2021 INSC 764

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.753 OF 2017

ARVIND KUMAR
@ NEMICHAND & ORS. **…APPELLANTS**

VERSUS

STATE OF RAJASTHAN **…RESPONDENT**

WITH
CRIMINAL APPEAL NO.756 OF 2017
CRIMINAL APPEAL NO.754-755 OF 2017

J U D G M E N T

M.M. SUNDRESH, J.

1. All these appeals sprout from a common occurrence. One set of appeals are filed by the accused qua the charges framed on the first occasion. The other set of appeals are filed by the de facto complainant over a trial started in

pursuance to the order passed invoking Section 173(8) of the Criminal Procedure Code (CrPC), facilitating further investigation, leading to the addition of ten more accused. No appeal has been filed against the dismissal of the appeal against acquittal and allowing the appeal against convictions qua the first trial. On the appeals filed by the convicted individuals, the de facto complainant filed his application for intervention. We deem it appropriate to deal with them by our common order, on the aforesaid scenario.

Brief Sketch

2. The prime accused, by name Surjaram had a dispute with the deceased over a pathway. The said pathway opens and runs through the lands of the deceased and some other prosecution witnesses on the way to his *dhani*. The lands of the deceased and the pathway which is claimed by Surjaram as that of his own, are surrounded by the lands of the latter.
3. In view of the dispute aforesaid, Surjaram obtained an order of stay in the revision petition filed by him. He had put up an obstruction by way of a wall blocking the entry of the deceased and others into their *dhani* and lands. Surjaram was also stated to have approached the local police. An effort was made to resolve the dispute through panchayat on the date of the occurrence.
4. It is the case of the prosecution that Surjaram along with his son and other accused numbering about 25 in total, got into the land of the deceased

Ladduram, who was sleeping in the courtyard along with other witnesses, and attacked them with *farsi, barchi (small sword), lathi, bhala* and *sword* in the wee hours of 18.07.1989. The other deceased Mohan and Brijender who were sleeping in their home nearby were also dragged and attacked. The accused were stated to have come in two jeeps. The evidence of the prosecution would also suggest that the wall constructed blocking the pathway was found to be opened.

5. PW-5, Harlal, a physically challenged person needing the assistance of a stick to move around, had seen the occurrence from about 15-20 feet distance. On the next day i.e., 19.07.1989 at about 6.00 a.m., PW-5 went to the police station and lodged a written complaint which was reduced in writing as the FIR under Exhibit P-13 by PW-20. The written complaint is said to have been written by a mysterious stranger whose identity was not known to any of the prosecution witnesses including PW-20. On the statement of PW-5 that it was written in the police station, PW-20 feigned ignorance. Taking PW-5 along with the other witnesses after sending the injured to the hospital, PW-20 took up the investigation. He drew the plan and prepared a report on the suggestion of PW-5. It was signed by one of the other prosecution witnesses who also spoke about the occurrence though strictly not as an eyewitness.

6. All the injured witnesses and deceased Mohan were given treatment by PW-17 on the first occasion. Thereafter the post-mortem was done by PW-18, on the request made by PW-20. He also examined two of the injured accused viz., Arvind and Ramnarayan. Following are the injuries suffered as could be seen from Exhibit D-15 and D-16:

"**MEDICAL & HEALTH DEPARTMENT, RAJASTHAN**
Injury Report of Sh. Arvind Kumar S/o Surjaram Caste-Jat
Dated of Examination: 19/07/89 AT 8:30 A.M.

Nature of wound, incised, crushed etc.	**Size of every injury (in inches) length, width & deepness**	**Body part on which injury caused**	**Simple or Grievous**	**Caused by what kind of weapon**
Lacerated wound	2 cm x 0.6 x 0.5 cm	Left frontal temporal region	x-ray	Blunt
Lacerated wound	3 cm x 2 cm x bone deep	On frontal region of Scalp Rt. Bruise	-do-	Blunt
Lacerated wound	3 cm x 1 cm x bone deep	Anterior part on top of scalp left towards	-do-	Blunt
Lacerated wound	2 cm x 0.5 x 0.5 cm	On left parietal temporal region of scalp in the line of ear.	-do-	Blunt
Lacerated wound & Swelling	3 cm x 2 cm	On temporal region of scalp	-do-	Blunt

Lacerated wound	2.5 cm x 1 cm	On chin	Simple	Blunt
Lacerated wound	2 cm x 0.5 cm x 1 cm	On left leg	Simple	Blunt
Abrasion	4 cm x 1 cm	Left forearm	x-ray advised	Blunt
Bruise	7 cm x 2 cm	On left forearm	x-ray advised	Blunt
Bruise	7 cm x 1.5 cm	On left upper arm	Simple	Blunt
Bruise	4 cm x 2.5 cm	On left upper elbow	Simple	Blunt
Bruise (two)	5 cm x 2 cm	On left forearm on lateral aspect	Simple	Blunt
Bruise	15 cm x 2.5 cm	On neck (illegible)	Simple	Blunt
Bruise	14 cm x 2 cm	On back (illegible)	Simple	Blunt
Bruise	10 cm x 2 cm	On the left (illegible)	Simple	Blunt
Bruise	13 cm x 3 cm	On left side of chin	x-ray	Blunt
Bruise	12 cm x 2 cm	Over left shoulder	Simple	Blunt
Bruise	12 cm x 2 cm	On back of scalp region	x-ray	Blunt
Bruise	10 cm x 2 cm	On Rt. Upper (illegible)	Simple	Blunt

Bruise	7 cm x 2 cm	On Rt. Knee	Simple	Blunt
Abrasion	1 cm x 5 cm	On Rt. (illegible)	Simple	Blunt
Abrasion	1 cm x 1 cm	On Rt. Shoulder	Simple	Blunt
Abrasion	1.5 cm x 2 cm	On Rt. Forearm	Simple	Blunt

MEDICAL & HEALTH DEPARTMENT, RAJASTHAN

Injury Report of Sh. Ramnarayan S/o Rambakxa Ram, Aged -25 years, Caste-Jat

Dated of Examination: 19/07/89 AT 9.00 A.M.

