Shamshul Kanwar vs State Of U.P on 4 May, 1995

Equivalent citations: AIR 1995 SUPREME COURT 1748, 1995 (4) SCC 430, 1995 AIR SCW 2741, (1995) 2 EASTCRIC 239, (1995) 2 GUJ LH 569, (1995) 2 SCJ 466, 1995 CRILR(SC MAH GUJ) 387, (1995) 3 SCR 1197 (SC), (1996) 1 CHANDCRIC 43, 1995 CRILR(SC&MP) 387, (1995) 2 CRIMES 487, (1995) SC CR R 629, (1995) 3 CURCRIR 54, (1995) 3 ALL WC 1486, (1995) 2 ALLCRILR 249, (1995) 1 RAJ LW 62, (1995) 4 JT 159 (SC), 1995 SCC (CRI) 753

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Bench: M.M. Punchhi

CASE NO.:
Appeal (crl.) 887 of 1994

PETITIONER:
SHAMSHUL KANWAR

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 04/05/1995

BENCH:
M.M. PUNCHHI & K. JAYACHANDRA REDDY

JUDGMENT:

JUDGMENT 1995 (3) SCR 1197 The Judgment of the Court was delivered by K, JAYACHANDRA REDDY, J. A rioting of grave nature took place SHAMSHUL KANWAR v. STATE OF U.P. [K JAYACHANDRA REDDY, J] 1201 in Village Sakhni within the limits of Police Station Jahangirabad in District Bulandshahr at about 3.30 P.M. on 1.2.89 in the course of which 11 people died and some others were injured including a police constable who was on bandobust duty. In respect of this occurrence 21 accused were tried for offences punishable under Sections 148, 302/149, 307/149 and 332/149 I.P.C. and Section 25 of the Arms Act. The trial court acquitted A-9 Asgar, A-19 Munna Baboo, A-20 Jarrar and A-21 Israr and convicted the remaining accused. Out of them six were sentenced to death and the rest to imprisonment for life and also for shorter terms of imprisonment for the other offences. The convicted accused preferred appeals to the High Court and the trial Judge also made a reference for confirmation of death sentence. The State also filed two appeals one being against the acquittal of the four accused and the other appeal was for enhancement of sentence of imprisonment of life of the 11 accused to death. The High Court acquitted A-3 Vilayat Hussain and A-18 Ali and confirmed the death sentence of A-1 Shamshul Kanwar but reduced the sentence of death in respect of other five accused to one of imprisonment for life. With this modification all the appeals filed by the accused as well as the State were disposed of by a common judgment. In this

Court, as against the said judgment, A-1 Shamshul Kanwar has filed Criminal Appeal No. 887/94, A-10 Rais has filed Criminal Appeal No. 888/94 and A-2 Rashidul Zafar and other convicted accused have preferred Criminal Appeal Nos. 889-891/94. Criminal Appeal Nos. 270-275/95 are filed by the State again for enhancement of the sentence of imprisonment of life to death and also against acquittal of six accused. Since these appeals arise out of a common judgment of the High Court, the same can be disposed of together by us.

Village Sakhni was faction-ridden. A-1 Shamshul Kanwar was, at the relevant time, the Pradhan of the Village and he led one faction and the other faction was led by P.W. 4 Mohd. Hussain and others. In the year 1981 one Mirja Badar belonging to the party of A-1 was murdered. In that case 12 persons including P.Ws. 1, 2 and 4 were tried in a long-drawn trial and were convicted. They remained in jail during the trial and also after conviction except Kallu Beg alias Kallua who was granted bail on some compassionate ground. They filed an appeal in the High Court and also sought bail. In the first instance the bail was refused and later they were granted bail. When they were out of jail they were threatened by A-1 and members of his family. They were not allowed to enter the boundaries of the Village. Therefore P.W. 4 and others left the Village and began to live at Delhi. P.W. 4's mother-in-law, an old lady, alongwith her husband went to Delhi to the residence of P.W. 4, 10 or 12 days prior to the present occurrence. She was suffering from some mental trouble and also severe asthama. She died on the intervening night of 31.1.89 and 1.2.89 at about 9.30 P.M. Before her death she expressed her last wish that her body during the 'janaza' (funeral) should be buried in her family grave-yard in the very Village Sakhni. In accordance with her wish P.W. 4, his father, P.W. 1, P.W.2 and others about eight persons alongwith women-folk carried the dead body in a truck and started to Village Sakhni at about 6 A.M. on 1.2.89. They reached Village Dariyapur on the way at about 8 A.M. P.W. 4 reached the residence of his friend namely Pradhar, of Village Dariyapur and took the help of four persons who also followed the party armed with their licenced guns and the party reached Bulandshahr where P.W. 4 and his father met the Labour Minister who was camping there and requested him to provide police assistance as they were apprehending danger to their lives at the hands of A-1 and others. The Minister addressed a letter to the S.H.O, Jahangirabad Police Station. They left Bulandshahr at about 10 A.M. with the truck and reached Jahangirabad Police Station at about 11 A.M. and met the S.H.O. and handed over the letter of the Minister alongwith an application seeking police help. The S.H.O. sent an escort comprising of an A.S.I., P.W.20 and two armed constables. All of them left Jahangirabad which is about four kms. away and reached Village Sakhni at about 11.30 A.M. and stopped the truck outside the house of the dead old lady. The dead body was taken inside and the 'janaza' (funeral) was prepared according to the rites and from the Village they went to the grave-yard. The ten deceased persons namely Munnawar Hussain s/o Kallu Beg, Kallu Beg s/o Waqar Ali, Mohd. Ali s/o Avej Ali, Ashgar s/o Bulaki Hussain, Munnawar Hussain s/o Haji Mohd., Azad Ali s/o Barakat Ali, Imdad Hussain s/o Farkat Hussain, Shabir Hussain s/o Haji Mohd., Shakuat Ah" s/o Kale hussain and Farkat Ali s/o Mohd. Hussain were also among them and they participated in the funeral. P.W. 20, A.S.I. who escorted them having noticed that there was tension in the Village, by way of abundant caution, went to Shamshul Kanwar, Pradhan (A-1) and had a talk with him. It appears that A-1 told him that his brother was killed by the other party and that he cannot do anything. P.W. 20, however, asked him to understand the situation and returned to the place of funeral. He felt that the tension has become more serious and that the police force with him was not sufficient and he asked one of the persons gathered there to

