High Court of Madhya Pradesh
Bench Gwalior
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DB:- Hon'ble Shri G. S. Ahluwalia &
Hon'ble Shri Rajeev Kumar Shrivastava, JJ

CRA 629 of 2009

Vinoda, Son of Baburam ------Appellant

Vs.

State of Madhya Pradesh -------- Respondent

&

CRA 674 of 2009

(1) Gangadeen, Son of Baturi
(2) Ramsundar son of Barelal
(3) Ramnaresh son of Barelal ------Appellants
(4) Mahaveer son of Barelal
(5) Barelal son of Baturi

Vs.

State of Madhya Pradesh -------- Respondent

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Shri DR Sharma, Counsel for the appellant in CRA No.629/2009.
Shri Sunil Soni, Counsel with Shri SS Kushwah, Counsel for the the appellants in CRA No.674 of 2009.
Shri CP Singh, Panel Lawyer for the respondent/ State in both the criminal appeals.

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Reserved on 23/10/2021
Whether approved for reporting Yes

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JUDGMENT
(Delivered on 28/10/2021)

Per Rajeev Kumar Shrivastava, J:-

By this common judgment, **CRA No. 674/2009 [Gangadeen and Others Vs. State of Madhya Pradesh]** filed by appellant- accused Gangadeen and four

others shall also be decided. From the order sheet dated 20/10/2021, it appears that during the pendency of appeal, appellant No.5 Barelal has expired and the appeal filed on behalf of appellant No.5 Barelal has been **dismissed as abated.**

For the sake of convenience, the facts of **CRA No.629/2009 [Vinoda vs. State of Madhya Pradesh)** shall be taken into consideration, as both are arising out of the same judgment.

(2) Both the Criminal Appeals preferred against the judgment of conviction and sentence dated 17/08/2009 passed by First Additional Sessions Judge to the Court of Fifth Additional Sessions Judge, (Fast Track Court) Ambah, District Morena (MP) in Sessions Trial No.137/2006, by which appellants-accused have been convicted and sentenced for the following offences :-

Sr. No	Name of appellants -accused	Offence	Sentence
1 2. 3. 4. 5. 6.	Gangadeen Ramsundar Ramnaresh Mahaveer Barelal(dead during pendency of appeal) Vinoda	148 of I.P.C. 302/149 I.P.C. 307/149 I.P.C. 324/149 I.P.C.	R.I. for one year Life Imprisonment and fine of Rs.1000/-; in default thereof six months RI R.I. for 7 years and fine of Rs.500/-; in default thereof three months RI R.I. for one year and fine of Rs.200/-; in default thereof two months RI

(3) The prosecution case, in brief, is that on 13/03/2006 at about 07:00 pm, accused persons Mahaveer and Vinoda reached the house of complainant Sukhram and told the son of complainant, Sheoprasad (Shivprasad) and Kalyan to bring liquor. On that, the son of the complainant denied the same. Thereafter, accused Mahaveer and Vinod went away towards the village after abusing in filthy language. After sometime, all the accused persons returned back to the

place of occurrence. Accused Barelal was having an "axe", Mahaveer was having a "farsa", Ramnaresh was having a "ballam", Karua was having a "farsa", Gangadeen and Vinoda were having "lathi". Deceased Shivprasad was not having any weapon in his hand or bare handed. All the accused persons started causing injuries to deceased Sheoprasad alias Shivprasad by means of aforesaid deadly weapons. When witnesses Kalyan, Jyoti, Sonpal came there for rescue of the deceased Shivprasad, all the accused persons inflicted injuries to them. Accused Barelal inflicted injury on the head of Kalyan by means of "axe" and accused Karua inflicted injury to Kalyan by means of "farsa" and accused Ramnaresh inflicted injury by means of "ballam". Accused Ramnaresh inflicted injury to Jyoti by means of "ballam" and accused Mahaveer and Karua also inflicted injuries on the head of Sonpal by means of "farsa".

(4) It is an admitted fact that complainant party and accused persons were knowing each other prior to the incident. After the incident, the complainant party reached the Police Station Ambah by bringing the injured witnesses and deceased Sheoprasad alias Shivprasad.

(5) Jagat Singh (PW10) Assistant Sub-Inspector, Police Station Ambah registered FIR (Ex.P5). Injured Kalyan, Sonpal and Jyotiram were sent for medical examination vide Ex.P.7 to Ex.P9. On 16/05/2006, accused Gangadeen, Ramnaresh, Ramsundar and Mahaveer were arrested vide arrest memo Ex.P10 to Ex.P13. They were sent for medical examination vide Ex.P24 to Ex.P26 and Dr.Ramkrishna Barothiya (PW15) prepared MLC reports respectively. On 14/03/2006, ASI Badshah Singh (PW17) prepared *Panchnama* of dead body of deceased Sheoprasad alias Shivprasad vide Ex.P.30 and Safina Form Ex.P29 for

postmortem of dead body of deceased along with application Ex.P28. Spot map was prepared and blood-stained clothes of deceased and plain soil were seized from the place of occurrence vide Ex.P1. Statement of witness Kalyan was recorded u/S. 161 of CrPC. Dr.MR Sharma (PW16) conducted postmortem of the deceased. On 02/04//2006, police in-charge D.S. Bhadoriya (PW16) recorded statements of witnesses Jyoti, Sonpal and Ramswaroop u/S. 161 of CrPC. Police In-charge Rajendra Pathak (PW13) also recorded statements of Ramprakash, Kishori and Ramdas. Discharge ticket Ex. P21, X-ray report Ex.P18 and X-ray plate Ex.P19 were also seized. On 26/07/2006, accused persons were arrested as per Ex.P30 and their memorandum u/Section 27 of the Evidence Act was recorded vide Ex.P5. All the seized articles were sent for examination to FSL. Police, after completing the investigation, filed charge sheet against accused persons u/Ss. 148, 302 read with Section 149, in the alternative Sections 302, 307/149 of IPC.

(6) Accused persons pleaded not guilty and claimed to be tried. Statements of accused persons u/S. 313 of CrPC were recorded. Accused Gangadin took a plea that at the time of alleged incident, he had gone to village Udaypura. Accused Ramsundar took a plea that at the time of alleged incident, he was in Gwalior as he was doing a job in Gwalior. Accused Vinoda took a plea that at the time of alleged incident, he was in Delhi and he has falsely been implicated. All the accused persons did not examine any witness in order to lead any defence evidence.

(7) Prosecution, in order to prove its case, examined Sukhram (PW1), Kalyan (PW2), Jyotiram (PW3), Krishna Kumar (PW4), Ramdas (PW5), Sonpal

(PW6), Mohkam Singh (PW7), Raghuraj Singh Tomar (PW8), Shriniwas (PW9), Jagat Singh Yadav (PW10), Dr. Jagdish Singh (PW11), DS Bhadoriya (PW12), Rajendra Pathak (PW13), Dr. RP Gupta (PW14), Dr. Ramkrishna (PW15), Dr. MR Sharma (PW16) and Badshah Singh Bhadoriya (PW17).

