

KASHI RAM AND ORS.

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v.

STATE OF M.P.

OCTOBER 17, 2001

[DR. A.S. ANAND, C.J., R.C. LAHOTI AND ASHOK BHAN, JJ.]

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Penal Code, 1860 :

Sections 96, 97, 99, 100, 101 and 102 :

Accused charged with murder and causing injuries—One of the accused also injured in the incident—Trial Court, disbelieved the testimony of the prosecution witnesses as to genesis of the incident and drawing an inference that members of prosecution party opened an attack on accused and accused opened fire in exercise of right of private defence and ordered acquittal of all the accused—High Court reversing it—On appeal held, all accused except one exceeding his right of private defence—The accused who exceeded his right of private defence convicted—Others acquitted.

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Plea of self defence—When could be taken—It can be taken at any stage of the trial including cross examination, recording of statements of the accused by adducing defence evidence and during the course of submission, relying on probabilities and circumstances.

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Self defence—Extent of—Extends to causing death so long as apprehension continues—Can be exercised for defence of person or property of another as well.

Ss. 148-149—Unlawful assembly and right of private defence—So long as accused act in right of private defence their object of assembly is not considered unlawful—However when they exceed their right of private defence the assembly becomes unlawful—Even in such situations, only such members who exceeded such right of private defence alone would be liable to be punished.

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Evidence Act, 1872 :

S.105—Burden of proof—Scope and ambit of—The burden on the accused is not so heavy as on the prosecution—If on material available on record a preponderance of probabilities is raised which renders the plea of the accused

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A *plausible, same should be accepted and benefit of doubt should be extended to the accused persons.*

B *Appeal—Interference by High Court—When High Court deals into an appeal against acquittal and if two views are reasonably possible, one supporting the acquittal, other recording a conviction, it would not interfere merely because it feels that sitting a Trial Court its view would have been for recording conviction.*

C **Eight accused persons/appellants were tried by Trial Court on charges u/s. 148, 302, 302 read with Sections 149, 324 read with Section 149 Indian Penal Code and Sections 25 and 27 of the Arms Act, 1959, allegedly for assaulting and killing three persons and injuring others. According to the prosecution the incident took place when accused started unloading mustard straw and allegedly spreading the same on common pathway of village. When complainant protested, the accused came out armed with weapons and assaulted complainants resulting in the death of 3 persons including one stranger and injuring others. Injured includes one of the accused.**

D **The Trial Court observed that injuries of all the three persons, who died in the incident were caused when they were in front of the house of one of the accused 'R' and held that there was an unsuccessful attempt on the part of prosecution witnesses to shift the place of incident from near the house of the accused to a distant place near the house of prosecution witnesses. The Trial Court analysed the prominent features of the case i.e. non-examination of any independent witness, the testimony of the prosecution witnesses having been found to be unreliable as to genesis of the incident, complete non-explanation by the prosecution witnesses of the injuries sustained by one of the accused and other accused 'R' firing in exercise of right of private defence and concluded that none of the accused persons could be said to have committed any offence and directed their acquittal. On appeal, by the complainant, High Court set aside the acquittal of accused persons and convicted them. Hence this appeal.**

E **On behalf of the appellants-accused, it was contended that factum of accused having sustained serious injuries on the vital parts of the body was well established and that the injuries had been received in the same incident in which complainants suffered injuries and such injuries were not**

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explained by the prosecution witnesses. Therefore, the prosecution story should have been discarded and accused should have been acquitted.

Partly allowing the appeal filed by one of the accused and allowing the appeals filed by other accused, the Court

HELD : 1. High Court while hearing an appeal against an acquittal has powers as wide and comprehensive as against a conviction, yet the statutory principle which would guide the High Court is if two views are reasonably possible, one supporting the acquittal and the other recording a conviction, it would not interfere merely because it feels that sitting as Trial Court its view would have been one of recording a conviction. [276-G-H; 277-A]

Chandu v. State of Maharashtra, (2001) 4 Scale 590, relied on.

2. The High Court overlooked some of the factual and legal aspects of the case viz that the investigation suffered from serious infirmities, which to some extent prejudiced the accused in their defence; and that the investigating officer did not make an effort to investigate the cause of and circumstances resulting in injuries on the person of accused and he did not even make an attempt at recording the statement of injured accused. If this would have been done the investigation would not have been one sided. [277-C-D]

3. As per Section 105 of Evidence Act, the burden of proving the existence of circumstances which would bring the act/alleged offence within the exercise of right of private defence is on the accused but it is not so heavy as it is on the prosecution. If on the available 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 benefit of doubt should be extended to the accused. [277-E-F-G]

Danyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR (1964) SC 1563; *State of Punjab v. Gurbux Singh & Ors.*, [1995] Suppl. 3 SCC 734; *Vijayee Singh v. State of U.P.*, AIR (1990) SC 1459, relied on.