inform the Police Station on telephone from Village Alipur to send more force at the grave-yard. The people who had come from Delhi and Dariyapur and some people of the Village alongwith the police force were there. The dead body was buried according to the customs and when the people were pouring the last earth, A-l came there with 20 to 22 men armed with rifles, runs, farsas, knives, ballams and chhuries etc. and blocked the area. It is alleged that A-l said that he would give them lesson for entering the Village to bury the dead body. Thereupon his younger brother Rashidul Zafar alias Chotta, A-2 exhorted that they have plenty of arms and nobody could go safe. Seeing the seriousness of the situation, A.S.I., P.W. 20 asked again P.W. 4 to send one man immediately to Village Alipur to phone to the Police Station for additional force. In the meantime the additional police party was seen coming from the side of Jahangirabad. Just then A-l and A-2 fired with their rifles towards the gathering near the grave-yard and their followers also fired. With the firing of A-l and A-2 two persons, Shabir Hussain, deceased no. 1 and his younger brother Munnawar Hussain, deceased no. 2, fell down. Meanwhile people ran helter skelter for saving their lives but the accused went on firing indiscriminately as a result of which deceased no. 3 to deceased no. 8 received injuries and fell down. Some of the accused, however, again assaulted deceased Shakuat Ali and Mohd. Ali with the ballams and farsas. P.W. 3 also was assulted by the accused Nisar s/o Saklain, Bhura and Jarrar with ballams and farsas. Thereupon A.S.I., P.W. 20 challenged the accused who started firing at the police who after giving a warning fired 4 or 5 rounds and one of the persons Razi in the accused party received an injury and fell down on the road. He was, however, carried by his associates. The police party managed to surround four of the accused namely Nisar s/o Saklain, Nisar alias Baddu s/o Mohd. Hussain, Balloo and Masita alias Ranjha and took them into custody alongwith their respective blood-stained weapons. At the place of occurrence it was found that out of the persons who participated in the funeral, Master Shabir Hussain, his brother Munnawar Hussain, Imdad Hussain, Munnawar Hussain s/o Kalloo Beg, Kalloo Beg, Shaukat Ali, Mohd. Ali, Farkat Ali and Ashgar Abid (9 persons) had already died. Azad Ali, Mohd. Taqi and Firdos Ali were in injured condition and one police constable also was found with an injury. The Village people and the relations of the injured carried them from the place of occurrence for treatment. Out of them Azad Ali, deceased no. 10, died later in the hospital. It is also alleged that four persons who were brought from Dariyapur were confined by the accused near the Sheesham tree and all their guns also were taken away. Razi, one of the persons of the accused party died later. P.W. 4, however, scribed the earliest report, went to the Police Station accompanied by six persons at about 5.30 P.M. and submitted the report. The case was registered and the investigation commenced. Inspector, P.W. 8, reached the scene of occurrence at about 7 P.M. and took the four accused into custody. P.W. 8 seized the weapons that were recovered and also the empty cartridges at the scene of occurrence and prepared the necessary panchnamas and sent all the dead bodies for post- mortem.

The Doctors, P.Ws. 9, 10, 11 and 13 conducted the post-mortems on the dead bodies and they found fire-arm injuries on many of the deceased persons and also incised injuries on some of them. The accused were arrested on various dates and some weapons were recovered. After completion of the investigation the charge-sheet was laid. The prosecution in support of its case examined 32 witnesses and P.Ws. 1 to 4 and 20 mainly figured as eye- witnesses. Out of them P.Ws. 1 and 3 are injured witnesses. P.W. 6, the Doctor, examined P.W. 1 on 6.2.89 and found one fire-arm injury on the right leg. On being x-rayed a radio opaque shadow was also found indicating that he received injury from a fire- arm. P.W. 6 also examined P.W. 3 Mohd. Taqi and he found three wounds and

injuries nos. 2 and 3 were such which could have been caused by a fire-arm and x-ray also confirmed the same.

All the accused, when examined under Section 313 Cr.P.C., denied the incident and pleaded ignorance. They also stated that they were not aware about the death of the old lady or about the burial. In general they stated that they were implicated because of enemity apart from individually giving the particulars of hostility between them and the prosecution party. The trial court accepted the evidence of the eye-witnesses alongwith the evidence of P.W. 20. The trial court, however, acquitted A-9 on the ground that he was aged about 82 years and that he had a cataract in the right eye and as seen in the court, he was very old and in a tottered condition and that a doubt arose about his being a member of the unlawful assembly and participating in the occurrence and accordingly he was given benefit of doubt. The trial court acquitted A-19, A-20 and A-21 on the ground that while the witnesses alleged that they were armed with spears and used them, the Doctors did not find any injury which could have been caused by a spear on any of the injured persons and therefore their presence at the scene of occurrence was doubtful. The trial court sentenced A-l and A-2, who opened the fire, to death and A-ll, A-15, A-16 and A-17 who were arrested on the spot holding that A-l and A-2 initiated the attack by firing their rifles which hit deceased nos. 1 and 2 and that other four accused persons who were arrested on the spot were armed with deadly weapons and inflicted injuries on Sabir Hussain, Shaukat Ali and Mohd. Ali, the deceased persons and thus took an active part and therefore they deserve the extreme penalty. The trial court convicted the remaining 11 accused also under Sections 302/149 and for other offences but awarded imprisonment for life. The High Court acquitted A-3 on the ground that use of rifle by him was doubtful. The High Court also acquitted A-18 on the ground that the overt act namely that he inflicted injuries with the knife on the deceased Farakat Hussain, attributed to him becomes doubtful since there is no corresponding injury which could have been caused by such a weapon. The High Court, however, reduced the death sentence of A-2 holding that he being a younger brother followed the orders of A-l, his elder brother and at his instigation he used his rifle once and therefore his case stands on a different footing. The death sentence awarded to A-ll, A-15, A-16 and A-17 who were arrested on the spot was also reduced to imprisonment for life by the High Court holding that their case stands on the same footing as that of other accused who also gave farsa blows to the deceased Shabir Hussain but sentenced to imprisonment for Me only and therefore a distinction cannot be made between these four and the others. Regarding the case of A- 1, Shamshul Kanwar, the High Court took the view that he was in a commanding position and he could have stopped the entire massacre and that he behaved with least reasonableness and there-fore the death sentence has to be maintained.

Shri Rajendra Singh, learned senior counsel appearing for A-l submitted that all the eye-witnesses are interested and they have not come forward with the real version and that there was only a fight between two parties and as to how it originated, the prosecution is silent and that no independent witness has been examined. Learned counsel mainly relied on the general diary entry Ex.Ka-124 made by P.W. 20 and pointed, out that the version mentioned therein is somewhat different and that none of the particulars spoken to by P.W. 20 now are mentioned therein and therefore the present version is a result of consultations and fabrications and it is highly doubtful whether A-l and other accused were present at the scene of occurrence and the assailants, whoever they may be, must have acted in their self- defence. Shri U.R. Lalit, learned senior counsel appearing for A- 2, A-14.

A-15 and A-16 submitted that P.Ws. 1 to 4 figured as accused in the other case and were convicted and therefore they were all out to implicate all their enemies and that there was delay in examining and recording the statements of P.Ws. 1 and 3 and that P.W. 4's evidence bristles with discrepancies and improvements in material particulars and that in a case like this an identification parade was absolutely necessary but not held. He also pleaded that the case of A-2 is in no way different from that of A-3 who was acquitted. Shri Raju Ramachandran, learned counsel appearing for the remaining appellants while adopting the arguments of the other two learned counsel, however, further contended that it cannot be definitely said that all the accused were present at the scene of occurrence only as members of the unlawful assembly and since the occurrence has taken place in the Village itself it is quite possible that they might have been there only as onlookers or by-standers and that mere attribution of overt acts to them by the interested witnesses, in such as situation, cannot be a safe test to fix their presence as members of the unlawful assembly. Shri R.C. Verma, learned counsel appearing for the State contended that this is a fit case where the appeals by the State should be allowed having regard to the magnitude of the occurrence during which as many as 10 persons belonging to the prosecution party were killed in a brutal manner and that acquittal of these accused should be set aside and death sentence should be awarded to all of them.