(8) The Trial Court, by the impugned judgment and sentence, after marshalling the evidence available on record, found appellants - accused guilty and accordingly, convicted and sentenced them, as described in paragraph 2 of this judgment.

(9) Challenging the impugned judgment of conviction and sentence, it is submitted by the learned Counsel appearing for the appellants- accused that the trial Court has erred in considering the evidence produced before it as there were various contradictions and omissions in the evidence of prosecution witnesses. It is further submitted that the witnesses are relative of the deceased and they are interested witnesses and, therefore, their evidence is not reliable. Further, prosecution evidence does not support medical evidence. Even, there is nothing on record to suggest that all the accused persons had formed any unlawful assembly or they had acted in furtherance of common object to commit murder of deceased or cause any injuries to the victims/injured. The appellants have been falsely implicated and there is no common object for committing the offence aforesaid. Further, it is submitted that scene of occurrence and such incident did take place in the manner suggested by the prosecution is doubtful. Thus, conviction of appellants- accused u/Ss. 148, 302/149, 307/149, 324/149 of I.P.C. is unsustainable. Hence, prayed that the impugned judgment of conviction and sentence passed by the Trial Court deserves to be set aside.

(10) On the other hand, it is submitted by the learned Counsel appearing for the State in both the appeals that the prosecution has proved the guilt of all the accused beyond reasonable doubt. All the appellants formed an unlawful assembly and in furtherance of common object, they have caused injuries to deceased Sheoprasad alias Shivprasad by means of deadly weapons as well as caused injuries to victims/injured witnesses. It is further submitted that there was no previous enmity of the complainant party with accused persons, therefore, there was no reason for them to falsely involve the accused in the commission of crime. In support of his contention, he has relied upon the judgment passed by Supreme Court in the case of **Surjit Singh vs State of Punjab** reported in **AIR 1999 SC 2855.** The learned State Counsel further submitted that if there are some improvements here and some exaggerations there or some minor discrepancies in the evidence of witnesses, then the prosecution case will not be damaged thereby. In supported of his contention, he has relied upon the the judgment passed by the Supreme Court in the case **Meharban and Others vs. State of MP** reported in **AIR 1997 SC 1528.** He further supported the impugned judgment of conviction and sentence and submitted that there being no infirmity in the impugned judgment of conviction and sentence and the findings arrived at by the Trial Court do not require any interference by this Court. Hence, prayed for dismissal of both the appeals.

(11) Heard the learned Counsel for the parties and perused the record.

(12) The first question for determination of present appeals is **whether the death of deceased Sheoprasad (Shivprasad) was homicidal in nature or not?**

(13) It would be appropriate to throw light on relevant provisions of Sections

299 and 300 of Indian Penal Code.

The Law Commission of United Kingdom in its 11th Report proposed the following test :

> "The standard test of 'knowledge' is, Did the person whose conduct is in issue, either knows of the relevant circumstances or has no substantial doubt of their existence?"
> *[See Text Book of Criminal Law by Glanville Wiliams (p.125)]*

"Therefore, having regard to the meaning assigned in criminal law the word "knowledge" occurring in clause Secondly of Section 300 IPC imports some kind of certainty and not merely a probability. Consequently, it cannot be held that the appellant caused the injury with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of Shivprasad. So, clause Secondly of Section 300 IPC will also not apply."

The enquiry is then limited to the question whether the offence is covered by clause Thirdly of Section 300 IPC. This clause, namely, clause Thirdly of Section 300 IPC reads as under: -

> "Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The argument that the accused had no intention to cause death is wholly fallacious for judging the scope of clause Thirdly of Section 300 IPC as the words "intention of causing death" occur in clause Firstly and not in clause Thirdly. An offence would still fall within clause Thirdly even though the offender did not intend to cause death so long as the death ensues from the intentional bodily injury and the injuries are sufficient to cause death in the ordinary course of nature. This is also borne out from illustration (c) to Section

300 IPC which is being reproduced below: -

> "(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

Therefore, the contentions advanced in the present case and which are frequently advanced that the accused- appellants had no intention of causing death of deceased Sheoprasad (Shivprsasad) is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

(14) The scope and ambit of clause Thirdly of Section 300 IPC was considered by the Supreme Court in the decision in **Virsa Singh vs. State of Punjab** reported in **AIR 1958 SC 465** and the principle enunciated therein explains the legal position succinctly. The accused Virsa Singh was alleged to have given a single spear blow and the injury sustained by the deceased was "a punctured wound 2"x =" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal. Three coils of intestines were coming out of the wound." After analysis of the clause Thirdly, it was held: -

> "The prosecution must prove the following facts before it can bring a case under S. 300 "Thirdly"; First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the

intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout), the offence is murder under S. 300 "Thirdly". It does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death."

(15) In the case of **Arun Nivalaji More vs. State of Maharashtra (Case No. Appeal (Cri.) 1078-1079 of 2005)**, it has been observed as under :-

"**11**. First it has to be seen whether the offence falls within the ambit of Section 299 IPC. If the offence falls under Section 299 IPC, a further enquiry has to be made whether it falls in any of the clauses, namely, clauses 'Firstly' to 'Fourthly' of Section 300 IPC. If the offence falls in any one of these clauses, it will be murder as defined in Section 300IPC, which will be punishable under Section 302 IPC. The offence may fall in any one of the four clauses of Section 300 IPC yet if it is covered by any one of the five exceptions mentioned therein, the culpable homicide committed by the offender would not be murder and the offender would not be liable for conviction under Section 302 IPC. A plain reading of Section 299 IPC will show that it contains three clauses, in two clauses it is the intention of the offender which is relevant and is the dominant factor and in the third clause the knowledge of the offender which is relevant and is the dominant factor. Analyzing Section 299 as aforesaid, it becomes clear that a person commits culpable homicide if the act by which the death is caused is done

(i) with the intention of causing death; or

(ii) with the intention of causing such bodily injury as is likely to cause death; or

(iii) with the knowledge that the act is likely to cause death."

If the offence is such which is covered by any one of the clauses enumerated above, but does not fall within the ambit of clauses Firstly to Fourthly of Section 300 IPC, it will not be murder and the offender would not be liable to be

convicted under Section 302 IPC. In such a case if the offence is such which is covered by clauses (i) or (ii) mentioned above, the offender would be liable to be convicted under Section 304 Part I IPC as it uses the expression "if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death" where intention is the dominant factor. However, if the offence is such which is covered by clause (iii) mentioned above, the offender would be liable to be convicted under Section 304 Part II IPC because of the use of the expression "if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death" where knowledge is the dominant factor.

12. What is required to be considered here is whether the offence committed by the appellant falls within any of the clauses of Section 300 IPC.

