SIKANDAR SINGH & ORS. A

v.

STATE OF BIHAR

(Criminal Appeal No. 227 of 2007)

JULY 9, 2010 B

[D.K. JAIN AND R.M. LODHA, JJ.]

Penal Code, 1860:

ss. 302/149 and 307/149 – Murder and attempt to murder C *– 'Common object' – Eight accused armed with guns and other lethal weapons – One of them fired at the victims – One of the victims died at the spot – Another received injuries but survived – Vicarious liability of other accused – HELD: Once it is established that the unlawful assembly had common* D *object, it is not necessary that all persons forming unlawful assembly must be shown to have committed some overt act – 'Common object' does not require a prior concert and a common meeting of minds before the attack – Ingredients of s.149 – Explained – Both the courts below were correct in* E *coming to the conclusion that prosecution had established the case against all the accused.*

ss. 96 to 102 – Right of private defence of property – Out of eight accused armed with guns and other lethal weapons, one firing at the person who was cleaning the plot in dispute F *with broomstick causing his death – The same accused also fired at the brother of deceased who received injuries but survived – HELD: Right of private defence is a defensive right – It is neither a right of aggression nor of reprisal – Burden of establishing the plea of self-defence is on the accused, but it* G *is not as onerous as that lies on the prosecution – Plea of self-defence has rightly been rejected by trial court as the accused had no right over the land much less a right to be protected at the cost of life of other persons – High Court also*

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A *rightly held that the accused being aggressors, could not claim right of self-defence.*

Criminal Law:

Non-explanation of injuries on accused – HELD: Having
B *regard to the nature of the injuries, i.e. simple and superficial, suffered by one of the accused, prosecution case cannot be overthrown for non-explanation of the said injuries – Penal Code, 1860 – ss.302.149 and 307/149.*

C **The five appellants along with three others were prosecuted for murder of 'US', the brother of PW-4, and attempting to murder PW-4. The prosecution case was that a title suit between 'US' (deceased) and the accused with regard to a plot of land in front of the house of 'US'**
D **was pending. On the date of the incident when 'US' was cleaning the said plot, accused 'RS' came there and protested against the same. Heated arguments ensued between them. On the instigation of another accused, 'RS' went to his house and returned with a gun and other**
E **accused persons who were also armed with lethal weapons. They exchanged hot and abusive language with 'US'. Accused 'RS' fired at 'US', who died at the spot. He also fired at PW-4 who sustained injuries on his head and face. Certain villagers including PWs 1, 2, 3 and 5**
F **rushed to the spot meanwhile and witnessed the incident. Two of the accused died during the trial. The trial court convicted and sentenced accused 'RS' inter alia, u/ss 302 and 307 IPC, four accused u/ss 302/149 and 307/149 IPC, and the sixth accused u/s 148 IPC. Their appeal was dismissed by the High Court.**

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In the appeal filed by five accused, except accused 'RS', it was contended for the appellants that (i) there was no evidence to show that there was any meeting of minds of the appellants as to the common object to commit the
H **offences alleged; (ii) when the suit relating to the dispute**

of ownership of the land between the parties was still pending in the court, the deceased and his brother had no business to clean the land, and the complainant party being the aggressor, the appellants acted in self-defence; and (iii) that the prosecution failed to explain the injuries sustained by appellant-accused 'SJ'. A B

Dismissing the appeal, the Court

HELD: 1.1. Section 149 IPC has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring vicarious liability u/s 149 IPC for the offence committed by a member of the unlawful assembly, the liability of other members of such unlawful assembly during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [para 14] [386-E-H; 387-A] C D E F

Mizaji & Anr. Vs. State of U.P. 1959 Suppl. SCR 940 = 1959 AIR 572 - relied on.

1.2. A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the G H

A members composing it, and from a consideration of all the surrounding circumstances. [para 16] [388-D-E]

Masalti Vs. State of U.P. 1964 (8) S.C.R. 133 – relied on

B *Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra* 2009 (15) SCR 58 = 2009 (10) SCC 773 - referred to.