Since it is a case of death sentence, we have heard all the learned counsel at great length and we have been taken through the entire records. Before we proceed to consider their submissions, we would like to briefly refer to the evidence of the eye-witnesses which has been believed by both the courts below and consider whether the so-called infirmities in their evidence pointed out by the learned counsel are of any significance and whether there are good grounds for interference as sought by the State?

P.W. 4 is the main eye-witness in the case and he gave the F.I.R. In his chief examination he was given the details of the previous incident including the earlier murder case and about the party factions in the Village. He has also given all the details about their movements on the day of occurrence and how they picked up four armed people at Dariyapur and how they enlisted the police help and further details regarding the funeral. He mentioned the presence of P.W.I, P.W. 2, P.W. 3 and 10 deceased persons being present at the time of funeral. Then coming to the actual occurrence he deposed that after burial of the dead body they were about to leave for their residences at about 3.30 P.M. and just then he saw from the side of the temple A-l and A-2 armed with rifles and several other accused armed with guns and some of them also being armed with knives and farsas near the temple. The accused came towards the west of the road and A-l exhorted saying that they will teach them a lesson for entering the Village for burying the dead body. Thereupon his brother A-2 exhorted the other accused to ensure that none of their enemies in the prosecution party should get away alive. P.W. 20, A.S.I. was pacifying and as he sensed danger he asked P.W. 4 to send some man to ring up the Police Station asking for more help. P.W. 4 thereupon sent one Sajjad. In the meantime the additional police help consisting of two police parties having six con-stables and 2 S.Is. were seen coming from near the temple. Having seen the police parties, A-l and A-2 again exhorted other accused saying that they have enough of arms and they need not be afraid of anybody. P.W. 4 further deposed that A-l and A-2 in the first instance fired simultaneously at the prosecution party and they hit Shabir hussain, deceased no. 1 and his younger brother Munnawar Hussain, deceased no. 2, who having received the injuries fell down. At the same time Vilayat

Hussain, A-3 and Rais, A-10 fired at them and that the accused also fired at the police party and there was a stampede. P.W. 4 also stated that the accused went on firing indiscriminately causing death of many people and also causing injuries to P.Ws. 1 and 3 as well as to one constable Kanshi Ram. He stated that deceased nos. 3 to 8 fell down near the huts. Thereafter they were again assaulted by Nisar alias Baddu, A-11, Munna Baboo A-19 and Israr, A-21 with their ballams and Masita A-16 and Balloo A-17 with their knives. Nisar A-15 and Bhoora A-13 caused injuries to P.W. 3 with Churri and farsa and Jarrar A-20 with his ballam. Thereupon A.S.I., P.W. 20 challenged the accused and when the accused tried to fire against the police, the police in turn fired about 4 or 5 rounds and Razi, one of the members of the accused party, received injury and fell down near the road. There-upon the accused ran helter skelter and accused Razi also was carried away by his associates. The police party however surrounded four accused i.e. A-ll, A-15, A-16 and A-17 with their weapons which blood- stained. There-after P.W. 4 and one Gulbeg, P.W. 2 arrived at the place of occurrence and found all the deceased lying and P.Ws. 1 and 3 also with injuries. They were carried from the place of occurrence for treatment. Azad Ali, deceased no. 10 who was also injured was carried to the hospital but died later. P.W. 4 scribed the F.I.R., Ka-6 at the factory of one Hyder Ali and lodged the same in the Police Station at about 5.30 P.M. He was cross-examined at length and certain contradictions and omissions have been elicited. Both the courts below have considered them and have rightly held that they do not affect the veracity of his evidence. P.Ws. 1 and 3 also have given more or less the same version. It may not be necessary for the purpose of these appeals to discuss their evidence in detail once again in view of the concurring findings.

The main submission of the learned counsel is that they are interested witnesses inasmuch as admittedly they were accused in the earlier case and there would be tendency on their part to implicate many accused and that their evidence regarding the genesis of the occurrence is artificial and at any rate they have not come out with the whole truth. It is in this context that the learned counsel strenuously contended that for quite some time the accused did not do anything and according to the prosecution it is only after the burial, the occurrence took place and there is no reason whatsoever for the accused to indulge in indiscriminate firing at that stage and that having regard to the tension prevailing and because of some provocative incident that took place there must have been a melee and cross-firing between the police and the four armed men from Dariyapur and some persons belonging to the accused party. Learned counsel also contended that the F.I.R. is a result of consultations and fabrication and in the absence of the evidence of any independent witness it would be highly unsafe to place reliance on these partisan witnesses and there would have been many innocent by-standers and onlookers including some of the accused and therefore it cannot be held that a specific case is made out against these accused being members of the unlawful assembly with the common object of committing the murder. It is in this context that the learned counsel referred to the evidence of P.W. 20, A.S.I in the light of the entry in general diary Ka-124 and contended that there was no mention of any of the details of occurrence in that exhibit and that shows that the interested witnesses have later come forward with this fabricated and exaggerated version implicating all the accused. It is appropriate at this stage to consider the evidence of P.W. 20 and the submissions made by the learned counsel regarding the evidentiary value or otherwise of Ex.Ka- 124.

