TRILOKI NATH AND ORS. A

v.

STATE OF U.P.

OCTOBER 28, 2005

[S.B. SINHA AND R.V. RAVEENDRAN, JJ.] B

Penal Code, 1860:

Section 99—Right of private defence—Exercise of—Extent—Complainants piled up wood on the plot belonging to the accused on the occasion of 'Holika Dehan'—The complainants were chased away from the plot—Accused, apprehending injury, killed the deceased—Incident took place 300 paces from the plot—Trial court convicted the accused under S. 302—High Court affirmed the conviction rejecting the plea of private defence raised by the accused—Correctness of—Held: Accused must show the existence of grounds that death or grievous hurt would be caused to him—Even in such cases the right of private defence could not be exceeded so as to cause more harm than necessary—However, right of private defence is not available to the aggressor—As the accused was the aggressor right of private defence could not be claimed by him—Conviction upheld. C D E

Section 149—Unlawful assembly—Common object—Forming of—Basis—Held: For the purposes of attracting S. 149, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object—If a common object is adopted by all the persons and shared by them, it would serve the purpose. F

Maxim:

"Falsus in uno, Falsus in ombibus".—Meaning and applicabiliiy of.

According to the prosecution, the plot in dispute was in the possession of the accused. The complainants had piled up wood on the plot in dispute on the occasion of 'Holika Dehan' which was removed by the accused persons after chasing them away from the plot. Two persons on the side of the accused suffered lacerated wound on their heads. The said injuries were simple ones. The said incident took place about 300 paces from the G

 H

A plot in dispute. One of the accused persons fired a shot at the deceased who died on the spot. PWs 2 and 3 had also suffered lacerated wounds on their heads. The complainant and others who were accused in the counter FIR had been acquitted and the judgment of acquittal had been affirmed up to this court.

B The trial court convicted the accused persons for the offence under Section 302 read with Section 149 of the Penal Code, 1860. The High Court affirmed the conviction rejecting the plea of private defence raised by the accused persons. Hence the appeal.

C On behalf of the accused persons, it was contended that the injuries sustained by the accused were not explained; that the accused had caused the deceased's death in the exercise of his right of private defence and that as the entire incident took place within 2 to 3 minutes, there was hardly any occasion to form an unlawful assembly and a common object on the spot.

D Dismissing the appeal, the Court

HELD: 1. 'Falsus in uno, Falsus in ombibus' is not a rule of evidence in criminal trial and it is the duty of the court to disengage the truth from falsehood, to sift the grain from the chaff. [945-C]

E 2. It is essential for an accused to show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him, burden wherefor lies on him. [945-F]

F 3. It is true that while exercising the right of private defence a person is not expected to weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailant who is armed with weapons; but it is also true that the right of private defence cannot be exceeded so as to cause more harm than G necessary. Circumstances, thus, are required to be viewed, with pragmatism. It is also well-settled that a right of private defence is unavailable to the aggressor. The need to act must not have been created by the conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need. [945-G, H; 946-A]

H *Bishna @ Bhiswadeb Mahato* v. *State of West Bengal,* (Criminal Appeal

Nos. 1430-1431 of 2003), relied on. A

4.1. The Appellants being in possession of the disputed land were entitled to protect it but having regard to the past practice of performing 'Holika Dehan' on the land in question on the eve of 'Holi' which takes place once in a year, the complainants party evidently did not want to dispossess the accused persons permanently. In law, however, the accused persons could resist trespass. Even if a trespass has been committed, in certain situations, right of private defence can be used to eject the trespassers. [946-C, D] B

4.2. In this case, however, the incident took place 300 paces away from the land in question. PW-3 had gone to chakk. At the time of occurrence he was coming back from his chakk. It is. Therefore, not correct to contend that he had sent the servant to the plot in question with a view to tease the appellants and was waiting at some distance with others. He, therefore, could not have known any part of the occurrence which took place till then. [946-E] C D

5.1. By the time PW-1 reached near the land, the appellants were already in possession of the land as they had removed the wood, which had been placed on the land by the complainant party. The right of private defence in the aforementioned situation could not have been exercised for preventing trespass into the property or for evicting the trespassers. [947-E] E

5.2. The claim of private defence was, thus, not available to the appellants as: (i) occurrence had taken place 300 paces away from the disputed plot; (ii) the appellants were aggressors; and (iii) all of them were armed and in particular one of the accused was having a gun. [953-C] F

Munney Khan v. *State of M.P.* [1971] 1 SCR 943, *A.C. Gangadhar* v. *State of Karnataka* AIR (1998) SC 23811, *Rajesh Kumar* v. *Dharamvir* [1997] 4 SCC 496 and *Mannu* v. *State of U.P.*, AIR (1979) SC 1230, relied on. G

Harish Kumar v. *State of M.P.* [1996] 9 SCC 667, *Yogendra Morarji* v. *State of Gujarat,* [1980] 2 SCC 218, *Moti Singh* v. *State of Maharashtra,* [2000] 9 SCC 494, *Mahabir Choudhary* v. *State of Bihar* [1996] 5 SCC 107, *State of U.P.* v. *Ram Niranjan Singh,* [1972] 3 SCC 66 and *Subramani* v. *State of T.N.* [2002] 7 SCC 210, referred to. H

A **6.1. It is not the law that the prosecution case shall fail only because injuries on the person of the accused have not been explained. In certain situation it is not necessary to explain the injuries on the person of the accused. [955-B]**

Laxman Singh **v.** *Poonam Singh,* **[2004] 10 SCC 94,** *Chacko alias* B *Aniyan Kunju* **v.** *State of Kerala,* **[2004] 12 SCC 269,** *Kashiram* **v.** *State of M.P.,* **(2002) 1 SCC 71 and** *Vajrapu Sambayya Naidu* **v.** *State of A.P.,* **(2004) 10 SCC 152, relied on.**

6.2. The injuries on the accused have sufficiently been explained and, C **thus, it was not necessary for the prosecution to adduce any further evidence. [955-D]**

Takhaji Hiraji **v.** *Thakore Kubersing Chamanasing,* **[2001] 6 SCC 145, relied on.**

D **7.1. For the purpose of attracting Section 149 Penal Code, 1860 it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. [955-F]**

