of prudence or on the principle of judicial etiquette lean in favour of the view taken by the learned judge who had recorded the opinion for acquittal of the accused was expressly repelled by a three- Judge Bench of this Court in Dharam Singh v. State of Uttar Pradesh 1964 (1) Crl.LJ 78 and it was observed as under :

> "All that S. 429 says is that the opinion of the two judges who disagree shall be laid before another judge who, after giving such hearing, if any, as he thinks fit, shall deliver his opinion and the judgment or order shall be in accordance with such opinion. Now it is obvious that when the opinions of the two judges are placed before a third judge he would consider those two opinions and give his own opinion and the judgment has to follow the opinion of the third judge. Consequently on that opinion is based the judgment of the court. For all practical purposes the third judge must consider the opinions of his two colleagues and then give his own opinion but to equate the requirements with appeals against acquittals is not justified by provisions of S. 429 or by principle of precedent.
>
> There is no warrant for the contention that the opinion of the judge acquitting the accused has to be treated in the same manner as the judgment of acquittal by the trial court and that the judgment should show that all the findings and reasons given in the opinion of the acquitting judge are mentioned in the opinion of the third judge and indicate the reasons for disagreeing with the opinion of the acquitting judge."

Similar view has been expressed in Tanviben Pankajkumar Divetia v. State of Gujarat 1997 (7) SCC 156 that the third judge is under no obligation to accept the view of one of the judges holding in

favour of acquittal of the accused either as a rule of prudence or on the score of judicial etiquette. This being the settled legal position it is not possible to accept the contention raised by the learned counsel for the appellant.

10. Shri R.K. Jain, learned senior counsel appearing for A-1 and A-3 has submitted that in the inquest report there was no mention of the names of the accused or the weapons used by them in commission of the crime and the nature of the injury sustained by the deceased had also not been described and there was a general recital that the death had occurred on account of injuries caused. Emphasis has also been laid on the fact that the time and date of lodging the FIR has been mentioned as "10 p.m. on 15.3.79", though the prosecution has come out with a case that the FIR had been lodged at "10 p.m. on 14.3.79". Learned counsel has thus submitted that these features show that the FIR had in fact not been lodged by the time the inquest was held and the same has been anti-timed. In our opinion the date of lodging the report has been wrongly written in the inquest report as "15.3.79 samai 10 baje raat (15.3.79 at 10 p.m.)". At the top of the inquest report the crime number and the sections (Crime No.193/79 under Section 147/148/149/323/302 IPC) have been mentioned. The time of commencement of the inquest is written as "7 a.m. on 15.3.79" and the time of conclusion of the inquest is written as "8.30 a.m. on 15.3.79". If the inquest had been concluded by 8.30 a.m. on 15.3.79, there was no occasion for writing the time of lodging of the FIR as "10 p.m. on 15.3.79" as the person preparing the inquest report could not have written anything about an event which was yet to take place. We have not the slightest doubt that the investigating officer holding the inquest mentioned the date of lodging of the FIR as "15.3.79"

> instead of "14.3.79" inadvertently or by mistake. That apart, it is important to note that during the course of cross-examination PW.7 Ram Shabad Singh, SI, who held the inquest on the body of the deceased in the hospital, his attention was not drawn to the aforesaid fact that the date and time of lodging of the FIR was mentioned as "10 p.m. on 15.3.79". If the said discrepancy had been pointed out to him, he could have given an explanation for the same. No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in Court. Therefore, in the present case it is impermissible to draw any inference against the prosecution on the ground that the date of lodging the FIR was wrongly mentioned in the FIR. Regarding the non-mention of exact nature of injuries, it may be mentioned here that the deceased Hira Singh had been taken to the hospital where he was given medical aid. The inquest report mentions that there were two injuries which had been bandaged after applying some red colour medicine with cotton.