Nature of wound, incised, crushed etc.	**Size of every injury (in inches) length, width & deepness**	**Body part on which injury caused**	**Simple or Grievous**	**Caused by what kind of weapon**
Lacerated wound	5 cm x 2 cm x bone deep cm	On middle of scalp anterior region	x-ray	Blunt
Lacerated wound	2.6 cm x 0.5 cm x bone deep	On Rt. Anterior region of scalp	-do-	Blunt
Lacerated wound abrasion around the wound	2 cm x 0.6 cm x 0.6 cm	On left eye brow	----	Blunt
Abrasion	8 cm x 0.5 x 0.5 cm	Rt. Shoulder upper	----	Blunt
Bruise	12 cm x 2.5 cm	Rt. Shoulder	----	Blunt
Bruise	10 cm x 2.50 cm	On Rt. Shoulder above nearby above injury	----	Blunt
Bruise	6 cm x 2 cm	Transverse	----	Blunt

		bleeding back of Rt. Shoulder		
Abrasion	5 cm x 1 cm	Near armpit vertically placed	----	Blunt
Bruise	11 cm x 2.2 cm	On back of left side of chest placed oblique	----	Blunt
Bruise	12 cm x 2 cm	On Rt. Side of chest back	----	Blunt
Bruise	8 cm x 2 cm	On back of chest above Rt. Side cross of chest injury	----	Blunt
Bruise	7 cm x 3.3 cm	On back of Rt. Scapular region	----	Blunt
Bruise	13 cm x 2 cm	On left (illegible) region	Simple	Blunt
Bruise	8 cm x 3 cm	On left upper arm	Simple	Blunt
Lacerated wound	2 cm x 1 cm x 0.5 cm	On back of chest near armpit	Simple	Blunt
Lacerated wound	1.2 cm x 0.5 x 0.5 cm	On back of shoulder	Simple	Blunt
Bruise	13 cm x 2 cm	On back upper area of left shoulder	Simple	Blunt
Abrasion Bruise	3 cm x 2 cm	Left shoulder	Simple	Blunt
Abrasion	5 cm x 4 cm	On left lower	Simple	Blunt

		(illegible)		
Eardrum (illegible)	(illegible)	Rt. Little bon fractured 1st	Simple	Blunt

7. PW-18 gave a statement that he did treat both the injured accused persons on the request made by the police and found the aforesaid multiple injuries while taking them as in-patients and putting them through further medical evaluation.

8. PW-21, who was the Additional Superintendent of Police at the relevant point of time, took up the investigation from PW-20 on 24.07.1989. While PW-20 did the initial investigation including the preparation of plan and sketch, inquest report and mahazar report, PW-21 is stated to have arrested the accused on the same day, except Surjaram, who was arrested on 08.08.1989 at the police station itself and made the recoveries. It is interesting to note that in almost all the recovery memos PW-11, Om Prakash who was also an interested witness, has been shown as the eyewitness. Strangely, the arrest of the accused, was shown to be done on 31.07.1989, whereas two of the injured accused among them, were referred to the hospital by the police as early as on 19.07.1989, as admitted by PW-11.

9. After completion of the investigation, out of the 13 persons named by PW-5 in his written complaint, only seven have been charged for the major offense

punishable under Section 302 of the Indian Penal code *simplicitor* and Section 302 read with Section 149 among other sections. Almost all the witnesses are either close relatives or family members of the deceased. They are also stated to have been present at the scene of occurrence despite having their *dhanis* at different places.

10. Before the trial court, in the first trial the prosecution has examined 20 witnesses and marked 59 exhibits. On behalf of the defence 4 witnesses have been examined while marking 26 exhibits. In the second trial, the prosecution has examined 20 witnesses and marked 61 exhibits, while the defence examined 4 witnesses and marked 16 exhibits. Some of the accused pleaded private defence while the others made a simple denial. This is the factual position governing both the cases.

11. The trial court on the first occasion acquitted two of the accused while convicting five of them. On appeal, the High Court acquitted one more accused while confirming the conviction of the other four. In the process it rejected the appeal filed against the acquittal.

12. In the meanwhile, yet another report was filed in pursuance to the order passed under Section 173(8) of the CrPC providing for further investigation. Thus, an array of accused numbering about 10 more were added and the case was taken up for trial for the second time over the same occurrence. This

time, four of them were convicted while one was referred to the Juvenile Justice Board being a juvenile in conflict with law. The remaining five accused were acquitted. Thus, life sentence was imposed on the four accused.

13. Once again, appeals were preferred before the High Court. This time, the High Court while dismissing the appeals filed against the acquittal allowed the appeals filed by the convicted accused. Now all the parties have filed their respective appeals before us, except the State.

Evidence Before the Court

14. We have perused the oral and documentary evidence produced before us *in extenso*. We would like to touch upon the evidence from the side of the prosecution while keeping in mind the evidence put up by the defence. PW-5 is the author of the First Information Report (FIR). He is said to have seen the occurrence at night where there is no clear evidence of the existence of sufficient light. He actually went to take up logs and stones stored by him in a nearby place despite his apparent inability to walk. He is a degree holder. He along with other witnesses reached the office of PW-20 at about 06.0 0 a.m. on 19.07.1989. In his evidence he has stated that he did not know as to who wrote the complaint despite his ability to write. An explanation was given that he could not write in view of the situation, though the other eyewitnesses including the injured witnesses were present. It is his evidence that it was

written at the police station. He was also aware of the civil proceedings including the stay obtained against Ladduram. It is his further statement that the way to the *dhani* of the prosecution witnesses and the field passing through the field of Surjaram was indeed closed by him and they wanted it to be opened. He also used the pathway. An admission has been made that in view of the presence of a large crowd one could not say who was beating whom. The conduct of the panchayat on the morning of the date of occurrence was admitted. He has also seen the accused attacking the deceased and the injured witnesses with the weapons attributed to them.