E *Mizaji* **v.** *State of U.P.* **[1959] Supp. 1 SCR 940,** *Masalti* **v.** *State of U.P.* **(1964) 8 SCR 133,** *Baladin* **v.** *State U.P.,* **AIR (1956) SC 181,** *Bhajan Singh* **v.** *State of U.P.,* **[1974] 4 SCC 568,** *Shri Gopal* **v.** *Subhash,* **JT (2004) 2 SC 158,** *Ram Tahal* **v.** *State of U.P.,* **[1972] 1 SCC 136 and** *Vaijayanti* **v.** *State of Maharashtra,* **(Criminal Appeal No. 1100 of 2004 decided by SC on 22.9.2005), relied on.**

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7.2. The appellants and the other accused cannot be said to have formed a common object to kill any person, or to make an attempt in that behalf in view of the manner in which the occurrence took place. Their common object appears to be to teach PW-3 and others a lesson for making attempts to burn 'Holika' by causing grievous injuries to them. G **[959-F]**

8. The appellants were not entitled to raise the plea of self-defence both in respect of the property as also the person being themselves aggressors. The fact that the prosecution in the counter-case lodged by H **the accused has resulted in acquittal of the complainant party would also**

have some bearing in the matter. The injuries on the person of the accused persons had sufficiently been explained. The injuries on the person of the accused persons, therefore, lose all significance. [958-H; 959-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1150 of 2004.

From the Judgment and Order dated 22.4.2004 of the Allahabad High Court in Crl.A. No. 660 of 1981.

WITH

Crl.A. Nos. 1171, 1172 and 1173 of 2004.

S.R. Bajawa, Sushil Kr. Jain, S.Z.A. Warsi, Ms. Pratibha Jain and Ram Niwas, for B.K. Satija, K.S. Rana, Vijay Singh and David Rao for Khwarirakpam Nobin Singh, R.K. Kapoor and M.K. Verma, for Sudarsh Menon for the Appellants.

N.S. Gahlout and Prashant Chaudhary for Jatinder Kumar Bhatia for the Respondent.

M.N. Krishnamani, Shakil Ahmed Syed and Mohd. Taiyab Khan for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. These appeals arising out of a common judgment and order dated 22nd April, 2004 passed by the High Court of Judicature at Allahabad in Crl. Appeal No. 660 of 1981 and Crl. Appeal No.668 of 1981 were taken up for hearing together and are being disposed of by this common judgment. Criminal Appeal No.1150 of 2004 is by Triloki Nath, Krishna Chandra Singh, Shashi Kant and Sahdev (Accused Nos.6, 5, 7 and 8 respectively). Criminal Appeal Nos.1173, 1172 and 1173 of 2004 are respectively by Kunwar Prahald Singh (Accused No.1), Jitendra alias Mister (Accused No.2) and Gopal (Accused No.3). One of the eight accused namely, Chhanga has not filed any appeal.

BACKGROUND FACT:

The residents of village Devanand Pur had been performing "Holika Dehan" for a long time on Plot No. 399, which is said to be a banjar land.

A Kunwar Prahlad Singh became the owner of the said plot. He tried to enclose the said plot by a 'Mend' (Fence). An objection thereto was raised by the villagers including Laxmi Shankar Srivastava (PW-3); a complaint wherefor was made pursuant whereto an intervention was made by the police.

FIRs RELATING TO INCIDENT:

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On the Basant Panchami day, the villagers allegedly fixed 'Dhah' as a symbol of Holi on the said plot and started collecting fuel wood thereupon. On the said day at about 12 noon, Khuddey, PW-4 while going to the flour mill found the Appellants herein removing the wood. The accused Jitendra armed with a gun and the remaining accused armed with lathis were present. C Khuddey, PW-4, servant of Laxmi Shankar Srivastava, allegedly forbade them from doing so whereupon he was chased. Near the Hata of Pran, Laxmi Shankar Srivastava (PW-3), Sahjadey Jeevanlal (PW-2) Shabbir and other persons of the village arrived. Laxmi Shankar Srivastava allegedly had asked the accused as to why they have been chasing his servant. Triloki Nath D exhorted his companions saying 'Maro Sale Ko' whereupon Gopal hurled a lathi blow on PW-3's head. Shashi Kant accused gave the second lathi blow on his wrist. Kunwar Prahlad Singh and Sahdev also assaulted him with lathis. Chhanga and Krishna assaulted Sahjadey. Khuddey (PW-4) is said to have hurled lathi blow in defence of Laxmi Shankar Srivastava (PW-3). He thereafter raised hue and cry which attracted Nanhe (the deceased), and others. E Nanhe raised alarm saying that Lala (thereby meaning Laxmi Shankar Srivastava) was being killed whereupon Triloki Nath exhorted Jitendra asking him to kill him as he professes himself to be a great helper of Laxmi Shankar. Responding thereto Jitendra fired a shot at Nanhe. He fell down and died.

F A First Information Report was lodged by Dinesh Kumar Srivastava (PW-1) at about 2 p.m. on the same day.

A First Information Report was also lodged by Kunwar Prahlad Singh Srivastava (Accused No.1) at about 4.30 p.m. against Shahjadey, Bansidhar, Khuddey Chamar, Nanhe Chamar, Hira Passy, Shabbir and Laxmi Shankar G purported to be for commission of an offence under Section 147/323/352 of the Indian Penal Code alleging that Dinesh Kumar under the pretext of performing Holika Dahan placed some waste wood at Plot No. 399 and kept on adding thereto. He went to the said plot along with his sons Mister alias Jitendra and Gopal at about 11 a.m. and removed the said waste wood from his land. When they were returning, Dinesh Kumar came on his motorcycle H with a child. He allegedly stopped his motorcycle and called his servant as

also Shahjaddey and Bansi Brahman and exhorted "Jane na paye, mar pit low" whereupon they ran towards their house. On the way, Khuddey Chamar, Nanhe Chamar, Hira Passi, Shabbir, etc. came from the side of the east and south and surrounded him. The accused persons attacked Triloki. Sahdev and other persons ran towards him for his rescue and when they had been running to save their lives, they heard a sound of gun-fire from behind.

INJURIES ON THE ACCUSED:

Injuries suffered by Triloki Nath in the said incident are as under:

"(1) Lacerated wound, 6 cm x ½ cm x scalp deep on the left side of scalp, 6 cm above ear.

(2) Abraded contusion, 6 cm x 3 cm on the back of right shoulder."

Injuries suffered by Sahdev are as under:

"(1) Lacerated wound, 2.5 cm x ½ cm x scalp deep, 3 cm behind left ear.