13. Having regard to the facts of the case it can legitimately be urged that clauses Firstly and Fourthly of Section 300 IPC were not attracted. The expression "the offender knows to be likely to cause death" occurring in clause Secondly of Section 300 IPC lays emphasis on knowledge. The dictionary meaning of the word 'knowledge' is the fact or condition of being cognizant, conscious or aware of something; to be assured or being acquainted with. In the context of criminal law the meaning of the word in Black's Law Dictionary is as under: -

> "An awareness or understanding of a fact or circumstances; a state of mind in which a person has no substantial doubt about the existence of a fact. It is necessary ... to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended."

In Blackstone's Criminal Practice the import of the word 'knowledge' has been described as under: -

> 'Knowledge' can be seen in many ways as playing the same role in relation to circumstances as intention

> plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so. Since it is difficult ever to be absolutely certain of anything, it has to be accepted that a person who feels 'virtually certain' about something can equally be regarded as knowing it."

(16) Section 299 of Indian Penal Code runs as under :-

> "299. Culpable homicide.-- Wheoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

(17) Section 299 of IPC says, whoever causes death by doing an act with the bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing :

> (i) an act with the intention of causing death;
> (ii) an act with the intention of causing such bodily injury as is likely to cause death; or
> (iii) an act with the knowledge that it is was likely to cause death.

Without one of these elements, an act, though it may be by its nature criminal and may occasion death, will not amount to the offence of culpable homicide. 'Intent and knowledge' as the ingredients of Section 299 postulate, the existence of a positive mental attitude and the mental condition is the special *mens rea* necessary for the offence.The knowledge of third condition contemplates knowledge of the likelihood of the death of the person. Culpable homicide is of two kinds : one, culpable homicide amounting to murder, and

another, culpable homicide not amounting to murder. In the scheme of the Indian Penal Code, culpable homicide is genus and murder is species. All murders are culpable homicide, but not *vice versa*. Generally speaking, culpable homicide *sans* the special characteristics of murder is culpable homicide not amounting to murder. In this section, both the expressions 'intent' and 'knowledge' postulate the existence of a positive mental attitude which is of different degrees.

(18) Section 300 of Indian Penal Code runs as under :-

> "**300. Murder.--** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--
>
> *Secondly*.-- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--
>
> *Thirdly*.-- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--
>
> *Fourthly*.-- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(19) "Culpable Homicide" is the first kind of unlawful homicide. It is the causing of death by doing ;(i) an act with the intention to cause death; (ii) an act with the intention of causing such bodily injury as is likely to cause death; or, (iii) an act with the knowledge that it was likely to cause death.

(20) Indian Penal Code recognizes two kinds of homicide :(1) Culpable homicide, dealt with between Sections 299 and 304 of IPC (2) Not-culpable homicide, dealt with by Section 304-A of IPC. There are two kinds of culpable homicide; (i) Culpable homicide amounting to murder (Section 300 read with

Section 302 of IPC), and (ii) Culpable homicide not amounting to murder (Section 304 of IPC).

(21) A bare perusal of the Section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not the intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e., mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.

(22) There are three species of *mens rea* in culpable homicide.(1) An intention to cause death; (2) An intention to cause a dangerous injury; (3) Knowledge that death is likely to happen.

(23) The fact that the death of a human being is caused is not enough unless one of the mental sates mentioned in ingredient of the Section is present. An act is said to cause death results either from the act directly or results from some consequences necessarily or naturally flowing from such act and reasonably contemplated as its result. Nature of offence does not only depend upon the location of injury by the accused, this intention is to be gathered from all facts and circumstances of the case. If injury is on the vital part, i.e., chest or head, according to medical evidence this injury proved fatal. It is relevant to mention here that intention is question of fact which is to be gathered from the act of the party. Along with the aforesaid, ingredient of Section 300 of IPC are also required to be fulfilled for commission of offence of murder.

(24) In the scheme of Indian Penal Code, “Culpable homicide” is genus and “murder” is its specie. All “Murder” is “culpable homicide” but not vice versa. Speaking generally 'culpable homicide sans special characteristics of murder' if culpable homicide is not amounting to murder.

(25) In the case of **Anda vs. State of Rajasthan** reported in **1966 CrLJ 171,** while considering “third” clause of Section 300 of IPC, it has been observed as under:-

> “It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on sufficiency of injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and causing of such injury was intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature.”

(26) In the case of **Mahesh Balmiki vs. State of M.P.** reported in **(2000) 1 SCC 319,** while deciding whether a single blow with a knife on the chest of the deceased would attract Section 302 of IPC, it has been held thus :-

> “There is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly

establish that the appellant had intention to kill the deceased. In any event, he can safely be attributed knowledge that the knife blow given by him is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

(27) In the case of **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat** reported in **(2003) 9 SCC 322**, it has been observed as under :-

"The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties

> have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

(28) In the case of **Pulicherla Nagaraju @ Nagaraja vs. State of AP** reported in **(2006) 11 SCC 444**, while deciding whether a case falls under Section 302 or 304 Part-I or 304 Part-II, IPC, it was held thus :-

> "Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was

> any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

(29) In the case of **Sangapagu Anjaiah v. State of A.P. (2010) 9 SCC 799,** Hon'ble Apex Court while deciding the question whether a blow on the skull of the deceased with a crowbar would attract Section 302 IPC, held thus**:-**

> "**16.** In our opinion, as nobody can enter into the mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crowbar as the weapon of offence. He has further chosen a vital part of the body i.e. the head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to cause death of the deceased."

(30) In the case of **State of Rajasthan v. Kanhaiyalal** reported in **(2019) 5 SCC 639,** this it has been held as follows:-

> "**7.3** In **Arun Raj [Arun Raj v. Union of India, (2010) 6 SCC 457 : (2010) 3 SCC (Cri) 155]** this Court observed and held that there is no fixed rule that whenever a single blow is inflicted, Section 302 would not be attracted. It is observed and held by this Court in the aforesaid decision that nature of weapon used and vital part of the body where blow was struck, prove beyond reasonable doubt the intention of the accused to cause death of the deceased. It is further observed and held by this Court that once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows.
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> **7.4** ***In Ashokkumar Magabhai Vankar [Ashokkumar Magabhai Vankar v. State of Gujarat,*** **(2011) 10 SCC 604 : (2012) 1 SCC (Cri) 397]** , the death was caused by single blow on head of the deceased with a wooden pestle. It was found that the accused used pestle with such force that head of the deceased was broken into pieces. This Court considered whether the case

would fall under Section 302 or Exception 4 to Section 300 IPC. It is held by this Court that the injury sustained by the deceased, not only exhibits intention of the accused in causing death of victim, but also knowledge of the accused in that regard. It is further observed by this Court that such attack could be none other than for causing death of victim. It is observed that any reasonable person, with any stretch of imagination can come to conclusion that such injury on such a vital part of the body, with such a weapon, would cause death.

7.5 A similar view is taken by this Court in the recent decision in Leela Ram (supra) and after considering catena of decisions of this Court on the issue on hand i.e. in case of a single blow, whether case falls under Section 302 or Section 304 Part I or Section 304 Part II, this Court reversed the judgment and convicted the accused for the offence under Section 302 IPC. In the same decision, this Court also considered Exception 4 of Section 300 IPC and observed in para 21 as under: (SCC para 21)

> "**21**. Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are: (i) that the act was committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and (iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner."