15. PW-6 had deposed that the accused persons had come to his house just prior to the occurrence on foot. He also had a dispute with regard to the pathway, with the main accused Surjaram. He admits that the field was belonging to Surjaram and the pathway was closed on the date of occurrence. He claims, he did not see the injuries suffered by the injured accused. Surjaram's field is adjacent to the field of Ladduram. To elicit the contradiction made by him, the defence has marked Exhibit D-3 which is the statement given under Section 161 CrPC by him. PW-9 identified some of the accused for the first time in the court. He once again speaks about the occurrence. On a specific query, he denied the panchayat held.

16. PW-10, who is also an eyewitness, once again admitted the fact that the field of Surjaram is situated on both sides of the pathway. He denied the factum of the dispute having reached to the police station on the earlier occasion. This witness is the son of the deceased, Ladduram.

17. PW-11 speaks about the presence of about 20-25 accused persons just prior to the occurrence. He is also the witness who is stated to have signed most of the recoveries made by the prosecution including the Exhibits P-21 – P-28 and P-31 to P-36. He is also the one who is aggrieved by the order of stay obtained by Surjaram. The defence also confronted him with the statement made under Section 161 CrPC. This witness for a change speaks about the presence of the accused on 19.07.1989 in the hospital. However, an explanation was given that they have got themselves admitted on the pretext of an accident. Though the police personnel, including PW-21 was present, no action was taken. However, it is his deposition that both the injured accused were under the custody of the police during their stay in the hospital. Thus, the evidence of PW-11 does indeed help the case of the defence that the actual arrest was truly supressed. The further statement given by PW-11 is to the effect that when he reached the police station in the morning both the headmen were present. It is also to be noted that he did acknowledge the fact that there was an attempt at reconciliation on 18.07.1989 at the police station,

though he gives a different story that it was Surjaram who was trying to attack him.

18. On the analysis of the aforesaid evidence, not only the presence of the accused at the time of the registration of the FIR could be understood but also the factum of the dispute reaching the police station as alleged by the defence, on the date of occurrence, though in the morning hours, is clear.

19. PW-18 is the doctor who conducted the post-mortem. He has deposed that the cause for the death of the deceased, Mohan Singh was due to shock and excessive bleeding. It is also a result of multiple fractures and excessive injuries to the intestines. Prior to him, PW-17 conducted the medical examination of the deceased, Mohan Singh, wherein he opined that injuries nos. 1-3 are inflicted by a sharp-edged weapon, while the remaining injuries have been caused by some blunt weapon. In his cross examination he has stated that injury can be caused by a blunt weapon, but it can also be caused by sharp edged weapon on rare occasions.

20. It is very relevant to note that PW-18 in clear terms has stated that he also conducted the medical examination of Arvind Kumar and Ramnarayan, the two injured accused persons. He acknowledged Exhibit D-15 and D-16, strangely marked by the defence but not by the prosecution, pertaining to the injury reports of the aforesaid two accused persons, carrying 25 and 20

injuries respectively. In his evidence as PW-14 in the second trial, he made the following statement:

> "I have also carried out the medical examination of the injuries inflicted on the body of accused Arvind Kumar and Ram Narayan, both of them remained admitted at the hospital only. Both of them were admitted patients. The medical examination of both accused was done at the request of police station Laxmangarh. For the injuries inflicted on the body of Arvind Kumar S/o Surjaram the medical examination was carried out on 19.07.1989 at 7-8 in the morning and the following injuries were found on his body…"

21. We have no difficulty in accepting the said evidence of the prosecution, especially in the absence of any re-examination, in coming to the conclusion that the two injured accused suffered multiple injuries, got admitted as in-patients, underwent further treatment and all this happened on the advice made by PW-20 and PW-21 as the case may be. There is an obvious and clear suppression of the aforesaid facts.

22. PW-20, as stated, was the station officer who did the initial investigation. He did not make any investigation on the motive part, particularly with reference to the existing dispute between the parties over the pathway, an order of stay having been obtained by Surjaram, and the consequential panchayat held. He

admitted that he did not either visit the pathway or the surrounding land. He did not seem to remember by who, when and where the complaint was written. Though there was some evidence to show that he met the accused he did not remember meeting them. Clear evidence has been let in by him saying that the disputed pathway was open. He claims that he did not send the accused to the hospital. The plan and sketch were prepared as per the advice of PW-5. No investigation was done from the nearby houses and owners of the nearby fields. At the time of preparation of the observation mahazar report he did not record the statement of any witness as one of the prosecution witnesses was available at the said place. There was no wall as found by him blocking the pathway.

23. The evidence, as understood by us, obviously does not inspire confidence. PW-20 has certainly supressed many facts including the circumstances under which the FIR was registered and the reference of the two injured witnesses to the hospital.

24. PW-21 took over the investigation which factum we have recorded already. This officer holding a very high post made the arrest of the accused person excepting Surjaram on 31.07.1989. As per the arrest memos and Exhibits P-16 to P-18 and Exhibit P-9, Surjaram was arrested on 08.08.1989, followed by the arrest memo under Exhibit P-36. In his evidence he says that on

02.08.1989 he wrote letters to conduct medical examination of the accused persons. Even he was not aware of the facts narrated above involving the civil dispute. He did not remember as to whether he mentioned about the injuries inflicted on the accused persons as per the arrest memo. However, he got the injury reports on 24.07.1989 itself. He did not even visit the disputed site nor examined the landlords nearby.

25. From the evidence discussed, the arrest having been made in the police station few days after the treatment was given to the two injured witnesses, almost all the recovery memos found the name of PW-11, Om Prakash, who is an interested witness. We do not know as to how and in what manner arrest could be made especially when the evidence of PW-18 is clear in respect of the injuries suffered by the two accused persons and they were under the custody of the police when they were referred for treatment, which they took as in-patients. Obviously, PW-21 also did not conduct any investigation on the injuries suffered by the accused. We do not wish to say anything more.

26. Witnesses examined on the side of the defence along with the documents would primarily indicate two factors preceding the occurrence, namely complaint having been made by Surjaram in the morning hours of the date of occurrence, followed by an attempt to resolve the same through panchayat. Injury reports of the defence have been marked along with Section 161 CrPC

statements given by the prosecution witnesses in support of the case as projected by the defence.