1.3. In the instant case, it has come in evidence, C particularly, the testimony of PWs 4 and 5, that when the accused persons reached the place of occurrence with accused 'RS', accused 'SS' and 'RS' were armed with guns and the other accused with lethal weapons, like spear, *farsa* and lathi. Though it is true that as per the D evidence, it was 'RS' who fired at the deceased and his brother (PW-4) with his gun, yet it was clear from the nature of the weapons that they possessed, that being more than five in number, they did form an unlawful assembly with the common object of eliminating the E deceased and his brother and in prosecution of the common object, the deceased was shot dead and an attempt on the life of his brother (PW-4) was made by one of the members of the unlawful assembly, namely, 'RS'. Thus, all of them had knowledge of the common object of the assembly. Therefore, their case falls within F theambit of s.149 IPC, and they are guilty of the offences for which they have been convicted and sentenced. [para 19] [389-G-H; 390-A-F]

2.1. The right of private defence is a defensive right. G It is neither a right of aggression nor of reprisal. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is H entitled to protect himself and his property. That being so,

the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended, and should not exceed its legitimate purpose. However, the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. [para 23-24] [391-G; 392-B-E]

Jai Dev Vs. *State of Punjab* **1962 SCR 489 = 1963 AIR 612;** and *Dharam & Ors. Vs. State of Haryana* **2006 (10) Suppl. SCR 391=JT 2007 (1) SC 299- relied on.**

Laxman Sahu Vs. State of Orissa **1988 AIR 83 - referred to.**

2.2. It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record. [para 25] [392-F-G; 393-A]

Vidhya Singh Vs. State of Madhya Pradesh **1971 AIR 1857;** *Munshi Ram & Ors. Vs. Delhi Administration* **1968 SCR 408 =1968 AIR 702;** *The State of Gujarat Vs. Bai Fatima & Anr.* **1975 (3) SCR 933 =1975 AIR 1478 ;** and *Salim Zia Vs. State of Uttar Pradesh* **1979 (2) SCR 394 = 1979 AIR 391 – relied on.**

2.3. The plea of self-defence has been rejected by the trial court on the ground that on the date of occurrence,

A the appellants had no right over the land in dispute, much less a right to be protected at the cost of life of other persons. The High Court has observed that except for a broomstick, neither the deceased nor any other member of the complainant party had any weapon in their hands; B the deceased was not damaging the land nor was changing its nature; no overt act at all was committed by any of the persons on complainant's side; thus, there was no threat to the property or to life of the appellants necessitating exercise of right of private defence. The C appellants were, in fact, aggressors and being members of the aggressor-party none of the appellants can claim right of self-defence. The appellants have failed to establish that they were exercising right of private defence. [para 28] [393-F-G; 394-A-D]

D 3.1. Non-explanation of injuries suffered by the accused cannot be held as an unqualified proposition of law that whenever the accused sustains an injury in the same occurrence, the prosecution is obliged to explain the injury and on its failure to do so, its case has to be E disbelieved or that a presumption has to be raised that the accused caused injuries in exercise of right of private defence. In the case of *Takhaji Hiraji**, a Bench of three Judges of this Court observed that before non-explanation of the injuries on the persons of the accused F by the prosecution witnesses may affect prosecution case, the court has to be satisfied of existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of occurrence in question. G [para 26 and 29] [393-C-D; 394-E-G]

**Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Ors.* 2001 (6) SCC 145 - relied on.

3.2. In the instant case, having regard to the nature H of the injuries allegedly suffered by appellant 'SJ', the

case of the prosecution cannot be overthrown because of non-explanation of the said injuries. As per the medical report, the injuries allegedly suffered by the said appellant are simple and superficial in nature. In view of the fact that the evidence against the appellants for having committed the offences has been found to be cogent and creditworthy, it outweighs the effect of the omission on the part of the prosecution to explain the injuries. [para 30] [393-H; 394-A-C]