(31) In the case of **Bavisetti Kameswara Rao v. State of A.P.** reported in **(2008) 15 SCC 725,** it is observed in paragraphs 13 and 14 as under:-

> "**13.** It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the learned counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the

screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.

14. In **State of Karnataka Vedanayagam [(1995) 1 SCC 326 : 1995 SCC (Cri) 231]** this Court considered the usual argument of a single injury not being sufficient to invite a conviction under Section 302 IPC. In that case the injury was caused by a knife. The medical evidence supported the version of the prosecution that the injury was sufficient, in the ordinary course of nature to cause death. The High Court had convicted the accused for the offence under Section 304 Part II IPC relying on the fact that there is only a single injury. However, after a detailed discussion regarding the nature of injury, the part of the body chosen by the accused to inflict the same and other attendant circumstances and after discussing clause Thirdly of Section 300 IPC and further relying on the decision in Virsa Singh vs. State of Punjab [AIR 1958 SC 465] , the Court set aside the acquittal under Section 302 IPC and convicted the accused for that offence. The Court (in **Vedanayagam case [(1995) 1 SCC 326 : 1995 SCC (Cri) 231] , SCC p. 330, para 4)** relied on the observation by Bose, J. in Virsa Singh case **[AIR 1958 SC 465]** to suggest that: (Virsa Singh case **[AIR 1958 SC 465],** AIR p. 468, para 16)

> "16. With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap."

The further observation in the above case were: **(Virsa Singh case [AIR 1958 SC 465]** , AIR p. 468, paras 16 & 17)

> "**16.** The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or

> otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.…
>
> 17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact."

(32) The next question for determination is **whether the offence falls within the ambit of Section 307 of IPC or not ?**

(33) Section 307 of IPC runs as under:-

> **"Attempt to murder.** - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned."

(34) In the case of **Bakshish Singh vs. State,** reported in **AIR 1952 Pepsul38,** it is observed that if a man commits an act with such intention and knowledge and under such circumstances that if death had been caused the offence would have amounted to murder and the act itself is of such a nature as would have caused death in the usual course of the events but for something beyond his control which prevented that result his act would be punishable as an attempt to murder.

(35) In the case of **Hari Singh vs. Sukhbir Singh & Others,** reported in

(1988) 4 SCC 551, the Supreme Court held that while examining whether a case of commission of offence under Section 307 IPC IPC is made out, the Court is required to see, whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of 'attempt to murder'. Under Section 307, the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner, in which, it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. The state of mind of the accused has to be established from surrounding circumstances and the motive would be relevant circumstance. Where the evidence is not sufficient to establish with certainty, existence of all requisite intention or knowledge of the accused, there can be no conviction under Section 307 IPC. The evidence on record, nature of injuries, if examined in the light of the aforesaid principle laid down by the Apex Court, it is difficult to hold that the appellants arrived in the house of the victim, Maikulal with an intention to cause death.

(36) The essential ingredients required to be proved in the case of an offence under Section 307 of IPC are :-

> (i) that the death of a human being was attempted;
> (ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and
> (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as:

> (a) the accused knew to be likely to cause death; or
> (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b)such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury. The first part makes any act committed with the intention or knowledge that it would amount to murder if the act caused death punishable with imprisonment up to ten years. The second part makes such an act punishable with imprisonment for life if hurt is caused thereby. Thus even if the act does not cause any injury, it is punishable with imprisonment up to 10 years. If it does cause an injury and thereafter hurt, it is punishable with imprisonment for life".

(37) For holding guilty under Section 307 of IPC, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not essential that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause the death of the person assaulted. The Court has to see that whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. It is sufficient in law, if there is intention coupled with some overt act in execution thereof. It must be noted that Section 307 IPC provides for imprisonment for life if the act causes 'hurt'. It does not require that the hurt should be grievous or of any particular degree. The intention to cause death is clearly attributable to the

accused since the victim was strangulated after throwing a telephone wire around his neck and telling him he should die. In order to amount to an attempt to murder, the act attempted must be such that if not prevented or intercepted, it would be sufficient to cause death of the victim.

(38) In the case of **Uttam Ghosh vs. State, 1995 Cr.L.J. 4079 (Cal),** it is held that similarly the accused was arrested for shooting of a professor in Amritsar and a pistol made in USA was recovered from his possession and on the basis of evidence on records he was convicted by the designated Court under Section 307 but on appeal High Court set aside his conviction on the ground that the accused was arrested on 25 November whereas his arrest was shown to have taken place on 6 December. Supreme Court also confirmed the verdict of the High Court and held that since appellant had been arrested prior to 6 December, his conviction was not sustainable. Where from the injuries caused intention or knowledge to cause death could not be inferred, it was held that conviction of the accused shall be altered from Section 307 to one under Section 324 and others would be held liable under Section 323. Here even benefits of probation were not given to the accused as he had assaulted the victim indiscriminately at a lonely place. The accused in a case before Supreme Court had due to political rivalry aimed the dagger blow at the head of the victim whose hand was severed from the wrist when he tried to ward off blow by raising his hands. It was held that conviction under Section 307 was proper as severity of blow was sufficient to spell out the murderous intent of the accused. Similarly where accused had fired a single shot injuring the victim due to previous enmity between them, it was held that the accused was guilty under Section 307 and was not entitled to the benefits of

doubts on the ground that the other accused were already acquitted.

(39) In the case of **Mohindar Singh vs. State of Punjab,** reported in **AIR 1960 Punj 135,** it is observed that the offence of attempt to commit murder punishable under Section 307 IPC is constituted by the concurrence of *mens rea* followed by an *actus reus.* An intent *per-se* is not an attempt. It implies purpose and attempt is an actual effort made in execution of the purpose. From the steps directed towards the objective sought, the criminal intent must be logically inferable. The attempt for purposes of Section 307 IPC should stem from a specific intention to commit murder, and this blameworthy condition of mind may be gathered from direct or circumstantial evidence, including the conduct of the accused. Apart from the necessary *mens rea*, the *actus reus* must be more than a preliminary preparation. The means must be apparently, though not really suitable, so that they can be adapted to the designed purpose.

(40) In the case of **Kanbi Nagji Kala vs. State,** reported in **1956 Cr.L.J. 1439 (Sau),** it is held that when the *mens re*a, which is essential to the offence of murder, was absent and where the weapons used by the accused were ordinary agricultural implements and did not necessarily indicate a deliberate intention to cause death or fatal injuries, conviction under Section 307 was held not sustainable. In that case four boys took their cattle for grazing; but the cattle strayed into the adjoining field of the accused and were committing mischief. The accused attempted to take them to pound but was obstructed by the boys resulting in a scuffle and some of the boys were seriously injured by sharp cutting weapons. The High Court ruled out the plea of self defence on the part of the accused but at the same time acquitted the accused of the charge under

Section 307 IPC for absence of *mens rea,* the accused using only sharp cutting agricultural implements used ordinarily by cultivators.