27. The prosecution witnesses in the second trial are the same as the first one, except with the addition of a few. Even here, Bhupendra Singh arrayed as PW-3, had stated that the disputed path was closed days prior to the occurrence and the accused Ramnarayan was arrested from the hospital. This again is yet another contradiction in the case of the prosecution.

28. PW-4, Harlal, who was PW-5 in the earlier trial, identified some more accused in the court. Even this witness, once again stated that the way to the farm of the deceased Laduram, was closed days prior to the occurrence. While reiterating the statement made on the first occasion during the earlier trial, a further statement has been made that papers for writing the written complaint were taken from the constable, though he was consistent that he did not know who wrote. It is his further evidence that the occurrence took place not in one place but the area around it. Even on the date of occurrence, the pathway was closed. However, he deposed to the effect that it was the SHO who broke open the way which also contradicts the statement made by the said officer.

29. Brijender, son of deceased Laduram is arrayed as PW-5 in the second trial. He denied the injuries on the accused. PW-8, Om Prakash, in tune with the statement made by the other witnesses, made an assertion that Surjaram has

closed the path, as told to him by the deceased Laduram. He was also aware of the civil proceedings between the parties. PW-9, son of the deceased Laduram had stated that the boundary wall of the field of the accused Surjaram was removed by them.

30. PW-20, who was the SHO at the relevant point of time, gave his evidence in tune with the earlier one. In his evidence he has stated that he did not make any inquiries with the neighbours of the deceased and the disputed way was open when he was travelling through it. There was no wall in existence at that point of time. As stated by him earlier, he had deposed that he did not know the author of the written report under Exhibit P-10 and the place where it was written.

31. Though the defence also let in evidence and marked certain documents, we do not wish to elaborate on them as we have discussed them already. Hence, reiteration, in our considered view, is not warranted.

Courts

32. We do not wish to go into the findings given either by the trial court or by the High Court separately with respect to the first chargesheet and then the second chargesheet. Suffice it to state that there were findings in favour of the accused with respect to over implication, contradiction in the evidence of the prosecution witnesses, disbelieving some of the witnesses including the delay

involved in lodging the FIR and the test identification parade having not been conducted. The courts also found that there are certain interpolations on the date on which Section 161 CrPC statements have been recorded. On the second occasion the courts did not approve the recoveries made.

33. While confirming the conviction it was accordingly held that there is evidence from the prosecution side that the convicted accused are the aggressors, the place of occurrence is not in dispute, injuries, if any, are minor and there are specific attacks that are attributed. On the aforesaid reasoning conviction has been rendered by the High court while confirming the judgment of the trial court

SUBMISSIONS

On behalf of the accused

34. Submissions are made by the learned counsel appearing on behalf of the Appellants/Accused and also the Respondents who were acquitted. Thus, we would like to summarise the submissions together. A plea of private defence has been specifically taken which has not been considered in the correct perspective by the courts below nor any investigation done on that. The delay caused in the FIR which is stated to have been registered at about 6:10 a.m. on 19.07.1989 having reached the concerned magistrate only at 5.00 p.m. though a jeep was available has not been explained by PW-20. The FIR

number has not been mentioned in the injury reports as corroborated by evidence of PW-17 and PW-18. The FIR appears to have been ante-dated. There is a clear suppression by the investigating agency. No investigation has been done on the motive. The site plan is contrary to the evidence of PW-20 and PW-6. The courts below ought not to have accepted the evidence of prosecution witnesses being interested witnesses. There are material contradictions in the evidence given. The requisite parameters to be complied with for invoking Section 149 IPC are not available. At best, it could be a case of a sudden fight. Having found the discrepancies in the evidence and given the benefit of doubt to the accused, the same ought to have been followed for the others. The occurrence has taken place in an open spot. There is not much of a distance between the disputed property and the place of occurrence. The recovery having not being proved, though in the second case, ought to have been applied in the first case as well. No independent witness was available during investigation and also before the court. The injuries inflicted would indicate only lacerated injuries and not incised. The medical evidence is contrary to the ocular evidence with respect to the injuries suffered. Insofar as the accused persons who were acquitted, the High court has given cogent reasoning. There is nothing perverse in the said findings rendered. Since

liberty of a person is involved, this Court can only interfere with the plausible or a possible view of the High court on the ground of perversity alone.

35. The accused persons acquitted by the High Court qua the second trial are similarly placed like the others acquitted pertaining to the first one and therefore, the said decision being not challenged, a challenge made before this Court on the others is liable to be rejected. The non-mentioning of the number of the FIR registered, in the injury reports of not only the witnesses but also the accused, raises a serious doubt that the said FIR is ante-dated. Witnesses have identified the accused wrongly and some of the witnesses, who signed the memos pertaining to recovery have turned hostile.

36. The learned counsel made an attempt to draw support of the submissions through the decisions referred hereunder:

    1. Kashi Ram Case (2002) 1 SCC 71
    2. Lakshmi Singh Case (1976) 4 SCC 394
    3. Ranjit Singh v. State of Punjab, (2013) 16 SCC 752
    4. State of Rajasthan v. Manoj Kumar, (2014) 5 SCC 744

<u>On behalf of the de facto complainant and the State</u>

37. Findings of fact rendered by both the courts below shall not be interfered with insofar as the conviction rendered and merely because the witnesses are either family members or relatives their evidence cannot be disbelieved.

Specific and clear overt act has been attributed against some of the accused. The multiple injuries suffered would lead to an inference. A defective investigation would not enure to the benefit of the accused. A mere delay *per se* can never be a ground for acquittal when there is adequate evidence both oral and documentary in support of the prosecution version. The plea of private defence and sudden fight are intrinsically opposed to each other. The presence of the other accused would be sufficient enough to attract Section 149 IPC. Mere discrepancies in the evidence would not make the prosecution version as false. The delay in sending an FIR is not substantial.

38. The HC has made an error in recording wrong factual findings with respect to the evidence of PW-4 and PW-5, who clearly speak about the presence of the accused who were acquitted by it in the second trial. It did not consider the reasoning of the trial court as incorrect. The evidence of PW-9 in the second trial has not been looked into in the proper perspective.