11. Learned counsel has also submitted that as the names of the accused or the weapons carried by them and the names of the eye witnesses had not been mentioned in the inquest report, it clearly showed that by the time the inquest report had been prepared, viz., 8.30 a.m. on 15.3.79, the prosecution was not sure about its case and the FIR had not come into existence. In support of this contention strong reliance has been placed on some observations made by a two- Judge Bench of this Court in Meharaj Singh v. State of U.P. 1994(5) SCC 188 in para 11 of the reports which read as

under :

> "..... It deserves to be noticed that in the inquest report even the name of the accused has not been mentioned. It also does not contain the names of the eye- witnesses or the gist of the statement of the eye-witnesses. It does not reveal as to how many shots had been fired or how many weapons had been used. The inquest report is not signed by any of the eye witnesses, although the investigating officer has categorically asserted that Kamlesh and Shiv Charan were present at the place of occurrence when he visited and he recorded their statements. If he had actually recorded their statements, there is no reason why the details which we have found missing from the inquest report should not have been there. ....."

and also the following observations made in para 12 :

> "..... Even though the inquest report, prepared under Section 174 Cr.P.C. is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW.8."

12. The provision for holding of inquest is contained in Section 174 Cr.P.C. and the heading of the Section is Police to enquire and report on suicide etc. Sub-sections (1) and (2) thereof read as under :

> 174. Police to enquire and report on suicide, etc. (1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub- divisional Magistrate.

The language of the aforesaid statutory provision is plain and simple and there is no ambiguity therein. An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details.

13. In Podda Narayana v. State of A.P. AIR 1975 SC 1252 it was held that the proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under S. 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. In Shakila Khader v. Nausher Gama AIR 1975 SC 1324 the contention raised that non-mention of a person's name in the inquest report would show that he was not a eye-witness of the incident was repelled on the ground that an inquest under Section 174 Cr.P.C. is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in Eqbal Baig v. State of Andhra Pradesh AIR 1987 SC 923 that the non-mention of name of an eye-witness in the inquest report could not be a ground to reject his testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of commission of the offence as the inquest report is not the statement of a person wherein all the names (accused and also the eye-witnesses) ought to have been mentioned. The view taken in Podda Narayana v. State of A.P. (supra) was approved by a three-Judge Bench in Khujji @ Surendra Tiwari v. State of Madhya Pradesh AIR 1991 SC 1853 and it was held that the testimony of an eye-witness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. The nature and purpose of inquest held under Section 174 Cr.P.C. was also explained in Amar Singh v. Balwinder Singh 2003 (2) SCC 518. In the said case the High Court had observed that the fact that the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried weight in favour of the accused. After noticing the language used in Section 174 Cr.P.C. and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution. Thus, it is well settled by a catena of decisions of

this Court that the purpose of holding an inquest is very limited, viz., to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eye-witnesses or the gist of their statement nor it is required to be signed by any eye-witness. In Meharaj Singh v. State of U.P. (supra) the language used by the legislature in Section 174 Cr.P.C. was not taken note of nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby over-ruled. The challenge laid to the prosecution case by Shri Jain on the basis of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted.

14. Learned counsel for the appellants have lastly submitted that the appellants had no motive to commit the murder of Hira Singh deceased as it was PW.1 Ganesh Singh who was an eye-witness to the assault made by A-1 and A-5 upon Udai Narain five days earlier and they wanted him (PW.1) not to give evidence against them in the said case. So the real animosity was with Ganesh Singh. The deceased Hira Singh was no doubt the elder brother of Ganesh Singh but he was living away from the village and was carrying on business in Calcutta. He had come to his village on the occasion of Holi festival and it was then that A-1 and some other co-accused had asked him to forbid his brother (PW.1) not to give evidence to which he had given a reply that being a witness to the incident he would give evidence in Court. Thus, the only act attributed to the deceased was his refusal to persuade his younger brother not to give evidence against A-1 and A- 5 regarding the incident of assault made upon Udai Narain. There was no guarantee that Ganesh Singh would not have given evidence against them even after Hira Singh had dissuaded him from doing so more so when he was living away from the village. Learned counsel has further submitted that so far as A-2, A-3 and A-5 are concerned, they did not cause any injury to the deceased and the second injury on the body of the deceased was a small incised wound which was only skin deep and it was a superficial injury. It has thus been urged that the conviction of the remaining accused for the offence under Section 302 with the aid of Section 149 IPC, other than the one who caused the stab wound on the chest which proved fatal, is illegal and deserves to be set aside.