(41) In the case of **Abdul Wahid vs. State of U.P.,** reported in **1980 CrLJ (NOC) 77 (All),** it was held as follows:-

> "Under Section 307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of 'attempt to murder'. Under Section 307 IPC the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. To constitute an offence under Section 307 IPC the intention or knowledge must be such as is necessary to constitute murder. The intention is to be gathered from the nature of the weapon used and the parts of the body where the injuries are inflicted and no conviction is legally permissible unless the prosecution proves the ingredients of Section 300 IPC of which intention or knowledge play a vital role. "

(42) Intent which is a state of mind can never be precisely proved by direct evidence as a fact: it can only be deduced or inferred from other facts. Some relevant considerations are :(1) the nature of weapon used; (2) the place where injuries were inflicted; (3) the nature of the injury caused; (4) the opportunity available which the accused gets. The Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that Section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Therefore, the intention is to be gathered from all the circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is

used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

(43) Now, **the facts of case are required to be marshallized with the help of prosecution evidence adduced before the Trial Court.**

(44) Dr. MR Sharma (PW16), in his evidence, deposed that on 14/03/2006 he was posted as Medical Officer at Civil Hospital, Ambha. On the said date, dead body of deceased was brought by Constable R.Maniram No.28 of Police Station Lukhrai,Ambah along with application form Ex.P27 carrying his signature from "A to A". In his statement, this witness stated that the dead body of deceased was identified by Sukhram, father of the deceased and cousin of deceased Ramdas. This witness further stated that deceased was wearing white-colour underwear, his eyes and mouth were shut and the deceased was having stiffness. On postmortem examination, he found the following injuries over the body of deceased:-

> "(1) Incised wound size 6x 1 cm x bone deep on the left parietal bone of skull.
> (2) Incised wound size 3x1 cm x bone deep on the front bone of skull left side.
> (3) Contusion size 8x7 cm was on occipito-temporal region of skull.
> (4) Lacerated wound size 3 x 1 cm straight on the left cheek.
> (5) Bruise size 5x 2 cm on the left shoulder.
> (6) Abrasion size 6x1 cm was on the left clavicle bone of shoulder side. "

(45) The doctor opined, that all the injuries were anti- morterm in nature. In the internal examination, as per the opinion of doctor, there was fracture of frontal and left-parietal bone of skull. The brain of deceased was ruptured,

teared and brain heamorrhage was caused. Remaining parts of body of deceased were healthy. Death of deceased was due to coma, as a result of various injuries inflicted to his brain. Duration of death of deceased was 6 to 24 hours. Death of deceased was homicidal in nature. This witness further stated that circumstantial evidence should also be considered and postmortem report is Ex.P28 carrying his signature from "A to A".

(46) **Hence, the death of deceased was homicidal in nature and the injuries caused to the deceased were sufficient to cause his death.**

(47) Dr. Ramkrishna Barothiya (PW15) in his evidence deposed that on 13/03/2006 he examined injured witnesses Kalyan, son of Sukhram (PW2), Jyotiram (PW3) and Sonpal (PW6). On medical examination of injured/victim Kalyan (PW2), he found following injuries over the body of injured Kalyan:-

> "(1) Incised wound size 6"x1" x bone deep, 2"x½' 'x bone deep, 1"x1/2" x bone deep
> (2) Incised wound size 2"x½" x bone deep on left side of middle head.
> (3) Incised wound size ¾" x 1/10" x 1/10" on left side of chest
> (4) Incised wound size ¾ " x 1/10"x ½" on below of arm. "

This witness stated that he had referred injured Kalyan to Neurology, JA Hospital, Gwalior and advised for his X-ray. Report is Ex.24 carrying his signature from "A to A".

(48) Dr. Ramkrishna Barothiya (PW15) in his evidence deposed that on medical examination of injured Sonpal (PW6), he found the following injuries on the body of injured Sonpal:-

> "(1) Incised wound size 2"x 1/10" x1/10" on left side of middle head.
> (2) Incised wound size 2½" x 1/10"x 1/10" on right side of back of middle head."

As per opinion of doctor, all the injuries were caused by sharp edged object and simple in nature. MLC is Ex.P25 carrying his signature from "A to A".

(49) Further, Dr. Ramkrishna Barothiya (PW15) in his evidence deposed that on medical examination of injured Jyotiram (PW3), he found the following injury on the body of injured Jyotiram-

(1) Incised wound size ¼" x1/10"x1/10" on right side of chest

As per opinion of doctor, the aforesaid injury was caused by sharp-edged object.

(50) The next question for consideration is **whether appellants- accused were members of unlawful assembly with deadly weapons and in furtherance of common object had committed murder of deceased Sheoprasad alias Shivprasad and cause grievous hurt/injuries to the victims Jyotiram, Kalyan and Sonpal; and whether they can be convicted with the aid of Section 149 of IPC or not ?**

(51) Learned Counsel for the appellants-accused submitted that as per ingredients of Section 149 of IPC, act should be done directly but in the present case, there is no overt act on the part of each of the appellants, therefore, no conviction can be made. In support of contention, learned Counsel relied on the judgment passed in the case of **Raju alias Rajendra and Another vs. State of Rajasthan,** reported in **2013 (1) CCSC 226 (SC**) and the judgment passed in the case of **Ranjit Singh vs. State of Punjab and Another,** reported in **2014 (1) CCSC 305(SC).** But in the present case, there is specific overt act on the part of the appellants-accused for preparation to commit the offence, who were having

various deadly weapons, therefore, fulfils the ingredients of Section 149 of IPC.

(52) Section 149 of Indian Penal Code runs as under :-

> "**149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--** 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."

There are two essential elements covering the act under Section 149 of Indian Penal Code, which are as under:-

> "(i) The assembly should consist of at least five persons; and
> (ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein."

(53) For recording a conclusion that a person is guilty of any offence under Section 149 of IPC, it must be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the five persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the five enumerated objects specified under Section 141 of IPC.

(54) The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of overt acts committed by such individual members of the assembly is not permissible.

(55) In the case of **Dani Singh v. State of Bihar** reported in (**2004) 13 SCC 203,** the Hon'ble Apex Court has observed as under :-

> "The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

1.

(56) In the case of **Mahadev Sharma v. State of Bihar** reported in **(1966) 1 SCR 18**, the Hon'ble Apex Court has discussed about applicability of Section 149 of IPC and observed as under :-"The fallacy in the cases which hold that a charge under Section 147 is compulsory arises because they overlook that the ingredients of Section 143 are implied in Section 147 and the ingredients of Section 147 are implied when a charge under Section 149 is included. An examination of Section 141 shows that the common object which renders an assembly unlawful may involve the use of criminal force or show of criminal force, the commission of mischief or criminal trespass or other offence, or resistance to the execution of any law or of any legal process. Offenses under Sections 143 and 147 must always he present when the charge is laid for an offence like murder with the aid of Section 149, but the other two charges need not be framed -separately unless it is sought to secure a conviction under them. It is thus that Section 143 is not used when the charge is under Section 147 or Section 148, and Section 147 is not used when the charge is under Section 148. Section 147 may be dispensed with when the charge is under Section 149 read with an offence under the Indian Penal Code."