(2) Abrasion, 1 cm x 1.5 cm on the front of left knee."

Before we advert to the submissions made by the learned counsel for the parties, we may notice some of the findings of the Trial Court and the High Court respectively.

FINDINGS OF TRIAL COURT :

(i) ".....Kunwar Prahlad Singh accused had enough cause of grievance against Laxmi Shanker Srivastava P.W.3 and Dinesh Kumar Srivastava P.W.1. Undisputedly Kunwar Prahlad Singh accused had his possession over plot No. 399 in dispute and the same had also been proved by the Khasra entries for the period preceding the date of occurrence, and such Khasra entries show the crop also of Kunwar Prahlad Singh accused in the plot in dispute."

(ii) "Thus, the defence case that the accused Triloki and Sahdeo had also received injuries in the same occurrence is also proved beyond doubt."

(iii) "As such, I find that the cause of grievance lay with the accused and not with the prosecution and it is quite probable that the

A accused Kunwar Prahlad Singh might have collected at the land in dispute fully armed with a view to effectively remove the fuel wood of Holi on the plot in dispute and to meet all resistance against it."

FINDINGS OF HIGH COURT :

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(i) "From the very inception the only logical inference is that those accused had gone well prepared with lathies and fire arm to deal with the other side who were resisting removal of holika woods and they knew well that the consequences may be of death merely because other accused did not have deadly weapon and except C lathi, which is also one of the deadly weapon and is capable of causing death, it is none other was caused death merely a chance or incident..."

(ii) ".....It was found that the plot No. 399 was in possession of Kunwar Prahlad Singh on the preceding day of occurrence and D he had grudge against these people who were acting against his interest by keeping Holika. According to prosecution witnesses P.W.1 to P.W.4 it is evident that fuel woods for Holi had been stocked on the said plot. There cannot be any grievance of P.W.1 D.K. Srivastava regarding this as neither P.W.1 nor P.W.3 claimed this land adversely against their personal rights. Their only role E was that P.W.1 D.K. Srivastava and P.W.3 L.S. Srivastava were playing leading role in burning of Holi. Therefore, it was the land-holder who had felt aggrieved. There is also no suggestion that the woods were stocked at the time of incident nor there is any case that Laxmi Shankar Srivastava, P.W. 3 and his associates F had collected arms to resist such removal of Holi. There is probability that the defence side had collected arms to take revenue (sic) or with a view of removal of fuel wood of Holi and to meet the resistance against it."

(iii) "Learned trial court has held that if Nanhe was killed in the G occurrence and the same was in the light of private defence, such contention of the learned counsel for the accused is absolutely false firstly because there is no case that the occurrence took place on or near the land in dispute to take possession over it place of Holi or Nanhey had gone near the land to take possession. Secondly, the fight had taken place not at the plot in dispute but H

at a place the distance of which has been stated by Khuddey, P.W.4 by an uncontroverted testimony, at 300 paces away from the disputed land. Thirdly, it comes out from the evidence that Kunwar Prahlad Singh accused had already thrown away fuel woods from the plot in dispute before the occurrence took place and according to his defence version he was proceeding from that place to his house and, therefore, finding of the trial court has sufficient reasons that the accused have not acted in their self-defence."

Upon completion of the trial, Jitnedra with other seven accused were found guilty of commission of the offence under Section 302/149 for commission of murder of Nanhe, under Section 307/149 for causing injury to Laxmi Shankar Srivastava and under Section 147 of the Indian Penal Code for rioting.

The Trial judge by an order dated 17.9.1981 convicted and sentenced the accused to imprisonment for life for the offence of murder. The said judgment has been upheld by the High Court.

SUBMISSIONS:

Mr. S.R. Bajawa, learned senior counsel appearing on behalf of the Appellants at the outset drew our attention to the fact that the injuries received by Laxmi Shankar Srivastava and Sahjadey are more or less similar to those received by Triloki Nath and Sahdev. Such injuries received by the said Appellants, it was contended, must have given rise to an apprehension in their minds that one of them may be killed and as such the accused had rightly exercised their right of private defence. Exercise of such right of private defence could not have been denied to the accused persons on the reasonings of the High Court, it was submitted, in view of the fact that although the place of occurrence was 300 paces away from the plot in question, both the incidents of removal of trespass from Plot No. 399 as also the occurrence in question took place as a part of the same transaction.

The learned counsel furthermore drew our attention to the post-mortem report and submitted on the basis thereof that as blackening and tattooing and scorching were found, the same could not have been caused from a double barrel muzzle loaded gun which is said to be the weapon of offence.

Mr. Bajawa would submit that the impugned judgments of conviction

A of sentence are unsustainable as:

(i) Witnesses have come up with half truth.

(ii) The actual reason for putting the woods on the plot in question was not disclosed. The land was not lying fallow as wheat crop was grown thereon and, thus, the accused could not have been dispossessed therefrom.

(iii) The complainants sent Khuddey to tease the accused and they had been waiting at some distance.

(iv) The accused had a right to remove the wood piled on their land.

(v) They had no animus against Nanhe, deceased and, thus, they could not have been convicted under Section 302/149 of the Indian Penal Code.

(vi) There was no triggering point for firing at Nanhe except his so-called shouting that the accused persons would kill Lala meaning thereby Laxmi Shankar Srivastava. which cannot be relied upon.

(vii) Only one shot was fired from the gun as of necessity, as two of the accused persons were seriously injured.

(viii)PW-2, the only independent witness, is not at all reliable.

(ix) Admittedly, Khudday had also come with a lathi which established that the complainant party was the aggressor.

(x) Khudday did not suffer any injury which shows that the accused persons were not the aggressors.

(xi) Unless Khudday was assaulted, no unlawful assembly could have been caused.

(xii) In any view of the matter, the entire incident took place at the spur of the moment.

Mr. R.K. Kapoor, learned counsel appearing on behalf of the Appellant in Criminal Appeal Nos. 1171 and 1172 of 2004 supplemented the submissions of Mr. Bajawa urging:

(i) The accused persons were not having any grudge against the deceased.

(ii) There was no motive for killing.

(iii) The complainants were only chased from the land, which by itself did not constitute an offence. A

(iv) Kunwar Prahlad Singh and Gopal did not give any exhortation for the death of Nanhe and as such their conviction under Section 302/149 is wholly unsustainable.