Sukhan Raut & Ors. Vs. State of Bihar 2001 Suppl. **(5) SCR 359 = 2001 (10) SCC 284;** *Basisth Roy & Ors. Vs. State of Bihar* **2003 (9) SCC 52;** *Shri Gopal & Anr. Vs. Subhash & Ors.* **2004 (1) SCR 1085 = 2004 (13) SCC 174;** and *Mohan Singh* Vs. *State of Punjab* **1962 Supp. (3) SCR 8;** *Lakshmi Singh & Ors. Vs. State of Bihar* **1976 (4) SCC 394;** *Dashrath Singh Vs. State of U.P* **2004 Suppl. (3) SCR 561 = 2004 (7) SCC 408 ;** *Shriram Vs. State of M.P.* **2003 Suppl. (6) SCR 129 = 2004 (9) SCC 292;** *Vijayee Singh & Ors. Vs. State of U.P.* **1990 (2) SCR 573 = 1990 (3) SCC 190** and *Bishna & Ors. Vs. State of W.B.* **2005 Suppl. (4) SCR 892 = 2005 (12) SCC 657 - cited.**

Case Law Reference:

2001 Suppl. (5) SCR 359	**cited**	**para 10**
2003 (9) SCC 52	**cited**	**para 10**
2004 (1) SCR 1085	**cited**	**para 10**
1962 Supp. (3) SCR 8	**cited**	**para 10**
1976 (4) SCC 394	**cited**	**para 10**
2004 Suppl. (3) SCR 561	**cited**	**para 10**
2003 Suppl. (6) SCR 129	**cited**	**para 10**
1990 (2) SCR 573	**cited**	**para 10**
2005 Suppl. (4) SCR 892	**cited**	**para 10**

1959 Suppl. SCR 540	relied on	para 14
1964 (8) S.C.R. 133	relied on	para 17
2009 (15) SCR 58	referred to	para 18
1962 SCR 489	relied on	para 22
1988 AIR 83	referred to	para 23
2006 (10) Suppl. SCR 391	relied on	para 24
1971 AIR 1857	relied on	para 25
1968 SCR 408	relied on	para 25
1975 (3) SCR 933	relied on	para 25
1979 (2) SCR 394	relied on	para 25
2001 (6) SCC 145	relied on	para 29

CIVIL APPELLATE JURISDICTION : Criminal Appeal No. 227 of 2007.

From the Judgment & Order dated 03.09.2004 of the High Court of Judicature at Patna in Criminal Appeal Nos. 268 of 2001 & 284 of 2001.

P.S. Mishra, Tathagat H. Vardhan, Ravi Ch. Prakash , Upendra Mishra, D.K. Jha, D.K. Pandey, Manu Shanker Mishra for the Appellants.

Anuj Prakash, Manish Kumar, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This criminal appeal, by special leave, arises out of a common judgment and order dated 3rd September 2004, delivered by the High Court of Judicature at Patna in three Criminal Appeals No.268, 284 and 384 of 2001, affirming the judgment and orders dated 7th June 2001 and 12th June 2001, passed by the Additional Sessions Judge, Bhojpur,