4.1. The High Court was also not right in discarding availability of plea of self defence on the ground that the plea was not taken by accused in statements u/s. 313 Cr.P.C. and as the accused did not enter into the witness box. Though Section 105 of the Evidence Act enacts a rule regard-

A ing burden of proof, it does not follow that the plea of private defence should be specifically taken. A plea of self defence can be taken while cross-examining the prosecution witness or in the statements of accused persons or by adducing defence evidence or it can be raised with submissions by relying on probabilities and circumstances. [278-B-C-D]

B *Vijayee Singh v. State of U.P.*, AIR (1990) SC 1459, relied on.

C 4.2. In the instant case, injuries caused to the accused are not explained by prosecution witnesses and one of the injuries could have been the result of gunshot whereas other injuries could not have been self inflicted. A grievous hurt was caused. Therefore, an apprehension that the prosecution party would persist in assault and could have resulted in grievous hurt or death was reasonably in the mind of injured accused and the others present there and they were justified in exercising right of private defence and causing reasonable harm to the complainants/members of prosecution party. The circumstances in which the accused were placed, their right of private defence extended to the extent of causing death so long as the apprehension continued. [279-B-C-D-E-F]

D *Dev Raj and Anr. v. State of Himachal Pradesh*, AIR (1994) SC 523, relied on.

E 5.1. An assembly though lawful to begin with may in the course of events become unlawful. So long as 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 become an unlawful assembly. There too only such of the members, who shared the doing of anything in 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 acts. [281-B-C]

F 5.2. In the instant case, if the accused 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 no one could have been convicted either u/s. 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 except 'R' caused any injury to anyone after the right of private defence

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had ceased to be available. One of the deceased sustained injury by gun shot fired by accused 'R' when the members of prosecution party were fleeing away. Though to begin with right of private defence was available to the accused 'R' yet the right was exceeded. Therefore, his act would be covered by Exception II to Section 300 IPC. All the conviction recorded and sentences passed by High Court are set aside. Instead accused 'R' is held liable to conviction under Section 304 Part II IPC. All the other accused-appellants are acquitted. [281-E-F; H; 282-A; 283-B; 283-C]

Yogendra Morarji v. State of Gujarat, AIR (1980) SC 660 and Dev Raj v. State of Himachal Pradesh, AIR (1994) SC 523, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 320 of 2000.

From the Judgment and Order dated 26.10.99 of the Madhya Pradesh High Court in CrI. A. No. 244 of 1988.

WITH

CrI. A. No. 63 of 2000.

J.C. Batra, G.C. Tyagi, Bhanu Pratap Tyagi and L.N. Gupta for the Appellants.

Ms. Vibha Dutta Makhija, Uma Nath Singh and Ms. Bharati for the Respondent.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Eight accused persons were tried by First Additional Sessions Judge, Morena, Madhya Pradesh on charges under Sections 148, 302, 302 read with 149, 324 read with 149, IPC and Sections 25 and 27 of Arms Act, 1959. On trial, the Sessions Court acquitted all the accused of the offences charged against them. The State of Madhya Pradesh, feeling aggrieved by the judgment of acquittal, preferred an appeal before the High Court. It appears that Inderlal alias Indera son of Kashiram (accused-respondent No.2 before the High Court) expired during the pendency of appeal. A Division Bench of the High Court has allowed the appeal and set aside the acquittal of the accused persons and instead convicted accused-respondent Ramesh under Section 302/149 IPC, 148 IPC and Section 27 of the Arms Act; accused Nanakram under Section 148 IPC and Section 27 of the Arms Act; accused Kashiram and

A Teekaram, each under Section 148 and Section 324/149 IPC; accused Suresh and Ratna, each under Section 147 and Section 323/149 IPC and sentenced each of them to various terms of imprisonment. Accused Ramesh, of course, has been sentenced to life imprisonment with a fine Rs. 5,000 for offence under Section 302/149 IPC, in default of payment of fine to rigorous imprisonment
B for six months, to one year R.I. under Section 148 IPC, and to one year R.I. under Section 27 of the Arms Act, all the sentences made to run concurrently. As to accused Prabhu, the High Court has held, that he inflicted a farsa injury on the head of Mahendra, but as the prosecution has not properly explained the injuries of Prabhu, he can be held to have acted in self-defence and therefore
C he deserves to be acquitted. His acquittal has not been challenged by State by filing an appeal.