(v) The occurrence took place because of the interference with possession of the Appellants in plot in question by Khuddey. As the entire incident took place within 2-3 minutes, there was hardly any occasion to form an unlawful assembly and a common object on the spot. B

(vi) There was no intention to kill Nanhe and as such for his death, others are not liable. C

Mr. Vijay Singh, learned counsel appearing on behalf of Shashikant in Criminal Appeal No. 1150 of 2004 drew our attention to the fact that he allegedly gave a lathi blow on the left wrist of Laxmi Shankar Srivastava whereas in his cross-examination he stated that such injury was caused by Gopal and submitted that in that view of the matter he could not have been held guilty. He further submitted that sufficient material had been brought on records to show that an election dispute was going on between the parties. D

Mr. N.S. Gahlout, learned counsel appearing in behalf of the State, on the other hand, submitted that : (i) having regard to the statements made in First Information Reports lodged by both the parties, the time of occurrence as well as the place of occurrence must be held to have been admitted; (ii) the death of Nanhe and the injuries suffered by Laxmi Shankar Srivastava and Sahjaddey being not denied and disputed, it was for the Appellants to show that the defence version was probable; (iii) in view of the fact that both Khuddey and Laxmi Kant Srivastava were injured witnesses, their presence at the place of occurrence cannot be disputed and in that view of the matter there is no reason as to why their testimonies should not be relied upon; and (iv) that from the First Information Report lodged by Kunwar Prahlad Singh, it would appear that the firing from a gun was admitted which being wholly unnatural would lead to an inference that the Appellants were the aggressors. Our attention in this behalf has also been drawn to setting up of another story by the Appellants in paragraph 9 of the S.L.P. which reads as under: E F G

"....As an altercation ensued, Khuddey attacked petitioner No. 1 and 4. Petitioner No. 1 and 4 wielded lathi in their defence and a free H

A fight ensued. Prahlad Singh tried to escape by running away from the scene of occurrence but from one side, Dinesh Kumar aimed his gun at Prahlad Singh and from the other side, the brother of Khuddey namely Nanhe confronted him. Prahlad Singh sat down to avoid the bullet fearing a shot from the gun of Dinesh Kumar and the bullet fired by Dinesh Kumar hit Nanhe and Nanhe died on the spot."

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It was submitted on the aforementioned premise that the Appellants have raised defences which are mutually destructive.

Drawing our attention to the findings of the learned Trial Judge as also the High Court, it was argued that it is apparent that the accused persons C were the aggressors and in that view of the matter they cannot claim any right of private defence and in particular having regard to the fact that :

(i) from the plot in question, wood had already been removed.

(ii) place of occurrence is not the land in question but 300 paces D away therefrom.

(iii) If the version of the accused persons is to be accepted that somebody has fired from behind, it cannot be said that they have done so in self-defence.

(iv) Such statements being vague no positive case of self-defence has E been made out.

It was submitted that in villages normally the servants carry a lathi and in that view of the matter it cannot be said that the accused persons came heavily armed. Drawing our attention to the statements of Khuddey, PW-4 wherein he categorically admitted that Triloki and Sahdev received injuries F from the lathi which he used in defence, it was submitted that in that view of the matter it could be said that the prosecution did not come out with the truth.

As regard, formation of common object, the learned counsel would G submit that the same can be formed on the spot.

ADMITTED FACTS:

The admitted facts are:

(i) That the plot in dispute was in possession of accused Kunwar H Prahlad Singh.

(ii) There are two factions in the village.

(iii) The complainants were piling up wood on the occasion of Holi which was removed by the accused persons.

(iv) Two persons on the side of the accused, viz., Triloki Nath, Sahdev suffered lacerated wound on their heads. The said injuries were simple ones.

(v) Nanhe died out of a gun shot injury. Laxmi Shankar Srivastava and Sahjadey also suffered lacerated wounds on their heads.

(vi) The complainant and others who were accused in the counter FIR have been acquitted and the judgment of acquittal has been affirmed upto this Court.

ANALYSIS:

The submissions of the learned counsel for the parties are required to be considered in the backdrop of the aforementioned admitted facts.

The Appellants at no stage disputed the correctness or otherwise of the autopsy report in respect of the deceased Nanhe and injuries sustained by Laxmi Shankar Srivastava and Sahjadey.. The relevant portion of the autopsy report reads as under:

"*** *** ***

(1) Multiple fire arm wounds of entry, in an area of 10 cm x 7 cm on the front of neck and upper part of chest in middle, smallest being 2/10 cm x 2/10 cm and biggest being ¾ cm x ¾ cm. Blackening and tattooing present searching (sic) present.

*** *** ***

(c) Laryex, Trachea and Broachi	Trachea and larvex ruptured at places 4 pallets recovered.
(d) Right Lung	Ruptured at apex & contains haematones 3 pallets recovered
(e) Left Lung	Ruptured atapex & contains haematomes 3 pallets recovered.

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(h) Large vessels		Injuries on both sides ruptured in neck. Jugular weni on (L) side ruptured 5 pellets recovered."

Laxmi Shankar Srivastava at the time of incident was about 74-75 B years old. From the medico-legal evidence, it appears that he received a lacerated wound 6 cm x ½ cm x bone deep on the top of skull, 12.5 cm above nasion and he had a fracture on the outer side of forearm 2 cm above wrist joint and abrasion on the front of left leg 10 cm above ankle.

Having regard to the nature of injuries suffered by Laxmi Shankar C Srivastava, a concurrent finding of fact has been arrived at that the Appellants had an intention to murder him. There is no reason to differ therewith.

Injuries said to have been suffered by Sahjadey, as would appear from the medical report proved by PW-5 are as under:

D "(1) Lacerated wound 5 cm x 1 cm x Bone deep on the right side, 7 cm. above ear.

(2) Contusion, 8 cm x 1.5 cm over right lip."

Both PWs-3 and 4 were eye-witnesses. Both of them, even according E to the Appellants, were present at the time of occurrence. Laxmi Shankar Srivastava (PW-3) was also an injured witness. Even in the first information report lodged by Kunwar Prahlad Singh both of them had been named. Their presence at the place of occurrence, therefore, cannot be disbelieved. The said witnesses have fully supported the prosecution case.