convicting and sentencing the present five appellants for various offences. A

2. In all, eight persons, namely, Rajeshwar Singh @ Kamta Singh, Nagina Singh, Sheo Jee Singh @ Akshay Singh, Awadhesh Singh, Sikandar Singh, Harendra Singh, Shankar Singh @ Sheo Shankar Singh and Besh Lal Singh @ Bansh Lal Singh were put on trial for having committed the murder of Upendra Singh. Two of the accused, namely, Nagina Singh and Awadhesh Singh died during the course of the trial and were thus, dropped. The learned Additional Sessions Judge convicted accused Rajeshwar Singh under Sections 302 and 307 of the Indian Penal Code, 1860 ("IPC" for short) as well as under Section 27 of the Arms Act, 1959 and sentenced him to undergo rigorous imprisonment for life under Section 302; rigorous imprisonment for ten years under Section 307 IPC and rigorous imprisonment for three years under Section 27 of the Arms Act. Accused Sheo Jee Singh @ Akshay Singh, Sikandar Singh, Harendra Singh, Shankar Singh @ Sheo Shankar Singh were convicted and sentenced to undergo rigorous imprisonment for life under Section 302 read with Section 149 and rigorous imprisonment for five years under Section 307 read with Section 149 IPC. Accused Sheo Jee Singh was further convicted and sentenced to undergo rigorous imprisonment for three years under Section 27 of the Arms Act. Accused Besh Lal Singh was convicted and sentenced to undergo rigorous imprisonment for two years under Section 148 IPC and Sikandar Singh, Shankar Singh and Harendra Singh were also convicted and sentenced to undergo rigorous imprisonment for six months each under Section 147 IPC. The sentences awarded to all the accused were to run concurrently. All the six convicts preferred the afore-noted three appeals. As stated above, by the impugned judgment, the High Court has dismissed all the appeals. Being aggrieved, Sikandar Singh, Harendra Singh, Shankar Singh, Sheo Jee Singh and Besh Lal Singh have preferred this appeal. Convict Rajeshwar Singh seems to have accepted the verdict of the courts below. B C D E F G H

A 3. Shorn of unnecessary details, the case of the prosecution may be summarized as follows:

There was a piece of land in front of the cattle shed of the deceased Upendra Singh where his cattle used to graze. There was dispute between the parties over the land and a title suit B in respect thereof was pending. In the morning of 23rd December 1987 at about 9-10 a.m., when the deceased was cleaning the said land, accused Rajeshwar Singh happened to reach there and protested against the act of the deceased, saying that the land belonged to him. Ignoring the protest, the C deceased continued cleaning the land. Some heated arguments ensued between them. Accused Nagina Singh (since dead), also happened to be at the spot. Having got infuriated and enraged, he exhorted Rajeshwar Singh to eliminate the deceased. Soon thereafter Rajeshwar Singh went D to his house and came back with a gun. He was accompanied by Sheo Jee Singh, Awadhesh Singh (since dead), Sikandar Singh, Harendra Singh, Shankar Singh and Besh Lal Singh, all armed with lethal weapons such as spear, *farsa* and lathi. They exchanged hot and abusive language with the deceased. E Accused Rajeshwar Singh fired at the deceased as a result of which he sustained injuries on his chest, abdomen, arm and forearm. In the meantime, Rajendra Singh (PW-4) came there and tried to save his brother Upendra Singh but he was also shot at by Rajeshwar Singh as a result of which he also F sustained injuries on his head, forehead and cheek. Upendra Singh, the deceased, succumbed to the injuries and died instantaneously at the spot.

4. Overhearing the cries, certain villagers including Jagdish Singh (PW-1), Samhoot Singh (PW-2), Harihar Singh (PW-3) G and Chandrama Singh rushed to the spot and witnessed the incident. PW-5-Gupteshwar Singh (uncle of the deceased) rushed to the police station and on the basis of his statement, a First Information Report (FIR) was recorded at about 1.00 p.m. on the same day. The autopsy was conducted by H Dr.Kamta Prasad Rai (PW-7) on the body of Upendra Singh.

He noted the following injuries: A

"(i) External injury – blood had come from both nostrils and mouth, eyes were open (sic). 41 pellets injuries on chest scattered all over the chest. Out of which 15 were penetrating on left side chest, 9 pellet injuries were on left arm and fore-arm. B

(ii) On internal examination trachea was found full of blood clots. Oesophagus (sic) contained blood clots 10 pellets injuries on left lung causing laceration of lung-tissues and blood vessels inside it. 2 pellet injuries C causing laceration and puncture of right lung tissue. Upper portion of diaphragm on left side was lacerated and haemorrhaging. 5 punctured wound by pellet on stomach causing illegible of its contents i.e. un-digested food. 7 pellet injuries on heart puncturing its chamber. All D chambers of heart were empty and whole chest cavity was full of blood clots."