P.W. 20 deposed that on 1.2.89 he was working as A.S.I., Jahan-girabad Police Station and at about 11 A.M., P.W. 4 came with two more persons and met the S.I. Satbir Singh, P.W. 8 and asked for police force for the cremation of his mother-in-law. On their application P.W. 8 directed P.W. 8 to take two constables for the cremation of the dead body in Village Sakhni. P.W. 20 took two constables and proceeded on his own motor bike. He took his service revolver and cartridges and the two constables took rifles and cartridges. On the way he noticed the truck which was carrying the dead body alongwith 16 to 17 persons. They reached the house of the dead lady and stayed outside the house. The persons and women who came in the truck went inside the house. P.W. 20 noticed that there was tension in the Village and learnt that it was due to enemity between the Pradhan of the Village Shamshul Kanwar, A-l and those persons who came with the dead body. P.W. 20 posted his constables giving some instructions and went to the house of A-l and had a talk with him. P.W. 20 deposed that A-l told him that those persons had murdered his brother and now they have come with the police and that he could not do anything. Thereupon P.W. 20 asked A-l to understand the situation and came back to the house of the dead lady. After reaching the place he felt that the tension was serious and that the force was not sufficient. He asked one of the persons gathered there to telephone to the Police Station from Village Jalipur to send more force. Meanwhile the 'janaza' was ready and it was taken to the ancestral graveyard of the Village at about 2.30 P.M. by the people who had come from Delhi and some of the local people. P.W. 20 and other constables as well as the four armed men from Village Dariyapur were following the 'janaza', some of them in the front and some of them in the back. The 'janaza' was brought to the Idgah of the graveyard and some prayers were offered. Then the body was buried according to the customs and those persons were pouring the last earth. Just at that time A-l came there with 20 to 22 men armed with guns, rifles, ballams and churries and they blocked the area form the side of the temple. A-l said that they would teach those persons a lesson for entering the Village to bury the dead body. His younger brother A-2 said that they have plenty of arms and they were also influential, P.W. 20 tried to counsel A- l. He also asked P.W. 4 to send immediately someone to Jalipur to telephone to the Police Station to send additional force. In the meantime obviously because of the earlier telephone call additional force was seen coming. Just at that juncture, according to P.W. 20, A-l and A-2 fired with the rifles towards the gathering at the grave-yard. Two persons received bullet injuries and fell down. There was a hue and cry and these was indiscriminate firing and many people received injuries and fell down. Some of the accused persons came and inflicted injuries with the sharp-edged weapons on some of the fallen men. P.W. 20 further deposed that the accused persons also stopped the police party. P.W. 20 gave a warning to the accused persons and proceeded towards them and the accused persons started firing towards them. P.W. 20 in self defence fired with his service revolver and also asked the two constables to fire two rounds. During that firing one of the members of the accused party Razi sustained injury and fell down. The other accused persons began to retreat. P.W. 20 and other constables, however, managed to capture four accused with their blood- stained weapons. P.W. 20 identified those persons in the court and also added that all the rest of the accused also were present in the court and he has known them since before he saw them on the day of occurrence. P.W. 20 proceeded to state that during the occurrence some of the constables also were injured. He arrested the four accused who were caught and later P.W. 8 came with force at about 7 P.M. to whom he handed over the four accused persons and the recovered arms. He stayed for the night in the Village itself. In the chief examination various panchnamas regarding the seizures and other particulars of scene of occurrence were marked. Then P.W. 20 was cross-examined. Then

Ex.Ka-124 is marked and further cross- examination proceeded on the basis of its contents. Entry in the General Diary marked as Ex.Ka-124 was written by P.W. 20 on 2.2.89 and it mainly contains the details of his proceedings namely leaving the police station, going to the scene of occurrence and the general outline of the occurrence and the steps taken by him and his police party. P.W. 20 is cross-examined with reference to the contents and it has been pointed out by the defence counsel that several details which P.W. 20 was giving in the court, have not been noted. P.W. 20, however, asserted that it was not necessary to write everything in the General Diary and what was written in the General Diary was only a short narration of what he and his men did. Further cross examination proceeded and it was pointed out that no names of the accused persons were mentioned nor the names of the witnesses nor other details were mentioned. On the assumption that G.D. Entry Ex.Ka-124 should contain more 'details the main contention raised is that in the absence of the same P.W. 20's presence itself should be doubted or in the alternative the present version given by the eye-witnesses who are interested should be rejected. The question is whether this assumption that the police officer should give all the details of the occurrence in the G.D. entry like Ex.Ka-124 is correct. This warrants an examination of scope of Section 172 Cr.P.C. and also refer to some of the decisions on this aspect.

Section 172 Cr.P.C. reads as under:

> "172. Diary of proceedings in investigation - (1) Every police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed the investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.
>
> (2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.
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> (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act (1 of 1872) shall apply."

This Section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well- known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The Section itself indicates as to the nature of the entries that have to be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may

use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 Cr.P.C. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitle to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 Cr.P.C. which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 Cr.P.C., the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above stated principles are reiterated in many decisions rendered by the courts.

As early as 1897 the Full Court of the Allahabad High Court in Queen Empress v. Mannu, ILR Allahabad VoL XIX 390 examined the scope of Section 172 Cr.P.C. and the meaning of the police diaries and Edge, CJ. who spoke for the Court held thus:

> "Section 172 of the Code of Criminal Procedure provides for the two events, on the happening of either of which the accused or his agent is entitled to see the special

> diary: and it enacts that, except on the happening on one of those events, "neither the accused nor his agents, shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court." In my opinion the plain meaning of section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police officer who made, it to refresh his memory or is used for the purpose of contradicting him."

(emphasis supplied) Coming to the entries that are to be made and the "aid" which the courts can have, it was further observed:

> "A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to deter-mine whether persons referred to in the special diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It must be always remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly."

This view of the Full Bench has been approved by the Privy Council in Dal Singh v. King Emperor, AIR (1917) PC 25. The Privy Council while disapproving the use to which the entries were put to, held thus :

> "In other words, they treated what was thus entered, as evidence which could be used at all events for the purpose of discrediting these witnesses. In then Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in Queen Empress v. Mannu, (1897) 19 All 390 where a full court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further concluding points which need clearing up, and which are material for the purpose of doing justice between the Crown and the Accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. The police officer who made the entry may be confronted with it but not any other witness."

In Pulukuri Kottaya v. King Emperor, AIR (1947) PC 67 it was laid down that breach of Section 172 does not amount to any illegality and the same does not vitiate the trial. In Niranjan Singh and Others v. State of Uttar Pradesh, AIR (1957) SC 142 it was urged that there was a failure to comply with para 109 of Chapter 11 of U.P. Police Regulation which lays down that when the investigation is closed for the day a copy of the case diary should be sent to the superior police officers and such failure amounted to infraction of rule of law. A Bench of three Judges of this Court considered this aspect and following the ratio in Pulukuri Kottaya's case held as under:

> "The Criminal Procedure Code in laying down the omissions or irregularities which either vitiate the proceedings or not does not anywhere specifically say that a mistake

committed by a police officer during the course of the investigation can be said to be an illegality or irregularity. Investigation is certainly not an inquiry or trial before the court and the fact that there is no specific provision either way in Chapter XLV with respect to omissions or mistakes committed during the course of investigation except with regard to the holding of an inquest is, in our opinion, a sufficient indicating that the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial."

In Habeeb Mohammad v. The State of Hyderabad, [1954] SCR 475 it was held thus:

"Section 172 provides that any criminal court my send for the police diaries of a case under inquiry or trial in such court and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial It seems to us that the learned Judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by section 172, Criminal Procedure Code, i.e., during the trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused."

In Khatri and Others (IV) v. State of Bihar and Others, [1981] 2 SCC 493 it was held thus:

The criminal court holding an inquiry or trial of a case is therefore empowered by sub-section (2) of Section 172 to send for the police diary of the case and the criminal court can use such diary, not as evidence in the case, but to aid it in such inquiry or trial. But, by reason of such- section (3) of Section 172, merely because the case diary is referred to by the criminal court, neither the accused nor his agents are entitled to call for such diary nor are they entitled to see it. If however the case diary is used by the police officer who has made it to refresh his memory or if the criminal court uses it for the purpose of contradicting such police officer in the inquiry or trial, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act would apply and the accused would be entitled to see the particular entry in the case diary which has been referred to for either of these purposes and so much of the diary as in the opinion of the court is necessary to a full understanding of the particular entry so used. It will thus be seen that the bar against production and use of case diary enacted in Section 172 is intended to operate only in an inquiry or trial for an offence and even this bar is a limited bar, because in an inquiry or trial, the bar does not operate if the case diary is used by the police officer for refreshing his memory or the criminal court uses it for the purpose of contradicting such police officer."