F Apart from some minor discrepancies like that at one place he stated "May be that the lathi used by Khuddey hit Triloki" and immediately thereafter he stated "I did not see Khuddey using lathi on Triloki. At the time of occurrence I did not see Triloki and Sahdev getting injured or bleeding. I did not see any lathi blow having been made on Sahdev", nothing else has been G pointed out to reject the testimony of PW-3. We would notice hereafter the statements of PW-4 as regards the role played by him. We do not find any infirmity in his evidence to discard the same. Both of them are natural witnesses.

PW2 is also one of the named eye-witnesses. He is an independent H witness. His presence at the time of occurrence cannot be doubted as he was

cited at one of the witnesses in the First Information Report which was recorded within one and half hour from the time of occurrence. A

It may be true that there appears to be some contradictions in his evidence as regard carrying of Laxmi Shankar on his back inasmuch as in cross-examination he had stated Ram Shankar carried Laxmi Shankar on his back, but that by itself may not be a ground to discard his evidence in totality. B

'Falsus in uno, Falsus in ombibus' is not a rule of evidence in criminal trial and it is the duty of the court to disengage the truth from falsehood, to sift the grain from the chaff.

C

The said First Information Report was lodged without any delay whatsoever; particularly having regard to the fact that after the incident the injured persons were required to be looked after and the distance of the Police Station from the place of occurrence was about three kilometers.

SELF-DEFENCE D

The law relating to self defence in view of a catena of decisions of this Court is now well-settled. A plea of right of private defence may be in respect of property or a person. Section 99 of the Indian Penal Code, however, mandates that the right of private defence, in no case, extends to inflicting of more harm than necessary. Section 100 of the Code provides that the right of private defence of the body extends under the restrictions mentioned in Section 99 to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein. It is essential for an accused to show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him, burden wherefor lies on him. E F

It is true that while exercising the right of private defence a person is not expected to weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailant who is armed with weapons; but it is also true that the right of private defence cannot be exceeded so as to cause more harm than necessary. Circumstances, thus, are required to be viewed with pragmatism. It is also well-settled that a right of private defnece is unavailable to the aggressor. The need to act must not have been created by the conduct of the accused G H

A in the immediate context of the incident which was likely or intended to give rise to that need.

It is not necessary to dilate on the matter any further as in *Bishna @ Bhiswadeb Mahato and Ors.* v. *State of West Bengal* [Criminal Appeal Nos.1430-1431 of 2003], the issue has been discussed at some length.

B

The case at hand has to be considered having regard to the principles of law, as noticed hereinbefore. We have seen that in what circumstances and to what extent the right of private defence can be exercise would depend upon the fact situation obtaining in each case.

C The Appellants being in possession of the disputed land, were entitled to protect it but having regard to the past practice of performing Holika Dahan on the land in question on the eve of Holi which takes place once in a year, the complainants party evidently did not want to dispossess the accused persons permanently. In law, however, the accused persons could resist D trespass. Even a trespass has been committed, in certain situations, right of private defence can be used to eject the trespassers.

. In this case, however, the incident took place 300 paces away from the land in question. Laxmi Shankar Srivastava had gone to chakk. At the time of occurrence he was coming back from his chakk. It is, therefore, not correct E to contend that he had sent the servant to the plot in question with a view to tease the Appellants and was waiting at some distance with others. He, therefore, could not have known any part of the occurrence which took place till then.

According to the Appellants, they were attacked upon exhortation of F Laxmi Shankar Srivastava. As would be noticed from the discussions made hereinafter that the said stand of the Appellants cannot be said to be correct. It has not been shown that apart from Khuddey any other person was carrying any weapon. On the other hand, all the Appellants were armed with lathis except Jitendra who was carrying a gun. There is no material on records to G show that there had been any overt act on the part of the complainant. In the above circumstances, it is unlikely that the complainant would ask others to assault the Appellants.

Both the learned Sessions Judge and the High Court came to a concurrent finding of fact that the incident took place after Khuddey was chased. It is H possible that as regard the right of the villagers to perform Holika Dahan or

because of old enmity, the incident occurred but it is clearly not a case of free-fight amongst two groups of people, both being armed with deadly weapons. Thus, no case of self-defence has been made out.

PW-4 categorically stated in his examination-in-chief that he used lathi in defence only after Gopal and Shashikant assaulted Laxmi Shankar Srivastava and Sahjaddey. In cross-examination, the said witness accepted that Triloki and Sahjaddey received injuries from the lathi which he had used in defence, stating :

> "....I was shielding against the attack of the accused on my lathi and was also making the attacks. Approximately, I shielded against 2-4 blows of lathi. In defence I had attacked Triloki. I had given one lathi blow. I had made one attack with my lathi on Sahdev also..."

He further categorically stated that none other than him and the accused had lathi/danda in their hands. We find no reason to disbelieve his testimony.

The Trial Court and the High Court have found that the nature of injuries on the person of Triloki Nath and Sahdev were too trivial. No case has also been made out, as suggested, that Dinesh Kumar (PW-1) was armed with a gun. He was in fact not present at the time of incident. No such suggestion was given to him that he was present at the time of incident with a gun. Such a suggestion had not been given also to any other witness. Non-sustenance of any injury by Khuddey is also not of much significance. He in his evidence, as noticed hereinbefore, has clearly stated as to why he had to wield lathi and how he had been defending himself and had been able to hit blows on Sahdev and Triloki Nath.

In the First Information Report lodged by Kunwar Prahlad Singh, it is alleged that they had run away when a sound of gun fire was heard. It is interesting to note that as regard the said incident, Dinesh Kumar was also said to have lodged a First Information Report but the same was not brought on record.

We have noticed hereinbefore that even in the First Information Report it has been admitted that the accused persons had also received injuries as a lathi was wielded. PW-3 although stated that he had not seen at the time of occurrence Triloki or Sahdev getting injured but he accepted that "May be that the lathi used by Khuddey hit Triloki". Merely a suggestion was given to PW-3 on behalf of the Appellants that Triloki Nath and Sahdev tried to

A mediate between the two groups and after they started beating Triloki Nath and Sahdev with lathi and in the melee Triloki Nath and Sahdev in turn assaulted others, but the same was denied.