(57) It is relevant to mention here that if all the necessary ingredients are present in a case when charges were framed under Section 149 of IPC, each member of unlawful assembly shall be held liable. The condition precedent is that the prosecution proves the existence of unlawful assembly with a common object, which is the offence.

(58) In the case of **Kuldip Yadav vs. State of Bihar reported in (2011) 5 SCC 324**, it is held that a clear finding regarding nature of the common object

of the assembly must be given and the evidence discussed must show not only the common object, but also that the object was unlawful, before recording a conviction under Section 149 of IPC. Foremost essential ingredient of Section 141 of IPC must be established.

(59) Sukhram (PW1) in his statements deposed that accused Vinoda inflicted injury on the head of Sheoprasad by means of "lathi". Accused Mahaveer inflicted injury by means of "farsa" on head of Sheoprasad. Accused Karua inflicted injury by means of "farsa" on the head of Sheoprasad. Accused Balla inflicted injury by means of "axe" on the head of Sheoprasad. Accused Gangadeen inflicted injury by means of "lathi" on the cheek of Sheoprasad. Accused Naresh also inflicted injury by means of "ballam" on the *Kalthari* of Sheoprasad. Thereafter, accused Mahaveer and Karua also inflicted injuries on the head of his son Kalyan by means of "farsa". Accused Balla inflicted injury by means of "axe" on the head of Kalyan. Accused Naresh inflicted injury by means of "ballam"on the below of arm and inflicted injury to the chest of Kalyan. When witness Jyoti came for rescue, accused Naresh also inflicted an injury to his chest by means of "ballam "and inflicted injury to witness Sonpal also.

In his cross-examination, this witness stated that on the date of incident, mustard crops were standing in the field. All the accused persons were hidden themselves in the mustard field. This witness stated that he had taken the dead body of deceased Sheoprasad from the field of Ramveer, who had fallen on the ground with blood-stains. He was wearing pant and shirt. On the date of incident after sunset there was bright night. In his cross-examination, this witness stated

that this fact has been narrated by him to police in his police diary statement Ex.D2. In paragraph 7 of his cross-examination, this witness stated that he had seen the dead body of deceased Sheoprasad while removing clothes from his body by the police. This witness in paragraph 9 of his cross-examination denied that Sonpal, Ramprakash, Kalyan and Shivprasad had taken liquor on the date of incident. In paragraph 11 of his cross-examination, this witness denied that accused Mahaveer and Vinod had told hisson for bringing the liquor. In paragraph 13 of his cross-examination, this witness stated that all the accused persons had come near the well of the field of Ramveer with deadly weapons and this fact was narrated by him and he could not say as to why Police did not mention in the report. After 15-20 minutes of the incident, at about 07:00 pm, they reached Police Station and Police within 10-15 minutes registered FIR. This witness in paragraph 20 of his cross-examination admitted that there is no independent witness. In paragraph 29 of his cross-examination, this witness denied that his son Shivprasad and Kalyan had any evil intention on the wife of appellant-accused Vinoda. This witness denied that unknown persons have committed murder of his son Shivprasad.

(60) Injured witness Kalyan (PW2), in his evidence, deposed that accused persons, six in number, were unlawfully assembled and surrounded deceased Sheoprasad and killed him. This witness stated that accused Mahaveer, Karua and Barelal inflicted injury on his head by means of "farsa". Accused Naresh inflicted injury on his chest and below the arm by means of "ballam". When Sonpal came for rescue, accused Mahaveer and Karua also inflicted injuries to him by means of "farsa". Accused Naresh also inflicted injury to his uncle

Jyotiram by means of "ballam". This witness, in his cross-examination, admitted that on the date of incident, on the date of incident there was an atmosphere of taking drink and fish near the well. On the date of incident, his relatives had come to his house. This witness, in paragraph 4 of his cross-examination, deposed that on the date of incident, after sunset there was a moon light. This witness in paragraph 7 of his cross-examination deposed that at the time of recording of his statement, he had already narrated about the injuries caused to deceased Sheoprasad to police and he could not say as to why Police did not write in his police diary statement Ex.D1. This witness further deposed he had not narrated about the injury caused to witness Sonpal by accused Gangadeen. At the time of recording of his statement, he had already disclosed to the police about the injuries sustained by witness Sonpal caused by accused-appellants Mahaveer and Karua and he could not say as to why Police did not mention this fact in his police diary statement Ex.D1. In paragraph 18 of his cross-examination, this witness stated that at the time of recording of his statement, he had already narrated that he had gone along with deceased Sheoprasad and had seen that the accused persons have beaten deceased Sheoprasad and he could not say as to why Police did not mention this fact in the report.

(61) Other injured witness Jyotiram (PW3) in his evidence stated that after the incident, near about 10-20 villagers reached the spot. On the date of incident, he had gone to the field for attending the call of nature. This witness stated that Sukhram had lodged report at Police Station. After 20 days of the incident, Police had come to the hospital and recorded his statement. This witness stated that the place of incident was the the field of Ramveer Singh Tomar and the time

of incident was 07:00 pm. This fact has been narrated by him to the Police and he could not say as to why Police did not mention this fact in his police diary statement Ex.D3. This witness further stated that he has already narrated to the Police that accused-appellant Mahaveer inflicted injury by means of "farsa" on the head of deceased Sheoprasad, accused Karua inflicted injury by means of farsa, accused Barelal inflicted injury by means of "axe" and accused Gangadeen inflicted injury on the cheek of Sheoprasad and he could not say as to why Police did not mention this fact in his police diary statement Ex.D3. This witness further stated that the dead body of deceased Sheoprasad was brought to the police station at about 11:00 pm and the deceased was wearing pant and shirt. On the *Panchnama* of the dead body of deceased, he had put his signature.

In his cross-examination, this witness admitted that Police had recorded his statement after 20 days of the incident as he was unable to tell anything because of pain. This witness in para 22 of his cross-examination admitted that the place of incident was the field of Ramveer and this fact has been narrated by him in his police diary statement Ex.D3. This witness denied that he is giving any false evidence. This witness in his cross-examination further deposed that after the sunset, there was a bright night and this fact has also been narrated by his brother Sukhram in his statement. This witness in paragraph 25 of his cross-examination deposed that at the time of taking the dead body of deceased Sheoprasad, he was wearing an underwear and his dead body was kept by Ramdas and Ramswaroop in a tractor. Rest of the clothes were either take off in the field or in his house.

(62) Krishna Kumar (PW8), the son of the deceased Sheoprasad, in his evidence deposed that he had taken off the bloodstained clothes of his father in

the field and shoes in the house. Ramdas (PW5) in his evidence also deposed that the son of the deceased had taken off the bloodstained clothes of deceased in the field and he along with witnesses Jyotiram and Sukhram had taken the dead body of deceased in a tractor. From para 15 and 16 of the statements of this witness, there are some omissions and contradictions regarding injuries caused by accused.