39. The learned counsel made specific reliance upon the following judgments:

    1. Vishvas Aba Kurane v. State of Maharashtra, (1978) 1 SCC 474
    2. Lalji v. State of U.P., (1989) 1 SCC 437
    3. State of Karnataka v. Moin Patel, (1996) 8 SCC 167
    4. Karnataka v. Moin Patel, (1996) 8 SCC 167
    5. Kripal Singh v State of Rajasthan (2019) 5 SCC 646

DISCUSSION

Fair, Defective, Colourable Investigation

40. An Investigating Officer being a public servant is expected to conduct the investigation fairly. While doing so, he is expected to look for materials available for coming to a correct conclusion. He is concerned with the offense as against an offender. It is the offense that he investigates. Whenever a homicide happens, an investigating officer is expected to cover all the aspects and, in the process, shall always keep in mind as to whether the offence would come under Section 299 IPC sans Section 300 IPC. In other words, it is his primary duty to satisfy that a case would fall under culpable homicide not amounting to murder and then a murder. When there are adequate materials available, he shall not be overzealous in preparing a case for an offense punishable under Section 302 IPC. We believe that a pliable change is required in the mind of the Investigating Officer. After all, such an officer is an officer of the court also and his duty is to find out the truth and help the court in coming to the correct conclusion. He does not know sides, either of the victim or the accused but shall only be guided by law and be an epitome of fairness in his investigation.

41. There is a subtle difference between a defective investigation, and one brought forth by a calculated and deliberate action or inaction. A defective

investigation *per se* would not enure to the benefit of the accused, unless it goes into the root of the very case of the prosecution being fundamental in nature. While dealing with a defective investigation, a court of law is expected to sift the evidence available and find out the truth on the principle that every case involves a journey towards truth. There shall not be any pedantic approach either by the prosecution or by the court as a case involves an element of law rather than morality.

42. Our aforesaid observation is to point out the approach of the Investigating Officers and at times courts. There is a clear distinction in the Code on knowledge and intention. We do not wish to reiterate the settled position of law but meant only to state a sleeping mind.

43. An offense would involve an element of mental rebellion when the mind of a person creates an action not supported by the ethos and values of a social structure in the form of law. This deviant behaviour is the harbinger of an offense ultimately. A feeling of pain, sorrow or tragedy is mental. It is what we think and not what we suffer that constitutes an action in us. Such an action might at times create a social deviance. It is this part which is expected to be seen both by the Investigating Officer and the court while dealing with a criminal case.

44. We would only reiterate the aforesaid principle *qua* a fair investigation through the following judgment of Kumar v. State, (2018) 7 SCC 536:

> "27. The action of investigating authority in pursuing the case in the manner in which they have done must be rebuked. The High Court on this aspect, correctly notices that the police authorities have botched up the arrest for reasons best known to them. Although we are aware of the ratio laid down in Parbhu v. King Emperor [Parbhu v. King Emperor, AIR 1944 PC 73], wherein the Court had ruled that irregularity and illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence, yet in this case at hand, such irregularity should be shown deference as the investigating authorities are responsible for suppression of facts.
> 28. The criminal justice must be above reproach. It is irrelevant whether the falsity lie in the statement of witnesses or the guilt of the accused. The investigative authority has a responsibility to investigate in a fair manner and elicit truth. At the cost of repetition, I must remind the authorities concerned to take up the investigation in a neutral manner, without having regard to the ultimate result. In this case at hand, we cannot close our eyes to what has happened; regardless of guilt or the asserted persuasiveness of the evidence, the aspect wherein the police has actively connived to suppress the facts, cannot be ignored or overlooked."

45. A fair investigation would become a colourable one when there involves a suppression. Suppressing the motive, injuries and other existing factors which will have the effect of modifying or altering the charge would amount to a perfunctory investigation and, therefore, become a false narrative. If the courts find that the foundation of the prosecution case is false and would not conform to the doctrine of fairness as against a conscious suppression, then the very case of the prosecution falls to the ground unless there are unimpeachable evidence to come to a conclusion for awarding a punishment on a different charge.

Private defence

46. A private defence need not be set up in a particular manner. Such a private defence need not be confined to the individual accused alone, to be applied to the others. Though the initial onus is on the accused to satisfy the court, the extent of evidence is that of preponderance of probabilities. Thereafter, the onus shifts. Once a private defence is accepted, there are two questions alone to the answered by the court, namely, the defence coming within the purview of Section 96 to Section 102 IPC and the other acting in excess. The concept of acting in excess has to be seen from the point of view of continued existence of the apprehension of danger. When the apprehension gets effaced with the attack being continued by an accused taking the plea of private defence, exceeding the said right would occur. The weapons used in the process would attain significance depending upon the facts of the case and if the injuries suffered by the accused unless being minor and superficial or suppressed on purpose, the benefit shall enure. The following paragraphs of the celebrated judgment of this Court in Kashiram v. State of M.P., (2002) 1 SCC 71 would be felicitous:

> "22. A few relevant factual and legal aspects overlooked by the High Court may now be noticed. The investigation suffers from a serious infirmity which has to some extent prejudiced the accused in their defence. The investigating officer having found one of the accused having sustained injuries in the course of the same incident in which those belonging to the prosecution party sustained injuries, the investigating officer should have at least made an effort at investigating the cause of, and the circumstances resulting in, injuries on the person of accused Prabhu. Not only the investigating officer did not do so, he did not even

make an attempt at recording the statement of accused Prabhu. If only this would have been done, the defence version of the incident would have been before the investigating officer and the investigation would not have been one-sided.