15. In this connection it is necessary to refer to the injuries caused to the deceased and the injured. PW.10 Dr.Prem Prakash, Medical Officer, District Hospital, Ballia performed post-mortem examination on the body of the deceased Hira Singh and found the following ante- mortem injuries on his person :

> 1. Stitched wound 3 cm long on the left side of chest 1 cm below the clavicle and 5 cm left to the mid line. On the removal of stitches, it is found that there is a stab wound 3 cm x 2 cm x chest cavity deep on the left side of chest 1 cm below the clavicle and 5 cm left to the mid line.

Margins of wound are well defined. Wound is directed downwards and towards the right side.

2. Incised wound 0.5 cm x 0.2 cm x skin deep on the left side of chest in mid axillary line 16 cm behind the axilla and 24 cm left to the mid line.

The internal examination showed that both the pleurae had punctured. The right lung had a punctured wound 1.5 cm x 1 cm x large tissue deep and the left lung had a punctured wound 2 cm x 1 cm x through and through in upper lobe. The doctor has opined that injury no.1 had been caused by a sharp pointed weapon whose both the edges were sharp and the blade of the weapon would have been about 3 cm wide. The weapon had punctured up to the depth of about 7-8 cms. and the injury was not possible by a weapon whose blade was more than 3 cm in width. The doctor has further opined that injury no.1 was sufficient in the ordinary course of nature to cause death. No internal damage had been caused by the second injury as it was skin deep only. PW-1 Ganesh Singh was medically examined in the Distt. hospital at 9.50 P.M. on 14.3.1979 and he was found to have sustained a lacerated wound on the right parietal region, a contusion with swelling on the right parietal region besides two contusions one each on the right shoulder and the left knee joint. Two other persons, who received injuries, namely PW-6 Ram Pyari and PW-3 Mohan Yadav were medically examined in the same hospital on the next day at 11.30 A.M. Ram Pyari was found to have sustained an abrasion on the head and swelling in the left hand, while Mohan Yadav had sustained two lacerated wounds on the fingers of left hand. The injuries of all the three injured were simple in nature.

16. The medical evidence shows that the deceased had died on account of stab wound which had been inflicted on the chest (injury no.1). Two accused, namely, Radha Mohan Singh (A-1) who was armed with spear and Devender Singh @ Mutuk Singh (A-4) who was armed with pharsa are alleged to have assaulted the deceased. Pharsa is a sharp weapon having a long blade while spear is a sharp pointed weapon. It is, therefore, obvious that injury no.1, which is a stab wound, was caused by Radha Mohan Singh (A-1). The pharsa does not appear to have been wielded with any amount of force or with an intention to cause injury as the incised wound is a very small and superficial one being only 0.5 cm x 0.2 cm x skin deep in dimension. The possibility that the deceased received this injury when he fell down on the pathway cannot be entirely ruled out. The remaining accused are not alleged to have assaulted the deceased but are alleged to have assaulted Ganesh Singh, Ram Piari and Mohan and the injuries on their person were found to be simple in nature. Having regard to these facts the nature of offence committed by the accused has to be determined.