(63) Another injured witness Sonpal (PW6) in paragraph 14 of his evidence deposed that in his presence, accused Mahaveer had not demanded any liquor from the deceased Sheoprasad. This witness further stated that after sunset, within 10-15 minutes there would be night of full moon. This fact has been narrated by him to Police at the time of recording of his statement and he could not say as to why Police did not mention this fact in his police diary statement Ex.D6. This witness in para 20 of his cross-examination stated that he had narrated to the Police that the place of incident had taken place in the mustard field and he could not say as to why Police did not mention this fact in his police diary statement Ex.D6. This witness further in his cross-examination deposed that his statement was recorded by Police after 20-22 days of incident as he was in the hospital and in his presence, Sukhram had not lodged report. This witness in paragraph 33 of his cross-examination denied that the incident had not taken place at 07:00 pm. In his cross-examination, this witness further deposed that at the time preparation of spot map, police did not call him.

(64) Jagat Singh Yadav (PW10), in his evidence deposed that on 13/03/2006 he was posted as Assistant Sub-Inspector at Police Station Ambha. This witness in paragraph 7 of his cross-examination, denied that at the time of registering the

FIR, due to overwriting the time of lodging FIR as 23:30 has been mentioned in place of 22:30. He further deposed that accused Gangadeen, Ramnaresh, Ramsundar and Mahaveer were arrested by him. Accused persons themselves had come to the Police Station on 16/05/2006. He had neither seized blood-stained clothes of the injured nor sent the deadly weapons to the Ballistic Expert. This witness in his cross-examination denied that later on, MLC reports of the injured witnesses Kalyan, Sonpal and Jyotiram(Ex.P7 to Ex. P9) were falsely prepared.

(65) It is evident from the record as well as evidence of aforesaid witnesses that the act done by appellants accused in furtherance of their common object has been proved by relevant prosecution witnesses wherein, the FIR registered by Jagat Singh Yadav (PW10), who stated that the FIR was lodged as per the information given by the father of deceased Sukhram (PW1). Postmortem of the deceased was conducted and the injured were medically examined. Postmortem of deceased has been proved, as mentioned above and MLC reports of the injured persons were also proved.

(66) It is an admitted fact that complainant party and the accused persons are knowing each other prior to the incident. Sukhram (PW1) in his evidence has specifically stated that on the date of incident, all the accused persons reached the spot and told his son deceased Sheoprasad to bring the liquor. When his son Sheoprasad denied the same, on that the accused persons abused in filthy language and went away. After sometime, all the accused persons returned back with various deadly weapons and caused grievous injuries to deceased Sheoprasad. When witnesses Sonpal, Jyotiram and and Kalyan came for rescue,

the accused persons also inflicted injuries to them by deadly weapons respectively. Deceased Sheoprasad had also sustained grievous injuries caused by accused persons by means of deadly weapons. Injured witnesses, Sonpal, Jyotiram and Kalyan in their evidence have specifically stated that the deceased had died due to the injuries caused by accused persons. Prosecution version of Sukhram (PW1) has been fully corroborated by evidence of the injured witnesses Kalyan (PW2), Jyotiram (PW3) and Sonpal (PW6). Even though, there are some contradictions and omissions in the statements given by aforesaid injured witnesses, but the aforesaid contradictions and omissions are not fatal to the prosecution case. The oracular evidence is fully supported by medical evidence.

(67) So far the defence of accused persons that the incident had taken place in the dark night, the same has no force. As the incident took place in the month of March at around 07:00 pm. In the month of March, after sunset there was a bright moon light and the victim(s) can identify the accused persons. There is no evidence of previous enmity between the accused persons and the complainant party. Rather, the present case reflects *modus operandi* of the accused persons that initially they reached the house of complainant and told the son of complainant to bring the liquor. When the son of complainant Sheoprasad refused to bring liquor, then the accused persons went away and after sometime, all the accused persons returned back to the place of occurrence with deadly weapons and committed the incident which reflects the motive of accused persons. As per the seizure memo, seized articles as well as deadly weapons like lathi, ballam, farsa and axe were seized by Investigating Officer, Jagar Singh

Yadav (PW10) vide Ex.P14 to ExP17 carrying his signature from "A to A". Spot map was prepared vide Ex.30. Bloodstained clothes and plain soil were also seized from the spot.

(68) So far as the argument advanced by learned counsel for the appellants-accused that all the relevant witnesses are relative witnesses and credibility of witnesses cannot be believed is concerned, there is no force in the said argument.

(69) The Apex Court in the case of **Harbeer Singh Vs. Sheeshpal and others,** reported in **(2016) 16 SCC 418** has held as under :-

> **"18.** Further, the High Court has also concluded that these witnesses were interested witnesses and their testimony was not corroborated by independent witnesses. We are fully in agreement with the reasons recorded by the High Court in coming to this conclusion.
>
> **19.** In *Darya Singh* v. *State of Punjab*, this Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities must be taken into account. This is what this Court said: (AIR p. 331, para 6)
>
> > "*6*. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. … But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. … If the criminal court is satisfied that the witness who is related to the victim was not a chance witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the

> assault has to be carefully scrutinized."
>
> **20.** However, we do not wish to emphasize that the corroboration by independent witnesses is an indispensable rule in cases where the prosecution is primarily based on the evidence of seemingly interested witnesses. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement.
>
> **21.** Further, in *Raghubir Singh* v. *State of U.P.*, it has been held that: (SCC p. 84, para 10)
>
> "*10*. … the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without unnecessary and redundant multiplication of witnesses. … In this connection general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind."

(70) Thus, it is clear that although the evidence of related witnesses cannot be discarded/disbelieved on this sole ground but their evidence must be examined very carefully and all infirmities must be taken into consideration.

(71) It is argued by learned Counsel for the appellants- accused that in the present case, there is a serious infirmity in the proof of prosecution evidence. The standard of evidence is not of a high quality and, therefore, accused persons are entitled to fair and true investigation and fair trial and prosecution is expected to play a balanced role in the trial of a crime. In support of contention, learned counsel has placed reliance on the judgment of Apex Court in the case of **Ankush Maruti Shinde and Others vs. Sate of Maharasthra,** reported in **(2019) 15 SCC 470.**

There is no force in the argument advanced by learned Counsel for the appellants-accused. As discussed above, ocular evidence is fully supported by

medical evidence. Furthermore, while the incident took place within no time, then in normal course of nature, it is not possible to witness the incident by independent witnesses along with the fact that number of witnesses is not material. It is well-settled principle of law that the quality of evidence and not quantity of evidence is material which is required to be judged by the Court to place credence on the statements of witnesses. Therefore, the credibility of prosecution witnesses in the present matter remained unrebutted.

(72) Learned Counsel for the appellants-accused further submits that the injuries found on the left side of body of deceased Sheoprasad reflect that he had died due to fall on the ground and the injuries sustained by him were not caused by any sharp-cutting objects.