(emphasis supplied) In Mukand Lal v. Union of India and Another, AIR (1989) SC 144 it was observed that the court is empowered to call for relevant case diary if there

is any inconsistency or contradiction arising in the context of the case diary and the court can use the entries for the purpose of contradicting the police officer as provided in Sub-section (3) of Section 172 Cr.P.C. Likewise in State of Bihar and Another v. P.P. Sharma, IAS and Another, [1992] Supp 1 SCC 222 it was observed thus:

"The only duty cast on the investigation is to maintain a diary of his investigation, which is known as "Case Diary" under Section 172 of the Code. The entries in the case diary are not evidence nor can they be used by the accused or the Court unless the case comes under Section 172(3) of the Code. The court is entitled for perusal to enable it to find out if the investigation has been conducted on the right lines so that appropriate directions, if need be, be given and may also provide materials showing the necessity to summon witnesses not mentioned in the list supplied by the prosecution or to bring on record other relevant material which in the opinion of the court will help it to arrive at a proper decision in terms of Section 172(3) of the Code. The primary duty of the police, thus is to collect and sift the evidence of the commission of the offence to find whether the accused committed the offence or has reason to believe to have committed the offence and the evidence available is sufficient to prove the offence and to submit his report to the competent Magistrate to take cognizance of the offence."

Now coming to the rights of the accused regarding the use of diaries, this Court in Malkiat Singh and Others v. State of Punjab, [1991] 4 SCC 341 reiterating the view taken in Mannu's case and in Khatri's case (supra) regarding the scope of section 172 (3) also observed thus:

"The evidence on record clearly shows that the defence has freely used the entries in the case diary as evidence and marked some portions of the diary for contradictions or omissions in the prosecution case. This is clearly in negation of and in the teeth of Section 172(3) of the Code.

xxxx xxxx xxxx
xxxx xxxx xxxx

It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradiction the witness, i.e.

> Investigation Officer or to explain it in re- examination by the prosecution, with permission of the court It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence. Neither PW 5 nor PW6, nor the court used the case diary. Therefore, the free use thereof for contradicting the prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence.
>
> (emphasis supplied) With regard to the nature of the entries to be made in the diary as required under Section 172 Cr.P.C. and the limited permissible use by the court or by the accused indicated therein have been the subject matter of decisions of a number of High Courts over the years. It may not be necessary to refer to them. However, we have noticed that there is vague- ness as to the nature of the diary contemplated under this Section. In some States the diary referred to in Section 172 Cr.P.C. is known as "special diary" or "case diary'' and in some other States like Andhra Pradesh, J & K and Kerala there is a provision in the Police Acts that a "general diary"

is to be maintained in the police station thereby indicating it to be different from the case diary. In some States there are police standing orders to the effect that the diary contemplated under Section 172 Cr.P.C. can be of two parts; the first one relating to the steps taken during the course of investigation by the police officer with particular reference to tune at which the police received the information and the further steps taken during the investigation like visiting the places etc. and the second part contains statement of the circumstances ascertained during the investigation which obviously relate to the statements recorded by the officer in terms of Section 161 Cr.P.C. and other relevant materials gathered during the investigation. The copies of the second part which mainly contains the statements of the witnesses as a matter of course are supplied to the accused persons.

For instance Madras Police Standing Order No. 589 provides that the record of an investigation shall be made in the case diary (Form no. 82) which is the diary prescribed in section 172 of the Criminal Procedure Code. It will bear the number of the First Information Report. Order No. 590 further lays down that the record of investigation in a case diary should contain only daily details of the time at which the information reached the Investigation Officer, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation and that the Police will truly record the statement of persons examined by them in the court of the investigation. Para 2 further adds that case diaries should be prepared in two distinct parts, viz., (1) Investigation Part and (2) Statement of witnesses recorded under Section 162 Cr.P.C. and that the second part alone should be handed over to the Magistrate's clerk for making out copies to be furnished to the accused. Likewise in A.P. Police Standing Orders, Order No. 599 refers to Section 172 Cr.P.C. and lays down that the said provision requires that every police officer making an investigation should enter day by day his proceedings in the investigation in

the diary, setting forth time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Para (3) of the said order says that the case diary proper should contain these details and should be written in Form No. 71. Para (2) further lays down that statements of witnesses examined by the police during the investigation should be recorded in Form No. 72 and should be attached to the case diary for the day. Police Standing Order No. 600 is to the effect that the copies of the statements of witnesses proposed to be examined during an inquiry or trial should be made available to the accused before the inquiry or trial commences and that the case diary proper may be put to use to the extent as provided under Section 172 Cr.P.C. Police Standing Order No. 601 contains the detailed instructions regarding writing of the case diary.

Therefore it is clear that the diary referred to in Section 172 and which the court may call for and which can be used to the limited extent mentioned therein obviously refers to the first part and to the copies of which the accused is not entitled to and the entries of which can be used to the limited extent by the court as well as by the accused as contained in Section 172 Cr.P.C. If by virtue of such police standing orders, the second part also forms compendiously part of the diary as a whole and if that also is before the court, the use of the entries in such second part which contains the statements of the witnesses recorded, would be of different nature. In some States for instance Uttar Pradesh there are regulations regarding the maintenance of general and case diaries. Section 161 Cr.P.C. provides for examination of witnesses by police. It further lays down that the police officer during investigation may examine the witnesses and may reduce into writing any statement made to him in the course of such examination and if he does so he shall "make a separate and true record" of the statement of each such person. Section 162 lays down that no such statement made by any person to a police officer shall if reduced to writing be signed "nor shall any such statement or any record thereof whether in a "police diary" or otherwise" be used for any purpose at any inquiry or trial save as provided under that Section. The words "police diary or otherwise" used in this Section have perhaps been the basis for dividing the diary into two parts. Section 167, an important provision, deals with the procedure when investigation is not completed within 24 hours and provides for production of the accused before a magistrate for seeking remand. This provision also lays down that the officer in charge of a police station or the police officer making the investigation "shall forthwith transmit to the nearest judicial magistrate a copy of the entries in the diary hereinafter prescribed relating to the case" and at the same time forward the accused to such magistrate. Likewise sub-section (2a) of Section 167 which provides for production of the accused before an executive magistrate lays down that the copy of the entry in the diary "hereinafter" prescribed relating to the case shall be transmitted while forwarding the accused. The object underlying is that the magistrate before remanding the accused to custody should satisfy himself that there is a prima facie case for doing so after a perusal of the copies of the entries "in the diary". We are referring to this aspect only to point out that some vagueness or confusion is there in respect of the meaning of the word "diary" used in Section 172 and other Sections of Cr.P.C. and we suggest that a legislative change is necessary providing for framing of appropriate and uniform regulations regarding the maintenance of the diaries by the police for the purpose contemplated by Section 172 Cr.P.C. vis-a-vis the other sections referred to above.