5. Rajendra Singh (PW-4) was examined by Dr.Vijai Pratap Singh (PW-6), who found the following injuries on his body: E

"Three pin-head size holes over face-one over scalp, one over fore-head and one over cheek caused by pellet injuries. The injuries were caused by firearm within 12 hours and were simple in nature. In his cross-examination, F he deposed that the patient was referred to him by the police. No pellets were found imbedded inside the patient's wound. He has further deposed that such injury can be self-inflicted if one undertakes the risk."

6. Appellant Sheo Jee Singh was also examined by Dr. G Rameshwar Singh. Following injuries were found on his person:

"(i) One swelling covering around the lower 1/3 of right upper arm just above right elbow and fracture of underlying bone.

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A (ii) Complain of pain on right shoulder."

7. On completion of the investigation, chargesheet was submitted against all 0the eight afore-mentioned accused.

8. The accused denied their involvement in the murder of B Upendra Singh. In their defence, it was stated that they had been falsely implicated due to enmity because of long drawn land dispute and a series of other litigations arising therefrom. Their defence was that the suits in respect of the disputed land and the proceedings under Section 144 of the Code of Criminal C Procedure, 1973 ("Cr.P.C." for short) having been decided in their favour, there was no question of their picking up the quarrel with the deceased and in fact, it was the complainant party who were the aggressors in which Sheo Jee Singh was assaulted for which a case was also registered. A plea of exercise of right D of private defence was also raised.

9. As already stated, the trial court convicted all the accused for the offences noted above. The appeal of the appellants having been dismissed by the High Court, they are before us in this appeal.

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10. Mr. P.S. Misra, learned senior counsel appearing for the appellants has assailed the conviction of the appellants mainly on the grounds that: (i) there is no evidence on record to show the meeting of minds of the appellants as to the F common object to do away with the deceased. It was thus, argued that all the appellants cannot be held guilty for having committed offence under Section 302 read with Section 149 IPC. In support of the proposition that at the most they could be convicted and sentenced for their individual acts, reliance was placed on the decisions of this Court in *Sukhan Raut &* G *Ors. Vs. State of Bihar*[1], *Basisth Roy & Ors. Vs. State of Bihar*[2], *Shri Gopal & Anr. Vs. Subhash & Ors*[3]. and *Mohan Singh Vs. State of Punjab*[4]; (ii) the plea of self defence raised by the

1. (2001) 10 SCC 284.

H 2. (2003) 9 SCC 52.

appellants has not been properly appreciated by the courts below. It was strenuously urged that admittedly, there was long drawn land dispute between closely related parties who were locked in a series of proceedings and litigations in respect of the land on which the incident took place, the issue regarding ownership of the land being still pending, the deceased and his brother had no business to clean the land and, in fact by their action they instigated the appellants and, therefore, even if the version of the prosecution is taken at its face value, that the deceased died because of the injuries suffered in the brawl, the complainant party must be held to be the aggressors and whatever the appellants did was by way of self defence and (iii) that the prosecution has failed to explain the injuries on the person of appellant Sheo Jee Singh, which is fatal to the case of the prosecution, particularly when the conviction of the appellants is based on the evidence of the interested witnesses. In support of the proposition that the omission on the part of the prosecution to explain the injuries on the person of the accused is a very important circumstance from which the court can draw adverse inference against the prosecution for suppressing the relevant information regarding the incident, reliance was placed on the decisions of this Court in *Lakshmi Singh & Ors. Vs. State of Bihar*[5], *Dashrath Singh Vs. State of U.P.*[6], *Shriram Vs. State of M.P.*[7], *Vijayee Singh & Ors. Vs. State of U.P.*[8] and *Bishna & Ors. Vs. State of W.B.*[9].