The complainant and the accused persons are all residents of Village Jaitpur, P.S. Bagchini, District Morena, Madhya Pradesh. Sundera, PW7 and Siya Ram, PW9 are real brothers. Lakhan and Bindawan who died in the
D incident were the sons of their another brother Jagannath. Mahendra, PW8 is also son of late Jagannath i.e. he is real brother of the two deceased. Thus the two person who died in the incident and all the injured on the prosecution side and appearing as eye witnesses are related with each other.

E Accused Ramesh, Tika Ram, Prabhu and Bhabhuti were real brothers and resided jointly. Accused Ratna is the son of Bhabhuti. Nanak Ram and Suresh Accused are the sons of Prabhu. Kashi Ram and Inder Lal were also related to each other though separated by a few degree of relationship. Thus all the accused persons are related with each other.

F According to the prosecution, on 2.10.1984, at about 11 a.m., accused Ramesh brought in the Village a trolley, attached to a tractor, loaded with mustard straw. Accused, Teekaram, Nanakram, Prabhu, Suresh and Ratna started unloading the mustard straw and spreading the same on common pathway of the village. Sundera, PW-7 and deceased Brindawan protested against this act of the accused persons saying that filth and dirt would be caused
G in the village by the mustard straw. This enraged accused Ramesh who asked the boys to come out with lathis, farsa and gun. Accused Ramesh himself brought a 12 bore gun. Accused Inderlal and Nanakram brought rifles. Accused Kashiram, Prabhu and Teekaram brought farsas. Accused Suresh and Ratna came out armed with lathi. Accused Suresh and Ratna assaulted deceased
H Brindawan with lathis. Sundera, PW-7 and Siyaram, PW-9 tried to intervene

and save Brindawan. At the same time Mahendra Singh, PW-8 also came at the scene of occurrence. Accused Kashiram dealt a farsa blow on the head of Sundera, PW-7. Accused Suresh and Ratna also assaulted Sundera, PW-7 with lathis. Siyaram, PW-9 was dealt a farsa blow on his head by accused Teekaram. Prabhu inflicted a farsa injury on the head of Mahendra Singh, PW-8. Sundera, Siyaram, Mahendra Singh, Brindawan, Lakhan - all ran towards their houses. At that point of time, accused Inderlal fired from his rifle which caused injuries to Lakhan who fell down and died. Accused Ramesh fired with his gun causing injuries to Brindawan who also fell down. A woman named Jamuni Dhoban (washerwoman), who had nothing to do with the incident, happened to be at the scene of occurrence. A gunshot by Ramesh, though aimed at Sundera, PW-7, accidentally hit Jamuni Bai causing injury in her stomach. She fell down and died. The village people started assembling on hearing the hue and cry whereupon the accused persons took to their heels and escaped away.

At 3. p.m., a wireless message was received at Police Station Bagchini according to which a clash between two rival parties, resulting in murder, had taken place at Village Jaitpur. The official present at the police station flashed a message to the Station Officer, who had gone to Morena, the district headquarters, requiring him to reach Village Jaitpur. The police force was kept ready to move to Jaitpur. ASI, S.M.Sharma left the police station for Village Jaitpur at 3.30 p.m. accompanied by police force and requisite arms and ammunition. Parallel to these movements, Ram Gopal, the village Sarpanch, who did not have any knowledge of the details of the incident had reached the scene of occurrence and found accused Prabhu lying injured near his house. Prabhu was unable to speak and to give any information about the incident. Sarpanch Ram Gopal took injured Prabhu to the police station wherefrom Prabhu was sent to a hospital at Bagchini so as to have him treated for the injuries as also for medico-legal examination. Though, this factum was recorded in general diary of the police station, an FIR of the incident could not be recorded as no information as to any happening amounting to a cognizable crime could be given either by Prabhu, who was unable to speak or by Sarpanch Ram Gopal, who was ignorant of what had really happened.

ASI, S.M. Sharma, reached the scene of occurrence at about 6 p.m. There, Sundera, PW-7 narrated the incident to him which was taken down by ASI, S.M. Sharma as first information report of the incident. The same was sent to the police station and based thereon an offence under Sections 302, 307, 147,

A 148, 149, 452, IPC was registered and investigation commenced. Postmortem on the dead bodies of three persons, who had died in the incident, and medico-legal examination of other injured persons were conducted by Dr. R.S. Sikarwar, PW-1. It is necessary to notice the details of injuries as stated by Dr. R.S. Sikarwar and his opinion as it would have a material bearing on the result of the case.