We are constrained to go into this aspect in an elaborate manner as even on today we are coming across a number of cases where there has been a patent misuse of the case diaries to be maintained as per Section 172 Cr.P.C. The Full Court in Mannu's case observed, as long back as 1897, as under :

> "It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a Court or by an accused person or his agents of the diaries which are kept by Police officers under section 172 of the Code of Criminal Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case."

To the same effect are the observations by Privy Council in Dal Singh's case. But as pointed out by this Court in Malkiat Singh's case that the courts even in recent times are not keeping in view the true scope of Section 172 and the use to which the diaries should be put to.

Now coming to the position in the present case on this aspect we do not find anything on the record to show as to how Ex.Ka-124 the entry in the general diary came on record. It is nowhere endorsed in the deposition of P.W. 20 that he used the same for refreshing his memory or the court used it for contradicting P.W. 20 with reference to the entries in the diary. It is just mentioned that Ex.Ka-124 is marked. Thereafter we find a lengthy cross-examination on the basis of the contents of Ex.Ka-124 which is impermissible for the above said reasons. In any event P.W. 20 has rightly asserted that no further details need be mentioned in the entry in the general diary, Ex.Ka-124. It may be mentioned at this stage that P.W. 20 as a police officer left the police station under the orders of his superior to give protection to the funeral party. Therefore he was on duty and in respect of the same he made the necessary entries in the general diary. Being a witness to the occurrence he was examined by the investigating officer, P.W. 8 under Section 161 Cr.P.C. There is very little cross- examination of P.W. 20 with reference to the contents of his statement under Section 161. On the other hand, the whole cross-examination proceeded on the basis of Ex.Ka-124 by the learned defence counsel pointing out that the details given by him regarding the occurrence as a eye-witness are not there in Ex.Ka-124. As explained above this is not the scope of the use of the entries in the diary as provided under Section 172 Cr P.C. At this stage we have to point out that strictly speaking Ex.Ka-124 cannot be said to be an entry in case diary within the meaning of Section 172 Cr.P.C. nor it is a statement recorded under Section 161 Cr.P.C. P.W. 20 as an officer on duty made that entries in the diary kept in the Station which is also called general diary and different for "case diary". However, having regard to the way this document has been used in the case we are constrained to go into the scope of Section 172 Cr.P.C. and the nature of the entries to be made in the respective diaries. For all these reasons we are unable to agree with the learned counsel that P.W. 20 was not an eye-witness and that he was also subscribing to the version given by the interested witnesses. The evidence of P.W. 20 amply corroborates the evidence of the other eye- wit-nesses whose presence at the scene of occurrence cannot be doubted.

Regarding the genesis, the submission of the learned counsel for the appellants is that as per the entries in the general diary Ex.Ka-122 and Ex.Ka-124 till 3.45 P.M. nothing happened; at the most

there was tension and that because of some provocative acts on the part of the prosecution party the occurrence must have commenced and it is difficult to say as to who started firing first and taking the whole scenario into account it must be held that there was a fight between the two parties and there must have been cross-firing and therefore it cannot definitely be said that the accused alone were the aggressors. We see no force in this submission. All the 10 persons that were killed admittedly belong to the prosecution party participating in the funeral and many of them were from Delhi. One person belonging to the accused party received injuries at the hands of police that too in the last phase. The evidence of P.W. 20 is clear on this aspect who deposed that when the accused party started attacking the police they in turn fired and caused injuries to Razi accused and who was taken away by the accused and who died later. In assessing as to who were the aggressors several surrounding circumstances have to be taken into consideration. The prosecution party went to the village only for the cremation of the body of the old lady. They also took support of police and four other persons from Village Dariyapur. This no doubt might have created tension in the Village but as it emerges from the evidence and also from the fact that all the persons killed belonged to the prosecution party it is clear that the accused party were the aggressors and indulged in indiscriminate firing causing the death of so many people of the opposite party. There cannot be any doubt that they were the members of the unlawful assembly and such of those whose presence as members of the unlawful assembly is established cannot but be held guilty. Both the courts on a detailed examination of the evidence of the eye-witnesses P.Ws. 1 to 4 have concurrently held that the accused persons formed into an unlawful assembly with the common object of attacking and killing the members of the opposite party who were in the funeral procession.

This takes us to the next question as to whether all the accused challenged and tried were members of the unlawful assembly. Right from the stage of F.I.R. their names have been mentioned and in the evidence the eye- witnesses have particularly deposed that they were present at the scene of occurrence duly armed and specific overt acts also are attributed to at least six of them. In an occurrence of this magnitude where several persons have participated it would not be possible for the witnesses to specify the part played by each of them. It is clear from the facts and circumstances and from the evidence that such of those accused who came to the scene of occurrence armed with lethal weapons in a group and proceeded to participate in the attack, shared the common object of the unlawful assembly namely to attack and kill the members of the opposite party. Consequently they would be liable under Sections 302/149 I.P.C.

Now coming to the case of the individual accused, the trial court as well as the High Court have scanned the evidence of the eye- witnesses in great detail alongwith the evidence of P.W. 20 and held that the prosecution has established that these accused were members of the unlawful assembly sharing the said common object. The trial court, however, by way of abundant caution acquitted A-9, A-19, A-20 and A-21 after scrutinizing the evidence of the eye-witnesses who were interested in the light of the medical evidence and other circumstances and gave them benefit of doubt. Likewise the High Court acquitted A-3 and A-18. We have already referred to the reasons given by the courts below for acquitting these six accused and we do not see any ground to interfere in the appeal filed by the State against their acquittal.

Now coming to the case of the convicted accused, the learned counsel submitted that in a case of large scale rioting of this nature where even according to the prosecution a number of people gathered at the scene of occurrence, it is highly unsafe to convict any of the accused by the application of Section 149 I.P.C. unless it is positively proved that each one of them shared the common object and accordingly participated in the occurrence.

The scope of Section 149 has been explained in a number of cases by this Court. In Masalti and Ors. v. The State of Uttar Pradesh, AIR (1965) SC 202 it was observed as under :

> "What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by s.141 I.P.C. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s.141. While determining this question, it becomes relevant to consider whether the assembly consisted of some per-sons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin (S) AIR (1956) SC 181 assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, S.149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.
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> In Lalji and Others v. State of U.P., AIR (1989) SC 754 it was observed thus:
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> "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

> member 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 falls 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 S.149. It must be noted that the basis of the constructive guilt under S.149 is mere membership of the unlawful assembly, with the requisite common object or knowledge."