11. As against this, Mr. Anuj Prakash, appearing for the State, while supporting the decisions of the courts below, submitted that the period of applicability of order under Section

3. (2004) 13 SCC 174.
4. [1962] Supp. 3 SCR 848.
5. (1976) 3 SCC 394.
6. (2004) 7 SCC 408.
7. (2004) 9 SCC 292.
8. (1990) 3 SCC 190.
9. (2005) 12 SCC 657..

144 Cr.P.C. having expired, the said order had no bearing in so far as the assembly of the accused was concerned. It was argued that the evidence of PW-4 and PW-5 is unimpeachable, which prove that after altercation with the deceased, Rajeshwar Singh went inside his house and brought with him the appellants, who all armed with deadly weapons, came out with the common object to do away with the deceased.

12. We shall now proceed to assess each of the contentions seriatim. The first question is, whether all the appellants can be convicted under Section 302 with the aid of Section 149 IPC?

13. Section 149 IPC reads as follows:

"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."

14. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members

knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

15. In *Mizaji & Anr. Vs. State of U.P.*[10], explaining the scope of Section 149 IPC, this Court had observed thus:

> "This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under S. 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 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 S. 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. There is a

10. AIR 1959 SC 572.

A great deal to be said for the opinion of Couch, C.J., in Sabed Ali's case, 20 Suth WR Cr 5 (supra) that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in
B prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of S. 149, Indian Penal Code cannot be ignored or obliterated. In
C every case it would be an issue to be determined whether the offence committed falls within the first part of S. 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls
D within the second part."

16. A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an
E assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For
F determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage
G of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object,
H the same must be translated into action or be successful.

17. In *Masalti Vs. State of U.P.*[11], a Constitution Bench of this Court had observed that 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.

18. In *Pandurang Chandrakant Mhatre & Ors. Vs. State of Maharashtra*[12], of which one of us (R.M. Lodha, J.) was the author had, however, relying on *Masalti* (supra) and a few other decisions of this Court, cautioned that where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, only those accused, whose presence was clearly established and an overt act by any one of them was proved, should be convicted by taking into consideration a particular fact situation.

19. Having examined the present case in the light of the evidence on record, particularly the testimony of PW-4 and PW-5, which has been relied upon by the courts below to come to the conclusion that all the appellants are liable to be convicted for offence punishable under Section 302 IPC with the aid of Section 149 IPC, we are of the opinion that both the courts below were correct in coming to the conclusion that the prosecution has established case against all the appellants under the said provision. It has come in evidence that all the appellants, when they came out of their house with Rajeshwar

11. (1964) 8 SCR 133.
12. (2009) 10 SCC 773.

A Singh, they were armed with lethal weapons, like spear, *farsa* and lathi. Though it is true that as per the evidence, it was Rajeshwar Singh who had fired on the deceased and his brother (PW-4) with his gun, yet it is clear from the nature of the weapons that they possessed, as members of the unlawful B assembly, that they were determined to teach a lesson to the complainant party for daring to assert their right on the plot in question. From their conduct it can safely be held that the murder of Upendra Singh and injuries to PW-4 were immediately connected with their common object and, C therefore, their case falls within the ambit of Section 149 IPC and they are guilty of the offences for which they have been convicted and sentenced. In the FIR lodged by PW-5, it was recited that accused Rajeshwar Singh and Sheo Jee Singh were armed with guns while other accused were having various D lethal weapons when they arrived at the scene. Being more than five in number, they did form an unlawful assembly with the common object of eliminating the deceased and his brother and in prosecution of the common object, the deceased was shot dead and an attempt on the life of his brother (PW-4) was made by one of the members of the unlawful assembly, namely, E Rajeshwar Singh. Thus, all of them had knowledge of the common object of the assembly. The two courts below, having appreciated and assessed the evidence on the question, we are of the opinion that no ground is made out for a third review of the evidence on the issue. Hence, in our view, all the F appellants were liable and had been rightly convicted with the aid of Section 149 IPC.

20. As regards the plea of exercise of their right of private defence, here again we do not find much substance in the G submission.

21. Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence H

which is done in the exercise of such right. Similarly, Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to which rule of self defence is subject. Section 100 IPC provides, *inter alia*, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

22. The scope and width of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions, the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (See: *Jai Dev Vs. State of Punjab*[13].)

23. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the

13. AIR 1963 SC 612.

A necessity of averting an impending danger which is not self created. Necessity must be present, real or apparent. (See: *Laxman Sahu Vs. State of Orissa*[14].)

24. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property B is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly C disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or D his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the E prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. (See: F *Dharam & Ors. Vs. State of Haryana*[15].)

25. It is well settled that the burden of establishing the plea of self defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the G accused need not establish the plea of self defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material

14. AIR 1988 SC 83.

H 15. JT 2007 (1) SC 299.

on record. In *Vidhya Singh Vs. State of Madhya Pradesh*[16], this Court had observed that right of self defence should not be construed narrowly because it is a very valuable right and has a social purpose. (Also see: *Munshi Ram & Ors. Vs. Delhi Administration*[17]; *The State of Gujarat Vs. Bai Fatima & Anr*[18]. and *Salim Zia Vs. State of Uttar Pradesh*[19].)

26. In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had acted in exercise of his right of private defence. The defence has to further establish that the injury so caused on the accused probabilise the version of the right of private defence.

27. In the light of the afore-stated legal position, we will examine as to whether it could be said that the appellants had assaulted the deceased and one other member of his family in exercise of their right of private defence?

28. The plea of self defence has been rejected by the trial court on the ground that on the date of occurrence, the appellants had no right over the disputed land, much less a right to be protected at the cost of life of other persons. Dealing with the question, while rejecting the stand of the appellants, that they were in exclusive physical possession of the land, the High

16. 1971 (3) SCC 244.
17. AIR 1968 SC 702.
18. AIR 1975 SC 1478.
19. AIR 1979 SC 391.

A Court has observed that except for a broomstick, neither the deceased nor any other member of the complainant party had any weapon in their hands; the deceased was neither taking away the land nor was changing its nature or damaging it; no overt act at all was committed by the deceased or any of the B prosecution witnesses; no harm or injury was likely to be caused to the appellants or the land in dispute and thus, there was no threat to life or property of the appellants necessitating exercise of right of private defence. The High Court held that right of private defence of life and property cannot be exercised C against an unarmed person. In the light of the evidence on record, we have no hesitation in holding that the appellants were in fact, aggressors and being members of the aggressors party none of the appellants can claim right of self defence. The right to defend does not include a right to launch an offensive D or aggression. In our opinion, therefore, the appellants have failed to establish that they were exercising right of private defence.

29. Finally, the third question for consideration is as to what is the effect of non-explanation of injuries suffered by appellant E Sheo Jee Singh. It cannot be held as an unqualified proposition of law that whenever the accused sustains an injury in the same occurrence, the prosecution is obliged to explain the injury and on failure of the prosecution to do so, the prosecution case has to be disbelieved. In *Takhaji Hiraji Vs. Thakore Kubersing* F *Chamansing & Ors.*[20], a Bench of three Judges of this Court, referring to earlier three-Judge Bench decisions, observed that before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect prosecution case, the Court has to be satisfied of the existence G of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of occurrence in question.

30. In our view, in the present case, having regard to the

H 20. (2001) 6 SCC 145

nature of the injuries allegedly suffered by the said appellant, the case of the prosecution cannot be overthrown because of non-explanation of the said injuries. As per the medical report, the injuries allegedly suffered by Sheo Jee Singh were – '*swelling covering around the lower 1/3 of right upper arm just above right elbow and fracture of underlying bone*'. The injuries are simple and superficial in nature. In view of the fact that the evidence against the appellants for having committed the afore-stated offences has been found to be cogent and creditworthy, in our opinion, it outweighs the effect of the omission on the part of the prosecution to explain the injuries. We reject this ground as well.

31. For the afore-mentioned reasons, we do not find any merit in the appeal and the same is dismissed accordingly.

R.P Appeal dismissed.