ANALYSIS OF EVIDENCE

B The prosecution has fully established that Khuddey while going to the floor mill found the Appellants herein removing the wood, and asked them not to do so. He was, of course, armed with a lathi. Khuddey at that time, thus, was not causing any trespass. He did not physically prevent the Appellants from removing the trees. He even did not prevent them from reentering or otherwise obstructing them physically from possessing the land. He was chased C away. He came near the Hata of Pran which is about 300 paces away from Plot No.399. At that point of time in all probabilities Laxmi Shankar Srivastava (PW-3) and Sahjadey, (PW-2), Shabbir and other persons arrived there. Laxmi Shankar Srivastava had only asked the Appellants as to why they had been chasing his servant, whereupon Triloki Nath exhorted his companions to D assault him resulting in the incident. If Khoddey's evidence is believed, he had used his lathi to prevent assault on his master. He had used his lathi both by way of defence as well as assaulting two of the accused parties. The right of private defence in the aforementioned situation could not have been exercised for preventing trespass into the property or for evicting the trespassers. By the time Khuddey reached near the land, the Appellants were E already in possession of the land as they had removed the wood, which had been placed on the land by the complainant party.

The Appellants, therefore, were aggressors. The right of private defence cannot, thus, be claimed by them. [See *Munney Khan* v. *State of Madhya* F *Pradesh,* [1971] 1 SCR 943]

In *A.C. Gangadhar* v. *State of Karnataka,* AIR (1998) SC 2381, the Appellant was said to have caused an injury with an axe on the head of PW-5 when they protested against the accused from cutting the tree. The right of private defence claimed by the accused was denied opining :

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> "3. The learned counsel for the appellant, however, submitted that even if it is believed that A-1 had caused grievous hurt, he could not have been held guilty either under Section 326 or for any other offence as the said injury was caused by him in exercise of the right of private defence. Both the courts have come to the conclusion that the H accused and his companions were the aggressors and had started the

assault on the deceased and his children and that too, because they protested against the accused cutting the tree. Therefore, there was no scope for giving any benefit of right of private defence to the appellant. We, therefore, see no reason to interfere with the order passed by the High Court...." A

In *Rajesh Kumar* v. *Dharamvir and Ors.*, [1997] 4 SCC 496, it is stated: B

"20. Section 96 of the Indian Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence and the fascicle of Sections 97 to 106 thereof lays down the extent and limitation of such right. From a plain reading of the above sections it is manifest that such a right can be exercised only to repel unlawful aggression and not to retaliate. To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges levelled against them by bestowing on them the right to retaliate and attack the complainant party." C D

Therein, the prosecution case was as under :

"3. According to the prosecution case on the same day at or about 4.30 p.m. the five accused and Lachhi Ram started demolishing the inner boundary wall of the shop in order to make it a part of their own house. On hearing the sound of pounding on the wall Yogesh went to the lane in front of their house and asked the accused not to demolish the wall. Immediately thereafter accused Dharamvir, armed with a lathi, and the other four accused and Lachhi Ram came out of the shop with knives and started inflicting blows on Yogesh with their respective weapons. On hearing the alarms raised by him when Rajesh (PW 13), his father Dinesh Chander, and his grandfather Suraj Bhan came forward to his rescue, Subhash, Lachhi Ram and Suresh, assaulted Rajesh with their knives. All the five accused persons and Lachhi Ram also assaulted Dinesh Chander and Suraj Bhan causing injuries on their person. At that stage, Dinesh Chander fired a shot from his licensed gun, which hit Lachhi Ram. In the meantime Krishna Devi (PW 14), mother of Rajesh, had also reached the spot. Thereafter the five accused persons ran away with their weapons. Though Yogesh had succumbed to his injuries there, his body was taken to the Local Primary Health Centre, where the injured Dinesh Chander, Suraj Bhan E F G H

A and Lachhi Ram were removed for treatment. The injured Rajesh however first went to Samalkha Police Station to lodge the FIR."

The Trial Court recorded a finding relying upon the evidence of Rajesh Kumar (PW-13) and his mother Krishna Devi (PW-14) that the entire occurrence took place in the lane itself. The said finding was upset by the B High Court accepting the plea of right of private defence of person and property raised by the accused persons in the manner as noticed supra.

This Court held :

"21. We reach the same conclusion through a different route even C if we proceed on the assumption that the finding of the High Court that the accused party came out in the lane and attacked the complainant party after the latter had damaged the outer door of their house is a proper one. The offence that was committed by the complainant party by causing such damage would amount to "mischief" within the meaning of Section 425 of the Indian Penal D Code and, therefore, in view of Section 105 of the Indian Penal Code the accused would have been entitled to exercise their right of private defence of property so long as the complainant party continued in the commission of the mischief. In other words, after the damage was done, the accused had no right of private defence of property, which E necessarily means that when they attacked the complainant party in the lane they were the aggressors. Consequently, it was the complainant party—and not the accused—who was entitled to exercise the right of private defence of their persons; and their act of gunning down Lachhi after four of them were assaulted by the accused party with deadly weapons would not be an offence in view of Sections 96 and 100 of F the Indian Penal Code"

In *Mannu and Ors* v. *State of Uttar Pradesh,* AIR (1979) SC 1230, this Court held that when PW-1 and the deceased therein were going to the market they had been waylaid and attacked by the Appellants, they cannot G claim the right of private defence. These decisions apply in all fours to the facts of this case.

We may now consider some of the decisions relied upon by Mr. Bajawa.

In *Harish Kumar and Anr.* v. *State of M.P.,* [1996] 9 SCC 667 a finding H of fact has been arrived at that the court had been deprived of a truthful

account of the first of the two occurrences which had taken place and figuratively there was a first occurrence which led to the second one. It was furthermore found as of fact that some unpleasantness had occurred earlier wherefor some of the members of the complainant party had kept being there and others had started assembling in the lane in which the house of the appellants lay. In the aforementioned factual scenario, it was held:

> ".....19 As members of a faction, it is difficult to believe that they would have come there unarmed and less in number and be there for no cause, all the more knowing fully well that amongst the appellants were 2 licensed weapon-holders. It is alleged by the prosecution that it was Harish Kumar, accompanied by his companions, who first stepped forward towards the complainant party, present near the stone gate. Here then was direct confrontation. In the circumstances therefore, the possibility cannot be ruled out that Harish Kumar, becoming apprehensive of danger to himself and his family members chose to be defensive in becoming offensive, because of the first incident; without having the requisite intention to cause the murder of any particular person. He therefore fired but only once and the fire was not repeated. There was no indiscriminate firing. His act would therefore, be termed as one in exercise of the right of private defence of person entitling him to acquittal..."