Therefore, as indicated above, to infer common object it is not necessary that each one of them should have participated in the attack. However, the evidence of the eye-witnesses clearly establishes that each one of these convicted accused was member of the unlawful assembly whose common object was to commit murders. A-1 and A-2 are the real brothers of Mirja Badar, whose murder in fact was the root cause of the present incident. Ashgar and Nisar alias Baddu accused are their brothers-in-law. Ali, Razi, the deceased accused, and his nephew Shore alongwith Shamshul Kanwar and others were P.Ws. in the earlier case. The other accused also are closely related to these people and admittedly there was bitter enemity between the two groups. W.P. 4, who gave the earliest report, has mentioned the names of all these convicted accused in his deposition. He stated that A-1, Shamshul Kanwar and A-2, Rashidul Zafar alias Chhota were armed with rifles and both of them shot at the two deceased persons Shabir Hussain, D-1 and Munnawar Hussain, D-2 who fell down and died. It is also in his evidence that Ashgar, A-9, Rais, A-10 Haidar, A-4, Firoz, A-5, Baboo, A-6, Mahir, A-7 and Munna, A-8 were armed with guns and Nisar alias Baddu, A-11, Shore, A-12, Bhoora, A-13, Dilshad, A-14, Nisar, A-15 were armed with their farsas and Masita, A-16 and Balloo, A-17 were armed with knives. P.W. 4 also stated that all these persons were before the court. He further deposed that it was A-l and A-2 who fired first causing the death of D-l and D-2 and that at the same time the other accused armed with fire arms namely guns and pistols fired at them. As a result of this firing all the other deceased persons received injuries. It is also in his evidence that accused Shore and Dilshad with farsas attacked fallen Farkat Ali, D-3. Likewise Shaukat AH, D-7 had fallen down and he was attacked by Nisar Alias Baddu, with his farsa, and by Masita and Balloo with their knives. P.W. 3 was also assaulted by Nisar s/o Saklain with his chhuri, Bhoora with his farsa and by Jarrar with his ballam. It may be mentioned that four of the accused persons were

arrested on the spot. In respect of the material particulars regarding names of these convicted accused, the weapons with which they were armed and the details of the participation, we do not find any material omissions, variations or discrepancies when compared to the contents of the F.I.R. These particulars are also fond in the evidence of P.Ws. 1 to 3 and their evidence is also corroborated by the evidence of P.W. 20. Therefore both the courts below after having applied the necessary tests and after a careful appreciation of their evidence have rightly held that everyone of these convicted accused was the member of the unlawful assembly and thus liable under Sections 302/149 I.P.C. and it is unnecessary for us to once again reconsider every detail in respect of the case against each individual accused. However, we have perused the evidence of the material witnesses in great detail and we find that there is ample material to show that each one of these convicted accused was member of the unlawful assembly and was rightly convicted. The medical evidence also shows that the Doctors who conducted postmortems on the dead bodies found in all 23 incised wounds and likewise a number of fire-arm injuries. Therefore the evidence of these witnesses is also corroborated by the medical evidence.

As noted above, the High Court, however, altered the sentence of death to imprisonment for life in respect of five of the accused and confirmed the death sentence of A-l, Shamshul Kanwar only. The State also has filed an appeal for awarding death sentence to all the accused. It becomes necessary at this stage to consider whether this is one of "rarest of rare cases" in the light of the guidelines laid down by this Court and whether death sentence should be awarded to all as prayed for by the State.

It may not be necessary to refer to many decisions. In Bachan Singh and Others v. State of Punjab and Others, [1980] 2 SCC 684 the Constitution Bench observed thus:

> "As we read Sections 354 (3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist."

(emphasis supplied) In the same case the Court also noted some mitigating circumstances as well as aggravating circumstances. That may be relevant in awarding death sentence or otherwise. Thereafter it was further observed :

> There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation.
>
> "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expenses construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous functions with ever more scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

These guidelines laid down by the Constitution Bench have been reiterated in Machhi Singh v. State of Punjab, [1983] 3 SCC 470 and Allauddin Mian v. State of Bihar, [1989] 3 SCC 5. In Allauddin Mian's case it was also observed:

> "Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only."

(emphasis supplied) After referring to some U.S. cases, one of the mitigating circumstances noted in Bachan Singh's case is that "the offence was committed under extreme mental or emotional disturbance." In Dennis Councle Mcgautha v. State of California, 402 US 183, 28 L Ed 2d 711, 91 it was noted as under:

> "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished."

In the same judgment it was also pointed out as under: "Mitigating Circumstances, xxxx xxxx xxxx

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

xxxx xxxx xxxx Bearing these guidelines we shall examine the facts and circumstances in the instant case for the purpose of awarding sentence.

This is a case arising out of acute faction. It is unfortunate that in spite of the presence of the police party, a rioting took place. It is clear from the prosecution case that the prosecution party in large number along with four gunmen from Dariyapur whose services were enlisted and also the armed police party proceeded to the village under the umbrella provided by the Labour Minister and Pradhan of Village Dariyapur to bury the dead body of the old lady. The evidence of P.W. 20 also shows that there was tension. The way the prosecution party went to that Village in gusto with a spirit of bravado itself indicates that there must have been some provocative acts which created the tension particularly in the background of the acute faction. As already pointed out nothing happened for quite some time and it is also the case of the prosecution that the accused did not interfere with the burial It is only thereafter that some incident triggered off in firing by the accused persons. Unfortunately 10 persons on the side of the prosecution died. The large number of deaths on one side cannot ipso facto be a ground to bring the case into the category of "rarest of rare cases" particularly when we take into consideration the other aspects mentioned above.

In Francis alias Ponnan v. State of Kerala, AIR (1974) SC 2281 this Court observed as under :

> "Nevertheless, in deciding whether the case merits the less severe of the two penalties prescribed for murder a history of relations between the parties concerned the background, the context, of the factual setting of the crime and the strength and nature of the motives operating on the mind of the offender, are relevant considerations.
>
> The state of feelings and mind produced by these, while in sufficient to bring in an exception, may suffice to make the less severe sentence more appropriate."

(emphasis supplied) Bhoor Singh and Another v. State of Punjab, AIR (1974) SC 1256 is a case where there was a fight between two armed parties resulting in death and injuries where one of the accused persons also received fatal injuries. In such a situation while considering whether award of death sentence was warranted, this Court observed thus:

> 'The above circumstances, although insufficient to make out a plea of private defence or to palliate the offence, could legitimately be taken into account in choosing between the sentence of life or of death. Yet another supervening factor which by the sheer weight of compassion tilts the scales of justice in favour of life rather than extinguishing it, is that the dread of impending execution has been brooding over the head of these condemned prisoners for an excruciatingly long period. They were sentenced to death in 1971. We are now in 1974."

It is pertinent to note that none of the accused caused any injuries to any of the policemen. No doubt prosecution alleged that one Constable Kanshi Ram received a stray pellet injury which is simple. However, he was not even examined. Admittedly the police fired and caused the death of one of the accused persons. Yet there is nothing to show that the accused acted cruelly and attacked them. To that extent they manifested a sense of restraint. No doubt we have held that the accused were the aggressors. But aggression again could also be due to provocation, resulting in a disturbed and agitated state of mind. Many a time, in such a situation, heat of passion would be the mob of the man that commits a riot on his reason and does not look beyond the moment of its existence, causing disappearance of the sense of reasoning. We are referring to these circumstances to show that as pointed out in Francis alias Ponnan's case and Bhoor Singh's case, though insufficient to attract any exception are, however, very much relevant in awarding lesser sentence. Therefore, for the above reasons, the contention by the State that death sentence should be awarded to all the accused has to be rejected.