23. Section 105 of the Evidence Act, 1872 provides that the burden of proving the existence of circumstances which would bring the act of the accused alleged to be an offence within the exercise of right of private defence is on him and the court shall presume the absence of such circumstances. However, it must be borne in mind that the burden on the accused is not so heavy as it is on the prosecution. While the prosecution must prove the guilt of the accused to its hilt, that is, beyond any reasonable doubt, the accused has to satisfy the standard of a prudent man. If on the material available on record a preponderance of probabilities is raised which renders the plea taken by the accused plausible then the same should be accepted and in any case a benefit of doubt should deserve to be extended to the accused (see Dahyabhai Chhaganbhai Thakkar v. State of Gujarat [AIR 1964 SC 1563] , State of Punjab v. Gurbux Singh [1995 Supp (3) SCC 734 : 1996 SCC (Cri) 88] and Vijayee Singh v. State of U.P. [(1990) 3 SCC 190 : 1990 SCC (Cri) 378 : AIR 1990 SC 1459]). In Vijayee Singh case [(1990) 3 SCC 190 : 1990 SCC (Cri) 378 : AIR 1990 SC 1459] this Court emphasised the difference between a flimsy or fantastic plea taken by the defence which is to be rejected altogether and a reasonable though incompletely proved plea which casts a genuine doubt on the prosecution version and would therefore indirectly succeed. “It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence which is reasonable”. (SCC p. 218, para 29)

24. The High Court was also not right in criticising and discarding availability of plea of self-defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313 CrPC and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 CrPC or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh case [(1990) 3 SCC 190 : 1990 SCC (Cri) 378 : AIR 1990 SC 1459] . It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

25. We do not deem it necessary to state the law of private defence of person in very many details, as, for our purpose, it would suffice to notice a few provisions of the Penal Code, 1860 and restate only a few relevant and settled principles. Section 96 provides that nothing is an offence which is done in exercise of the right of private defence. Under Section 97 every person has a right, subject to the restrictions contained in Section 99, to defend his own body, and the body of another person, against any offence affecting the human body. Under Section 99 the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Under Section 100, right of private defence of the body extends to causing death if the offence which occasions the exercise of such right is an assault which reasonably causes an apprehension of death or grievous hurt, amongst others. Under Section 101, save as provided by Section 99, the right extends to the voluntary causing to the assailant of any harm other than death. Under Section 102 the right once available continues as long as an apprehension of danger to the body continues. When the apprehension of danger has ceased and yet a person continues his attack, he exceeds the right of private defence.

26. …On the principles already stated hereinabove and in the circumstances in which the accused persons were placed, their right of private defence extended even to the extent of causing death so long as the apprehension continued. At the trial the first six witnesses examined by the prosecution were formal witnesses. Sundera, PW 7 is the first witness examined by the prosecution at the trial deposing to the incident. In his statement, during cross-examination, the plea that the accused persons were acting in exercise of right of private defence of person was specifically introduced by suggesting that they were the members of the prosecution party who were the aggressors and the accused were acting only in defence of their person. They wielded their weapons when accused Prabhu was being assaulted and was under apprehension of being killed or suffering grievous hurt.

28. In Dev Raj v. State of H.P. [1994 Supp (2) SCC 552 : 1994 SCC (Cri) 1489 : AIR 1994 SC 523] this Court has held that where the accused received injuries during the same 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.

30. Could any of the accused persons have been held guilty of any offence for causing hurt with the aid of Section 149 IPC? We have already held that the accused persons had right of private defence of person of accused Prabhu available to them. The right of private defence need not necessarily be exercised for the defence of one’s own person; it can be exercised for the defence of the person of another. So long as an assembly of persons is acting in exercise of the right of private defence it cannot be an unlawful assembly. An assembly though lawful to begin with may in the course of events become unlawful. So long as the accused persons were acting in

> exercise of right of private defence, their object was not unlawful and so there was no unlawful assembly but once they exceeded the right, the assembly ceased to be lawful and became an unlawful assembly. There too only such of the members of the assembly who shared the object of doing anything in excess of the exercise of right of private defence, alone would be liable to be punished for the acts committed in prosecution of the common object or for their individual unlawful acts. The assemblage of accused persons, five or more in number, cannot wholly be held liable to conviction with the aid of Section 149 IPC unless the whole assembly shared the common object of doing anything in excess of the exercise of the right of private defence. In the case at hand, the High Court has not arrived at a finding that any of the injuries other than the one inflicted by Ramesh were so inflicted after the members of the complainant party had taken to their heels and yet Ramesh fired at them. If they had caused any injury before the members of the prosecution party had turned their back and started running away from the scene of occurrence, there was no unlawful assembly and none could have been convicted either under Section 148 or with the aid of Section 149 IPC. There is no finding arrived at by the High Court, and there is no positive evidence available on record to hold, that any accused (other than Ramesh, as to whom we are dealing with just hereinafter) caused any injury to anyone after the right of private defence had ceased to be available."

47. In Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394, this Court considered the effect of suppression of injuries suffered by the accused. Accordingly, it was held that if the injuries on the accused are substantial and to the knowledge of prosecution, a failure to conduct the investigation while denying the same would be fatal especially when a doctor who examined the deceased and the injured accused deposes otherwise. Paragraph 12 of the aforesaid judgement, states thus:

> "12. …It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:
> "(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima [(1975) 2 SCC 7] there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply 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 explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises.

Falsus in Uno- Falsus in Omnibus

48. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of discrepancy in a given case. When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that it is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject.

49. The said principle of law has been dealt with by this court in Anand Ramachandra Chougule v. Sidarai Laxman Chougala, (2019) 8 SCC 50, which states thus:

> "9. We have considered the respective submissions and perused the materials on record. The relationship between parties and the existence of a land dispute regarding which a civil suit was also pending are undisputed facts. The fact that a verbal duel followed by scuffle took place between the parties culminating in injuries is a concurrent finding of fact by two courts. The fact that the accused also lodged an FIR with regard to the same occurrence stands established by the evidence of PWs 19 and 22, the investigating officers, who have admitted that the respondent-accused had also lodged BRPS Cr. No. 79/02 — marked Ext. D-10, which was not investigated by them. Similarly, PW 11, the police constable, deposed that two of the accused were admitted in the District Hospital, Belgaum and that he was posted on watch duty. The occurrence is of 7-6-2002 and respondent-Accused 1 and 2 were discharged on 11-6-2002. Their injury

report has not been brought on record by the prosecution and no explanation has been furnished in that regard.