In *Yogendra Morarji* v. *State of Gujarat,* [1980] 2 SCC 218 the fact situation obtaining was absolutely different. The accused—appellant, a businessman, had purchased land in a nearby village and employed the deceased and a few others to dig a well thereupon. A dispute regarding payments due to the workers culminated in their collectively approaching the accused when he visited the village and was staying in his Manager's house. During course of their discussion, a heated altercation took place which was resented by the workers. They collectively were standing on a road and lingered near a field for about an hour. The accused started on his return journey at about 9 p.m. and when his station-wagon reached near that field, the deceased and his companions raised their hands signaling him to stop the vehicle whereupon the accused slowed down the vehicle and fired three rounds in quick succession from his revolver without aiming at any particular person. He went to the police station and surrendered his revolver. He was acquitted by the Trial Court but convicted by the High Court for commission of an offence under Section 304 of the Indian Penal Code. On appeal, this Court held that having regard to the fact that he had fired three rounds, he

must be held to have exceeded his right of private defence.

In *Moti Singh* v. *State of Maharashtra,* [2002] 9 SCC 494, this Court merely held that the right of private defence cannot be denied merely because the accused adopted a different line of defence particularly when the evidence adduced by the prosecution would indicate that they were put under a situation where they could reasonably have apprehended grievous hurt even to one of them.

In *Mahabir Choudhary* v. *State of Bihar,* [1996] 5 SCC 107, the law has been laid down in the following terms:

> "11. The emerging position is, you have the first degree of right of private defence even if the wrong committed or attempted to be committed against you is theft or mischief or criminal trespass simpliciter. This right of private defence cannot be used to kill the wrongdoer unless you have reasonable cause to fear that otherwise death or grievous hurt might ensue in which case you have the full measure of right of private defence."

There cannot be any dispute as regard aforementioned proposition of law.

In *State of U.P.* v. *Ram Niranjan Singh* [1972] 3 SCC 66, this Court in the facts and circumstances obtaining therein was of the opinion that two incidents which have taken place on 7th December, 1965 were integrated ones and, thus, the same right of private defence the Respondent had for causing the death of the deceased No. 1 was available to him in respect of the deceased No. 2. The said decision has no application in the present case.

In *Subramani and Ors.* v. *State of T.N.* [2002] 7 SCC 210 again a positive case of exercise of right of private defence was made out. Therein the question was as to whether the accused had exceeded their right of private defence. They were held to have initially acted in exercise of their right of private defence of property and in exercise of the right of private defence of person later and in that factual backdrop, it was held:

> "21....In the instant case we are inclined to hold that the appellants had initially acted in exercise of their right of private defence of property, and later in exercise of the right of private defence of person.

It has been found that three of the appellants were also injured in the same incident. Two of the appellants, namely, Appellants 2 and 3 had injuries on their head, a vital part of the body. Luckily the injuries did not prove to be fatal because if inflicted with more force, it may have resulted in the fracture of the skull and proved fatal. What is, however, apparent is the fact that the assault on them was not directed on non-vital parts of the body, but directed on a vital part of the body such as the head. In these circumstances, it is reasonable to infer that the appellants entertained a reasonable apprehension that death or grievous injury may be the consequence of such assault. Their right of private defence, therefore, extended to the voluntarily causing of the death of the assailants." A B C

The claim of right of private defence was, thus, not available to the Appellants as : (1) occurrence had taken place 300 paces away from Plot No.399 of Village Devanand Pur; (ii) The Appellants were aggressors; and (iii) All of them were armed and in particular Jitendra was having a gun. D

In fact Nanhe exercised and could in the facts and circumstances of the case his right of private defence in assaulting Triloki Nath and Sahdev.

INJURIES ON THE ACCUSED:

Although the injuries suffered by Triloki Nath and Sahdev may be at the same place on their persons as of Laxmi Shankar Srivastava and Sahjadey but they are not similar. The injuries suffered by Triloki Nath and Sahdev are simple in nature. Even in the first information report also Section 323 was mentioned. The injuries suffered by Laxmi Shankar Srivastava and Sahjadey, on the other hand, were grievous in nature. The Appellants were not only charged under Section 326 of the Indian Penal Code but also under Section 307 thereof. They have been found guilty of commission of the said offences by both the courts. E F

It is not the law that prosecution case shall fail only because injuries on the person of the accused have not be explained. There is a plethora of decisions to show that to show that in certain situation it is not necessary to explain the injuries on the person of the accused. G

In *Laxman Singh* v. *Poonam Singh & Ors.*, [2004] 10 SCC 94, it was observed: H

A "7.....But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to B explain the injuries. (See *Lakshmi Singh* v. *State of Bihar* 6.) A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether C the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting...."

Yet again in Chacko alias *Aniyan Kunju and Ors.* v. *State of Kerala,* [2004] 12 SCC 269,

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"7.....Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That *per se* cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the E prosecution is supported by an eyewitness who is found to be truthful as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable."

In *Kashiram and Ors.* v. *State of M.P.* [2002] 1 SCC 71, whereupon F Mr. Bajawa relied upon, a 3-Judge Bench of this Court was satisfied that a case of private defence has been made out by the Appellants therein. The High Court in that case did not record any specific finding. The Court referred to its earlier decision in *Dev Raj* v. *State of H.P.* [1994] Supp 2 SCC 552 wherein it was held that where the accused received injuries during the same G occurrence in which the complainants were injured and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution.

Vajrapu Sambayya Naidu and Ors. v. *State of A.P. and Ors.,* [2004] 10 H SCC 152 is distinguishable on facts. Therein a finding of fact was arrived at

that not only the complainant's decree for eviction was obtained against the informant, actual delivery of possession was also effected and accused No. 13 came in a possession of land in question. In that context, this Court observed that the complexion of the entire case changes because in such an event the Appellants cannot be held to be aggressors.

No decision relied upon by the Appellants lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein.

Detailed discussions on this question have again been made in *Bishna @ Bhiswadeb Mahato* (supra) and in that view of the matter, it is not necessary to dilate thereover.

We are of the considered opinion that the injuries on the accused have sufficiently been explained and, thus, it was not necessary for the prosecution to adduce any further evidence. [See *Takhaji Hiraji* v. *Thakore Kubersing Chamansing and Ors.*, [2001] 6 SCC 145]

COMMON OBJECT

A concurrent finding of fact has been arrived at by both the courts. Nothing has been pointed out to show as to why this Court should take a different view. When a large number of persons assembled with a gun and other weapons having in mind the dispute over the land in question, they must be held to have found common knowledge that by reason of their act, somebody may at least be grievously injured.