The trial court sentenced Shamshul Kanwar, A-l, Residual Zafar alias Chotta, A-2, Nisar alias Baddu, A-11, Nisar s/o Mohd. Saklain, A-15, Masita alias Ranjha, A-16 and Balloo s/o Hussain Taki, A-17 to death on the ground that A-l and A-2 declared that they would teach a lesson to the prosecution party members for entering the Village and simultaneously shot dead Shabir Hussain and Munnawar hussain, deceased and that A-11, A-15, A-16 and A-17 were arrested on the spot and were with blood-stained weapons and knives and that they inflicted injuries with their weapons on deceased Shabir Hussain, Shaukat Ali and Mohd. Ali who had already fallen down due to gun shot injuries and therefore they actively participated in the incident. The High Court, however, set aside the death sentence awarded to A-2 Rashidul Zafar on the ground that he was younger brother of A-l and he simply might have followed the order of his elder brother Shamshul Kanwar, A-l who incited. The High Court also set aside the death sentence awarded to A-11, A-15, A-16 and A-17 on the ground that their case is in no way different from that of Bhoora, A-13 who was awarded life imprisonment only and no distinction can be drawn. Now coming to Shamshul Kanwar, A-l, the High Court observed thus:

The court pondered again and again over the question of inflication of the death penalty. Law cannot make the place of a revengeful individual to apply the theory of retribution. Scale of justice also cannot behave like the reckless citizens involved in this was whose conduct amounts to challenging the very legal methods which were available for setting scores concerning earlier murders. But one is left aghast and startled when one look the way Shamshul Kanwar has behaved in the instant case. He was the sitting Pradhan of the Village which is the ground root level of the democratic background of our socio-political scenario. Much more responsibility resided in him than other citizen. He knew that appeal has been filed by the accused convicted with regard to the earlier murder of his brother Mirza Badar. Thus Shamshul Kanwar was in a commanding position and he could have stopped the entire massacre. There is

no doubt in the mind of the court that had Shamshul Kanwar behaved even with the least reasonableness the ten dead bodies would not have fallen on the burial ground. It was too much for Shamshul Kanwar to have used the occasion of burying Smt Pharmoodan as the one for taking revenge of his brother's murder. Not only that, he arranged the mass annihilation in one of the most cowardice and reprehensible manner, in fact, burying all sentence of sociality, religious sentiments attached at the time of (sic) and appreciating the depressed sentiments of the family members of the dead. The well organised crime is an outright challenge to the very system of administration of criminal justice. Therefore, awarding of death sentence on Shamshul Kanwar was only just and proper and correct. Any thing short of do sentence on Shamshul Kanwar would make mockery of the law, render the administration of criminal law futile as well as death sentence under Section 302 I.P.C. practically nugatory. Therefore, the conviction and sentence awarded to Shamshul Kanwar have to be maintained as it is."

(emphasis supplied) Learned counsel for the State while supporting death sentence awarded to A- l submitted that the High Court should at least have con-firmed the death sentence as awarded by the trial court and that the reasons given for reducing the death sentence of A-2, A- 11, A-15, A-16 and A-17 are illogical and unsound. Having given our earnest consideration to the facts and circumstances of the case and particularly to the back-ground and the nature of the occurrence and the atmosphere in which the occurrence took place, we do not think that we should interfere and award death sentence to these five accused at this distance of time. It cannot be said that the reasons given by the High Court are wholly irrelevant particularly when viewed form the angle of the concept of "rarest of rare cases".

Now coming to the death sentence awarded to A-l, the question is whether the reasons given by the High Court would bring his case in the category of "rarest of rare cases"? One of the reasons given by the High Court is that he was the Pradhan of the Village and he incited others. In the earliest report it is mentioned that A-l said in a loud voice that the prosecution party would be taught a lesson for entering the Village and that it was A-2 who declared that none of the enemies should be allowed to go alive. Learned counsel for the accused also pointed out that in Ex.Ka-124 namely the general diary it is not mentioned that A-l gave any such incitement and that on the other hand it is mentioned that A-l and his party men surrounded and began to fire. We have perused Ex.Ka-124 and as pointed out we do not find any such incitement by A-l having been mentioned there. Though we are not using the same as evidence but by way of taking aid in the matter of awarding sentence, we are referring to the same. That part it has to be noted that for quite some time nothing happened. The presence of four gunmen of Village Dariyapur and the provocative gusto in which the funeral procession t6ok place must have created lot of tension and all the persons belonging to the accused party in the Village who had bitter enemity against the prosecution party because of the earlier murder must have all gathered and it cannot definitely be said that it was only because of the lead given by A-l the firing took place. That apart,

A-l who was armed with a rifle fired only once simultaneously alongwith A-2 as a result of which each one of two deceased persons Shabir hussain and Munnawar Hussain received one fire-arm injury and no other overt act is attributed to him. It is not definite as to whose shot hit whom. One of the deceased persons namely Munnawar Hussain had only one fire-arm injury and the other deceased Shabir Hussain also had one fire-arm injury as well as several incised injuries and the Doctor who conducted post-mortem on the dead body of Shabir Hussain opined that his death was due to shock and hemorrhage as a result of ante-mortem injuries thereby indicating that the death was not entirely due to fire-arm injury which can as well be attributed to the shot fired by A-l, Shamshul Kanwar. Therefore it is not established that the rifle shot fired by A-l alone was responsible for causing the death of Shabir Hussain, deceased. The prosecution case is that apart from A-l and A-2, one Vilayat Hussain was also armed with rifle and he fired. The High Court, however, acquitted Vilayat Hussain on the ground that he must have fired just a little later and thus was not responsible for causing any rifle shot injuries to either of the two deceased persons. In this context the inference drawn by the High Court is that only two rifle shots were fired one each by A-l and A-2. However, the medical evidence also is not definite whether there were other fire-arm injuries on any one of the deceased which can be attributed to rifle shots. That only shows that A-l, even if the prosecution case is to be accepted, shot only once and as discussed above it is also not clear whether it alone proved to be fatal, if we take the injuries on deceased no. 2 and the cause of his death. We are only pointing out these circumstances to show that A-l did not act in a cruel and diabolical manner so as to bring his case within the meaning of "rarest of rare cases". No doubt in the present depositions, P.Ws. 1 to 4 stated that A-l gave incitement. They were all interested witnesses and normally there would be tendency to give a leading role to the leader. We think it cannot definitely be concluded that A-l was at the command or he had full control as to stop the other members from indulging in violence. In the background mentioned above, infuriation was common to every one member of the accused party who were closely related to each other particularly in the background of bitter enemity mentioned above. Therefore in that situation they could have become uncontrollable. Having given our earnest consideration we are not able to separate the case of A-l for awarding death sentence and the reasons given by the High Court namely that A-l was Pradhan in commanding position etc. do not aggravate the case against A-l.

For all these reasons we think that the death sentence awarded to A-l, Shamshul Kanwar should also be reduced to imprisonment for life. In the result Criminal Appeal No. 887/94 filed by A-l, Shamshul Kanwar is partly allowed to the extent of reducing death sentence to imprisonment for life. In other respects it is dismissed. All the other appeals filed by the other convicted accused as well as the State are dismissed.

Appeal dismissed.