17. So far as A-1 is concerned, his case is fully covered by clause Thirdly of Section 300 IPC as it can be reasonably inferred that he intended to cause bodily injury to the deceased by aiming the blow on the left side of the chest and the injury was found to be sufficient in the ordinary course of nature to cause death. Therefore, he is clearly liable to be convicted under Section 302 IPC. Learned Sessions Judge had framed charge under Section 302 read with Section 149 IPC against all the accused including A-1. In view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that the failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend

himself. In Dalbir Singh v. State of U.P. 2004 (5) SCC 334, this question has been examined by a three Judge Bench to which one of us (G.P. Mathur,J.) was a party and aforesaid principle has been laid down. In the present case the witnesses examined on behalf of the prosecution, whose testimony has been relied upon, clearly deposed that A-1 was armed with a spear and he assaulted the deceased with the said weapon. In his examination under Section 313 Cr.P.C. a specific question in this regard was put to A-1. Therefore, A-1 was made aware of the basic ingredients of the offence and the main facts sought to be established against him were explained to him. Thus, he can be convicted under Section 302 IPC for having committed the murder of Hira Singh.

18. The question arises whether the conviction of the remaining accused under Section 302 read with Section 149 IPC is legally sustainable. The scope of Section 149 I.P.C. was explained in Mizaji v. State of U.P. AIR 1959 SC 572, which decision has been followed in many later cases, in the following manner :

> "The first part of section 149 IPC means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part, the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. Though it can be said that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object that does not make the converse proposition true; there may be cases which would come within the second part but not within the first. The distinction between the two parts of Section 149 Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of Section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part."

19. In Alauddin Mian v. State of Bihar AIR 1989 SC 1456 the import of Section 149 IPC was explained as under :

> "..... This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be safely construed as

it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of anyone or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, it is not the intention of the legislature in enacting Section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke Section 149 it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149."

20. As mentioned earlier there was no such motive which could have impelled the accused persons to commit the murder of Hira Singh as he had merely declined to ask or persuade his younger brother PW.1 Ganesh Singh from giving evidence against A-1 and A-5 in the case relating to assault made upon Udai Narain. The statement of Ganesh Singh had already been recorded under Section 161 Cr.P.C. The deceased was not himself a witness in the said case. A-2, A-3 and A-5 did not cause any injury to the deceased. The incised wound on the body of deceased is of very small dimension and is only skin deep, which shows that A-4 did not wield the farsa with any intention or object to cause injury to deceased. In view of these features of the case, it cannot be held that the common object of the unlawful assembly was to commit the murder of the deceased or that the members of the unlawful assembly knew that murder is likely to be committed in prosecution of the common object of the assembly. However, as members of the unlawful assembly carried deadly weapons, the knowledge that grievous injury may be caused can certainly be attributed to them. We are, therefore, of the opinion that conviction of A-3, A-4 and A-5 under Section 302 read with Section 149 IPC deserves to be set aside and instead they are liable to be convicted under Section 326 read with Section 149 IPC for which a sentence of 7 years RI will meet the ends of justice.

21. In the result, the appeal filed by Radha Mohan Singh @ Lal Saheb is dismissed with the modification that his conviction is altered from Section 302 read with Section 149 IPC to that under Section 302 IPC. He is sentenced to imprisonment for life under the said Section. The appeals filed by Kapil Deo Singh, Devendra Singh alias Mutuk Singh and Kaushal Kishore Singh are partly allowed. Their conviction under Section 302 read with Section 149 IPC and the sentence of imprisonment for life imposed thereunder are set aside. They are instead convicted under Section 326 read with Section 149 IPC and for the said offence they are sentenced to undergo 7 years RI. The

conviction of all the appellants for the remaining offences as recorded by the learned Sessions Judge and the sentences imposed thereunder are affirmed. All the sentences imposed upon the appellants shall run concurrently. The appellants shall surrender forthwith to undergo the sentences imposed upon them. The Chief Judicial Magistrate, Ballia (U.P.) is directed to take immediate steps to take the appellants into custody. After the appellants have been taken into custody, their sureties and bail bonds shall stand discharged.