10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Sunil Kundu v. State of Jharkhand [Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427] , this Court observed : (SCC pp. 433-34, para 28)

> "28. … When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."

12. The fact that an FIR was lodged by the accused with regard to the same occurrence, the failure of the police to explain why it was not investigated, coupled with the admitted fact that the accused were also admitted in the hospital for treatment with regard to injuries sustained in the same occurrence, but the injury report was not brought on record and suppressed by the prosecution, creates sufficient doubts which the prosecution has been unable to answer.

13. We find it difficult to concur with the submission on behalf of the appellants that the failure of the prosecution to investigate the FIR lodged by the accused with regard to the same occurrence or to place their injury reports on record was merely a defective investigation. We are of the considered opinion that the failure of the prosecution to act fairly and place all relevant materials with regard to the occurrence before the court enabling it to take just and fair decision has caused serious prejudice to them. A fair criminal trial encompasses a fair investigation at the pre-trial stage, a fair trial where the prosecution does not conceal anything from the court and discharges its obligations in accordance with law impartially to facilitate a just and proper decision by the court in the larger interest of justice concluding with a fairness in sentencing also."

Scope of section 149

50. Section 149 of the Code deals with a common object. To attract this provision there must be evidence of an assembly with the common object becoming an unlawful one. The concept of constructive or vicarious liability is brought into this provision by making the offense committed by one member of the unlawful assembly to the others having the common object. It is the sharing of the common object which attracts the offense committed by one to the other members. Therefore, the mere presence in an assembly *per se* would not constitute an offense, it does become one when the assembly is unlawful. It is the common object to commit an offense which results in the said offense being committed. Therefore, though it is committed by one, a deeming fiction is created by making it applicable to the others as well due to the commonality in their objective to commit an offense. Thus, it is for the prosecution to prove the factors such as the existence of the assembly with a requisite number, the common object for everyone, the object being unlawful, and an offense committed by one such member. Courts will have to be more circumspect and cautious while dealing with a case of accused charged under Section 149 IPC, as it involves a deeming fiction. Therefore, a higher degree of onus is required to be put on the prosecution to prove that a person charged with an offense is liable to be punished for the offence committed by the others under section 149 IPC. The principle governing the aforesaid aspect is

taken note of by this court in Ranjit Singh v. State of Punjab, (2013) 16 SCC 752:

> "35. *Baladin v. State of U.P. [AIR 1956 SC 181 : 1956 Cri LJ 345]* was one of the early cases in which this Court dealt with Section 149 IPC. This Court held that mere presence in an assembly does not make a person a member of the unlawful assembly, unless it is shown that he had done or omitted to do something which would show that he was a member of the unlawful assembly or unless the case fell under Section 142 IPC. Resultantly, if all the members of a family and other residents of the village assembled at the place of occurrence, all such persons could not be condemned ipso facto as members of the unlawful assembly. The prosecution in all such cases shall have to lead evidence to show that a particular accused had done some overt act to establish that he was a member of the unlawful assembly. This would require the case of each individual to be examined so that mere spectators who had just joined the assembly and who were unaware of its motive may not be branded as members of the unlawful assembly.
> 36. The observations made in Baladin case [AIR 1956 SC 181 : 1956 Cri LJ 345] were considered in Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] where this Court explained that cases in which persons who are merely passive witnesses and had joined the assembly out of curiosity, without sharing the common object of the assembly stood on a different footing; otherwise it was not necessary to prove that the person had committed some illegal act or was guilty of some omission in pursuance of the common object of the assembly before he could be fastened with the consequences of an act committed by any other member of the assembly with the help of Section 149 IPC. The following passage is apposite in this regard: (Masalti case [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] , AIR p. 211, para 17)
>
> > "17. … 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 is in that context that the observations made by this Court in Baladin [AIR 1956 SC 181 : 1956 Cri LJ 345] assume significance; *otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, 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.*"
>
> (emphasis supplied)
>
> 37. Again in *Bajwa v. State of U.P. [(1973) 1 SCC 714*] this Court held that while in a faction-ridden society there is always a tendency to implicate even the innocent with the guilty, the only safeguard against the risk of condemning the innocent with the guilty lies in insisting upon acceptable evidence which in some measure implicates the accused and satisfies the conscience of the court.
>
> 39. That in a faction-ridden village community, there is a tendency to implicate innocents also along with the guilty, especially when a large number of assailants are involved in the commission of an offence is a matter of common knowledge. Evidence in such cases is bound to be partisan, but while the courts cannot take an easy route to rejecting out of hand such evidence only on that ground, what ought to be done is to approach the depositions carefully and scrutinise the evidence more closely to avoid any miscarriage of justice."

Motive

51. Motive might lose its significance when adequate evidence in the form of eyewitnesses are available to the acceptance of the court. But, when a motive might have the impact of introducing a perceptible change to the very case projected by the prosecution, in favour of the accused, it cannot be brushed aside. It becomes more relevant when an accused sets up the plea of private defence. A common object and a motive may get interconnected. Thus, a deliberate and intentional avoidance of unimpeachable evidence qua motive would make the version of the prosecution a serious suspect.

Merits

52. We are distressed to note that the investigation has not been conducted in a fair manner. We have already recorded the evidence of PW-18 who is none other than the Government Doctor examined on behalf of the prosecution. This witness with abundant clarity has reiterated that accused were referred to him on 19.07.1989 by the police. Added to that, Exhibit D-15 and D-16 were marked by the defence. The injury reports under the aforesaid two Exhibits indicate the nature of injuries suffered. Two injured persons have been admitted as in-patient and treated on the request made by the prosecution. Despite questions having been put, there were deliberate denials by PW-20 and PW-21. The fact that the injury reports did not refer the FIR also weakens the case of the prosecution further. This puts the very case of the prosecution in serious doubt. PW-5 and PW-20 along with the other witnesses present at the time of giving the complaint admitted that it was written by somebody else who was present nearby. PW-5 contradicts himself by his evidence in the second trial that it was written by a policeman. It is beyond reasoning and human conduct that an unknown person could be present in the police station and that too not to the knowledge of PW-20. When PW-5 could write and possibly the other witnesses present at the time of registration of Exhibit P-12 and P-13, there is no reason to involve an unknown stranger. PW-20 says that

he did not know by whom and where it was written. A very serious doubt certainly emerges in our mind on the very genesis of the written complaint made by PW-5 and that too in the teeth of the clear suppression made. The evidence given by PW-11 that the accused were brought to the hospital under the pretext of accident also cannot be accepted as the other injured witnesses were also there and the post-mortem was done. He also acknowledged the presence of the police. His evidence was not accepted by PW-20 or PW-21. Once we come to the said conclusion based upon the records available, the entire so-called recovery cannot be relied upon. The preparation of plan followed by other documents prepared during the investigation clearly indicate the involvement of injured prosecution witnesses and the explanation given in this regard is not satisfactory.