This argument of learned Counsel has no force as whenever any person is attacked by more than one persons, the person who has been attacked, tries to save himself and in order to save from the injuries, the body reaction may differ from man to man and if only such injuries were found on the body of deceased, then it cannot be said that the deceased had fallen on the ground having sharp-cutting objects.

(73) The learned Counsel for the appellants- accused submitted that the time of the incident was around 07:00 pm and at that time, no one can identify any person or persons due to darkness.

Again, this argument has no force as the date of incident is 13th March and as observed by the Trial Court in its judgment, on 13th March the sunset times remains at around 06:25 pm and it is also a natural phenomenon that, after sunset around 45 minutes sufficient light remains there.

(74) The learned counsel for the appellants-accused further submitted that there are various contractions and omissions in the prosecution witnesses and the prosecution case is suffered from various contradictions, discrepancies and inconsistencies and in particular, there is a serious doubt about truthfulness or credibility of witnesses. If there are contractions and omissions in the statement of witnesses, then benefit should be given to the accused/appellants. In support of contention, the Counsel has relied on the judgments passed by Supreme Court in the case of **Prabhat @ Bhai Narayan Wagh & Another vs. State of Maharashtra** reported in **2013(1) CCSC 1001(SC)** and in the case of **Noushad alias Noushad Pasha & Others vs. State of Karnataka,** reported in **2015 (1) Crimes (32).**

Further, the counsel for the appellants- accused submitted that there is delay in recording statements of injured witnesses, Kalyan (PW2), Jyotiram (PW3) and Sonpal (PW6) and the delay has not been properly explained by prosecution because the statements of witnesses should have recorded on the same date of incident. The learned Counsel further submitted that there is long delay on the part of Investigating Officer in recording the statements of witnesses during investigation of the case. Therefore, delayed examination of the witnesses shall give an opportunity to them to concoct a different version that what actually took place in the incident. It is further submitted that conviction of accused cannot be based upon the evidence of injured witnesses whose conduct was unnatural and inconsistent with ordinary course of human nature making their presence at the place of incident extremely doubtful, is highly unsafe without corroboration from other piece of evidence. Further, it is

submitted that while appreciating the prosecution evidence, inherent improbabilities in the story narrated by alleged witnesses should be analyzed. In the present case, the testimony of the witnesses is not fully corroborated, therefore, the entire prosecution may be discarded and the conviction of accused is unsustainable. In support of contention, the learned Counsel has placed reliance on the judgments passed in the case of **Balakrushna Swain vs. The State of Orissa,** reported in **AIR 1971 SC 504, Salveraj vs. The State of Tamil Nadu,** reported in **AIR 1976 SC 1970, Balaka Singh & Others vs. The State of Punjab,** reported in **AIR 1975 SC 1962, Amar Singh vs. State (NCT of Delhi),** reported in **2020 SCC Online SC 826, Vijaybhai Bhanabhai Patel vs. Navnitbhai Nathubhai Patel & Others,** reported in **2004 SCC(Cri) 2032** and **Vipin Jog vs. State of Madhya Pradesh,** reported in **2008 Cr. L. J (MP)73.**

So far as the argument advanced by learned Counsel for the appellants-accused regarding contractions and omissions as well as the delay is concerned, the same has no force. On perusal of the record, it is apparent that no prejudice has been caused to appellants-accused due to delay in recording of statements of witnesses under Section 161 of CrPC as there is ample evidence available on record against the accused. As stated above, there is no material omissions and contractions in the evidence of prosecution witnesses. Corroboration is required whenever ocular or the medical evidence is not so strong to believe. Conviction of accused cannot be assailed merely because of some lacuna in the investigation and any failure or omission of investigating officer cannot render prosecution case doubtful or unworthy of belief in a case where prosecution case is fully established by direct testimony of the injured witnesses duly

corroborated by medical evidence.

(75) The learned Counsel for the appellants- accused also submitted that there was on blood on the seized deadly weapons, therefore, it cannot be said that weapons were used by accused persons for commission of alleged offence. So far as recovery of deadly weapons used by accused is concerned, none of the weapons was found to be stained with blood. Even the weapons were not sent to the Ballistic Expect.

Again, there is no substance in the said argument advanced by learned Counsel for the accused. As the discovery of weapons was made as per arrest of accused persons at the place where incident had taken place and the weapons were seized from the field of complainant at the behest of accused. Further, the bloodstained articles and plain soil were collected by Police from the spot. Also, ocular evidence is supported by medical evidence. Therefore, it cannot be said that accused persons have not used any deadly weapons causing injuries to the deceased as well as to victims/ injured, in the incident.

(76) On the basis of aforesaid discussion, it is evident that as per the medical evidence, the death of the deceased was homicidal in nature and was caused by deadly weapons. The victims were also injured by deadly weapons by accused persons. Nature of injuries of deceased were also dangerous to life. Ocular evidence of injured witnesses, namely, Kalyan, Sonpal and Jyotiram is fully corroborated by medical evidence. Hence, the motive of accused is emerged out from the evidence produced by Prosecution before trial Court. As the deceased refused to bring liquor, all the accused persons went away and after sometime, all the accused persons, who were members of an unlawful assembly consisting

of not less than five persons, in furtherance of their common intention, reached the spot and caused injuries to the deceased as well as to the victims/ injured by means of deadly weapons like farsa, ballam, axe and lathi, which are sufficient to cause the death of the deceased and also reflect common intention of accused appellants.

(77) In the light of foregoing discussion, we are of the considered opinion that the Trial Court has properly and legally analyzed and appreciated the entire evidence available on record and did not commit any mistake in convicting and sentencing the appellants- accused. Therefore, the impugned judgment of conviction and sentence dated 17/08/2009 passed by First Additional Sessions Judge to the Court of Fifth Additional Sessions Judge (Fast Track Court) Ambah, District Morena (MP) in Sessions Trial No.137/2006 is hereby **affirmed.**

(78) Consequently, **Criminal Appeal No.629/2009** filed by appellant- accused Vinoda fails and is hereby **dismissed.** Since he is on bail, therefore, his bail bonds stand cancelled. He is directed to surrender before the Trial Court concerned for serving the remaining part of jail sentence.

(79) Similarly, **Criminal Appeal No.674/2009** filed by appellant No.1 Gangadeen and four others (except appellant No.5- Barelal who has died during pendency of appeal) also fails and is hereby **dismissed.** Since appellant No.1 accused Gangadeen and appellant No.3 Ramnaresh are on bail, therefore, their bail bonds also stand cancelled. They are directed to surrender before the Trial Court concerned for serving the remaining part of jail sentence. Since the remaining accused (appellant No. 2 Ramsundar and appellant No.4 Mahaveer)

are in jail, therefore, they be intimated with the result of their appeal through the Jail Superintendent concerned.

(80) With a copy of this judgment, record of the Trial Court be sent back immediately.

(G. S.Ahluwalia) **Judge**	**(Rajeev Kumar Shrivastava)** **Judge**

MKB

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BARIK
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