For the purpose of attracting Section 149 of the IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose.

In *Mizaji and Anr.* v. *The State of U.P.*, [1959] Supp. 1 SCR 940, it was observed:

> "....Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a

A matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all...."

In *Masalti* v. *State of U.P.* [1964] 8 SCR 133, a contention on the basis of a decision of this Court in *Baladin* v. *State of Uttar Pradesh,* AIR (1956) SC 181 stating that it is well-settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, that an overt act was mandatory, was repelled by this Court stating that such observation was made in the peculiar fact of the case. Explaining the scope and purport of Section 149 of the IPC, it was held:

"....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 long with the other members of the assembly the common object as defined by Section 141 IPC Section 142 provides that whoever, 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 object specified by the five clauses of Section 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 Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons 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 was further observed:

"In fact, Section 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 Section 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." A B

Yet again in *Bhajan Singh and Ors.* v. *State of Uttar Pradesh,* [1974] 4 SCC 568, it was held: C

"13. Section 149 IPC constitutes, *per se*, a substantive offence although the punishment is under the section to which it is tagged being committed by the principal offender in the unlawful assembly, known or unknown. Even assuming that the unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well-knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused." D E

In *Shri Gopal and Anr.* v. *Subhash and Ors.,* JT (2004) 2 SC 158, it was stated:

"15. The essence of the offence under Section 149 of the Indian Penal Code would be common object of the persons forming the assembly. It is necessary for constitution of the offence that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. Furthermore, there must be some present and immediate purpose of carrying into effect the common object. A common object is different from a common intention insofar as in the former no prior consent is required, nor a prior meeting of minds before the attack would be required whereas an unlawful object can develop after the people get there and there need not be a prior meeting of minds." F G

In *Ram Tahal and Ors.* v. *The State of U.P.,* [1972] 1 SCC 136, a H

A Division Bench of this Court noticed:

> ".....A 5-Judge Bench of this Court in *Mohan Singh* v. *State of Punjab* has further reiterated this principle where it was pointed out that like Section 149 of the IPC Section 34 of that Code also deals with cases of constructive liability but the essential constituent of the vicarious
B criminal liability under Section 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless common intention, which Section 34 has its basis, is different from the common object of unlawful assembly. It was pointed out that common intention denotes action in
C concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention..."

D Recently, this Court in *Vaijayanti* v. *State of Maharashtra,* Criminal Appeal No. 1100 of 2004 disposed of on 22nd September, 2005 as regard formation of common intention opined:

> "Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention
E of all, each of such persons, is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof.
F The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case."

G *CONCLUSION*

The upshot of our aforementioned discussions is that the Appellants were not entitled to raise the plea of self-defence both in respect of the property as also the person being themselves aggressors. The fact that the prosecution in the counter-case lodged by Kunwar Prahlad Singh has resulted
H in acquittal of the complainant party would also have some bearing in the

matter. We have also found hereinbefore that injuries on the person of Triloki Nath and Sahdev had sufficiently been explained. The injuries on the person of the said Appellants, therefore, loses all significance. A

We, therefore, do not agree with the submissions of the learned counsel for the Appellants that the prosecution has come out only with a half truth. B

For the purpose of arriving at a finding of guilt of the Appellants, the number of shots fired by Jitendra would not be decisive. Carrying of a lathi by Khuddey who was responsible for causing injury on Trilokinath and Sahdev has sufficiently been explained by the learned Sessions Judge as also the High Court and we do not find any reason to differ therefrom. Similarly, non-sufferance of any injury by Khuddey is also not of much significance so as to tilt the balance in favour of the Appellants. It is equally incorrect to contend that no unlawful assembly could have been caused unless Khuddey was assaulted. Such a plea, in our opinion, is wholly misconceived. C

We are furthermore of the opinion that non-examination of Sahdev is not fatal. D

Mr. Bajawa, the learned Senior Counsel appearing on behalf of the Appellants laid emphasis on the fact that blackening, tattooing and scorching were found, the same could not have been caused from a double barrel muzzle loaded gun which was said to the weapon of offence. The said contention had not been raised before the Trial Court or before the High Court. Even the attention of the doctor (PW-5) was not drawn to this aspect of the matter. Had the doctor been confronted with such a plea, as has been raised before us, he might have explained the same. E

In this case having regard to the peculiar facts and circumstances of this case, we are of the opinion that the Appellants and the other accused cannot be said to have formed a common object to kill any person, or to make an attempt in that behalf in view of the manner in which the occurrence took place. Their common object appears to be to teach Laxmi Shankar Srivastava and others, a lesson for making attempts to burn Holika by causing grievous injuries to them. F G

The prosecution has been able to establish that on mere asking of Laxmi Shankar Srivastava as to why the other accused had been chasing his servant, Triloki exhorted his companions saying 'Maro Sale Ko', whereupon Gopal hurled a lathi blow on PW-3's head. Shashi Kant gave the second lathi H

A blow on his wrist. Kunwar Prahlad Singh and Sahdev also assaulted him with lathis, whereas Chhanga and Krishna assaulted Sahjadey. Thus, their common object to cause grievous hurt to some persons on the side of the complainant party is established. We are, therefore, of the opinion that all the accused persons including Jitendra are to be found guilty under Section 326/149 IPC.

B In the aforementioned premise, a significant aspect of the matter cannot be lost sight of. Only Triloki exhorted Jitendra to kill Nanhe who came to the spot accidentlly. The exhortation of Triloki was to Jitendra @ Mister, who was having a gun. On his exhortation only Jitendra fired from his gun as a result whereof, he died. We, therefore, are of the opinion that Triloki along C with Jitendra developed a common intention in that behalf on the spot. Both are, therefore, liable to be convicted under Section 302/34 IPC.

The sentence imposed by the High Court on Jitendra is, therefore, maintained. The conviction of other appellants is altered to one under Section 326/149 IPC. They are sentenced to undergo seven years' R.I. and also to D pay a fine of Rs. 1000 each, and in default to further undergo a simple imprisonment of three months. No separate sentence, however, is being passed for commission of an offence under Section 326/149 IPC as against Jitendra.

Triloki Nath is said to have expired during the pendency of the appeal. His appeal is, therefore, dismissed having been abated.

E These appeals are dismissed subject to the alteration in the conviction and sentence, as mentioned hereinbefore.

V.S.S. Appeal dismissed.