53. We find that the injuries suffered are not simple injuries and they are numerous. The injured accused were admitted in the hospitals as in-patients. The investigation officer did not go into the aspect of private defence deliberately. There is a clear admission with respect to non-consideration of an order of stay obtained by Surjaram, the complaint given by him, the earlier panchayat held between the parties and the wall constructed by him preventing the prosecution witnesses and the deceased to reach their respective places. Perhaps the prosecution would have come to a different

conclusion and so also the court if the truth was placed accordingly. On the contrary, witnesses deny the injuries to the accused, though the FIR makes a mention.

54. The place of occurrence also creates doubts in our mind, on view of the contradiction between the map prepared on the one side and the evidence of PW-20 along with the PW-5 and PW-6. PW-20 has also admitted that it was prepared as per the advice of PW-5. Evidence suggests that there was no blockage, and the wall was constructed by the main accused and there is not much of a distance between the place of occurrence and that of the land of the accused. The occurrence also took place in the courtyard which is an open space. Though it is contended by the learned counsel appearing for the de facto complainant that there are concurrent findings of facts, we find that when the facts are not considered properly by the courts and are contrary to the evidence on record, this Court can certainly invoke Article 136 of the Constitution of India. After all, a criminal case stands on a different footing than that of a civil case where onus lies heavily on the prosecution. There is a conscious attempt not to go beyond the case as projected by the prosecution witnesses.

55. The reasoning adopted by the Court for the accused persons acquitted will have to be applied to the case of the others as well in view of the aforesaid view expressed by us already, as we find that the suppression made would be

sufficient to disbelieve the case of the prosecution. There is no adequate material for the Court to come to a different conclusion with respect to the offence committed or for that matter, a case of exceeding the private defence. The accused persons have taken the plea of private defence as well as a bare denial. Once the Court has come to a conclusion that the other accused persons who have been acquitted would not have been present, the concept of private defence assumes more significance. The High Court itself has come to a conclusion, and so also the trial court on the second occasion, that it is a case of over implication. We do not find any error in the views expressed by the Court on that count.

56. The evidence adduced on behalf of the prosecution, particularly, the eyewitnesses do not inspire confidence. While there is a clear denial of them having attacked the injured accused persons, a mere statement that they carried logs would not be sufficient to reject the plea of private defence especially in the light of the injuries suffered. The witnesses speak of multiple injuries suffered by the deceased and the other injured witnesses. The view that the evidence of an injured witness has to be placed at a higher pedestal may not apply to a case of private defence with the accused also injured. The doctor's evidence does not support the specific overt act. Witnesses speak of knife, farsi and spears being used at random. The overt act attributed to the convicted accused using weapons such as *farsi* do not correspond to the

injuries. The injuries are primarily lacerated in nature. This discussion we make in addition to our primary conclusion we arrived at already. Suffice it to note that the genesis and origin of the occurrence and the manner in which it took place are certainly suppressed. When the plea of private defence is taken, the quality of material evidence will have to be a bit higher than that of the one required in a normal circumstance. We are concerned with the role of the prosecution in proving the case beyond reasonable doubt. Unfortunately, two lives have been lost. However, mere suspicion on a moral ground can never be the basis for a conviction. We can only lament that the situation has been brought forth by the unwarranted approach of the prosecution. Incidentally, we approve the views of the High Court on the acquittals rendered.

57. We may note that the prosecution witnesses though residing at different places, stated to have gathered at the place of occurrence in large number. Admittedly, the occurrence also happened during the night-time and there is no evidence to show existence of sufficient light.

58. The evidence adduced on behalf of the prosecution in the second trial, as discussed by us earlier, exposes the version of the prosecution much more. Witnesses, once again, reiterate and re-confirm not only the factum of prior dispute and occurrence but also the closure of the pathway days before. Our discussion on the facts being suppressed gets reinforced through the testimony

of the Government doctor for the second time. Even the courts found that recoveries in some cases are found not proved. Findings have been given on the delay in filing of the FIR and over implication by the witnesses. Thus, we can only state that the second trial makes the case of the prosecution any better. We also find force in the submission made by the learned counsel appearing for the accused that the acquittal by the High Court, not challenged qua the first trial, would give the benefit to the similarly placed accused whose acquittal was challenged in the second trial, though we have dealt with larger issues.

59. After going through the judgments on four occasions by both the courts, we find that the convictions rendered are to be interfered with in the light of the discussions made. The evidence adduced is not separable and the common findings rendered shall be made applicable to all the accused. There are too many loopholes which cannot be filled up, nor is there any evidence to come to a different conclusion including that of exceeding the right of private defence. What emerged as a civil dispute between two groups of villagers turned into a criminal case.

60. We are thus inclined to hold that the Accused-Appellants are entitled to the benefit of doubt as we also give our imprimatur to the plea of private defence as possible and plausible with due discharge of onus.

61. In the conspectus of above discussion, the appeals filed by the accused i.e., Criminal Appeal No. 753 of 2017 and Criminal Appeal No. 756 of 2017 are allowed and the appeals filed by the de facto complainant i.e., Criminal Appeal Nos. 754-755 of 2017 are accordingly dismissed.

……**……J.**
(SANJAY KISHAN KAUL)

……J.
(M.M. SUNDRESH)

New Delhi,
November 22, 2021