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C Postmortem on the dead body of Jamuni Bai was conducted at 8.30 a.m. on 4.10.1984. On external examination, Jamuni Bai was found to have sustained a punctured wound with inverted margins, circular in shape, size 4 x 4.5 c.m. situated on left side of abdomen, 20 c.m. below the left nipple. In the mid of the intestine four pellets were found embedded. On internal examination, right and left lungs were found to have been injured and reddish blood fluid was coming out from the cut surfaces thereof. There was fluid of reddish colour in the abdominal cavity. Small intestine was ruptured. Four pellets were removed from inside the small intestine which were sealed and handed over to the police. The cause of death was excessive bleeding and shock due to gunshot injury. The injury was homicidal and sufficient in the ordinary course of nature to cause death.

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E On the same day, at 9.45 a.m., postmortem was conducted on the dead body of Lakhan. There was two external injuries: (i) a gunshot lacerated wound, size 1 c.m. x 1 c.m. on the posterior part of the right thigh; the margins were rounded and inverted; this was the wound of entry of the bullet; and (ii) a gunshot lacerated wound - the wound of exit, on inner side of right thigh, size 20 x 10 c.m. The track of the wound, from the point of entry to the point of exit, passed through injuring the skin, muscle, blood veins, nerves and bones of thigh. The internal damage was confirmed on internal examination. The injuries were sufficient in the ordinary course of nature to cause death. The death was homicidal and had occurred due to excessive bleeding as a result of gunshot.

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G At 11.20 a.m. on the same day, postmortem on the dead body of Brindawan was conducted. On external examination the following injuries were found :-

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1. Wound of entry of pellets 37 in number on right thigh as a result of gunshot. The size of the wounds varied from 5 cm. to 5 inches. The shape of the injuries was rounded and margins were inverted. Some of the

injuries superficial while some of the injuries were deep upto the muscles;

2. One lacerated wound, size 4 x 3.5 x 12.5 cms. on right thigh, margins inverted, 28 pellets and one foreign body were found in the *rear side* of the thigh, deep in the muscles;
3. An abrasion, 3 x 1 c.m., on ante medial aspect of right knee;
4. An abrasion, 2 x 1 c.m., on anterior aspect of patella;
5. An abrasion, 5 x 1.5 c.m., on the patella bone of the left knee.

The first two injuries were gunshot wounds. The track of the wounds had damaged the muscles, blood veins and soft tissues. The direction of the injury was from left to right obliquely upwards. Abrasions were caused by hard and blunt weapons. All the injuries were ante mortem. Twenty-eight pellets were taken out from the wounds, sealed in a packet and sent to the police station. The cause of death was haemorrhage which had occurred due to wounds of entry of the pellets. The injuries were ante mortem.

Sundera, PW-7 was examined on 3.10.1984 and was found to have sustained the following injuries :-

- (1) An incised wound size 2" x 1/2" x 1/2" present at lower part of the head caused by sharp cutting object. Such injury could be caused by farsa or sword. In case the knife is straightened, then also such injury can be caused.
- (2) A contusion size 2" x 1" present on medial aspect of right arm.
- (3) A contusion size 2" x 1" present on left arm at lateral aspect.
- (4) An abrasion 1/4" x 1/4" x 1/4" present on superior aspect of left shoulder joint.
- (5) A swelling size 1" x 1/2" present on left thumb.
- (6) A contusion size 3" x 1" present on left gluteus region. Injuries no. 2 to 6 could be caused by hard on blunt object like lathi.

On 3.10.1984, Mahendra Singh, PW-8 was also examined and found to have sustained the following injuries:

A (1) An incised wound 4" x 1/2" x 1/2" present transversally on the superior aspect of middle of the scalp. Injury caused by sharp and cutting object.

(2) A swelling size 1/2" x 1/2" present on dorsal aspect of right thumb.

(3) A swelling size 2" x 2" present on inner side of left wrist.

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Injuries no. 2 and 3 could have been caused by hard and blunt object while injury no. 1 was caused by some sharp edge weapon. On x-ray being taken, Mahendra Singh was found to have sustained fracture of lower portion of ulna bone of left hand. The injury on the left wrist of Mahendra Singh was found to be grievous in nature while other injuries were simple in nature.

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On 3.10.1984, Siyaram (PW-9) was also examined and found to have sustained the following injuries :-

(1) An incised wound size 1" x 1/2" x 1/2" x 1/2" present on occipital region (back part) of the head.

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(2) An abrasion size 1" x 1/2" x 1/4" present on ante surface of the left leg.

(3) An abrasion size 1-1/2" x 1/2" x 1/4" present on ante surface of the left leg along with swelling.

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Injury no. 1 was caused by sharp cutting weapon while injuries no. 2 and 3 was caused by hard and blunt object.

In the opinion of Dr. R.S. Sikarwar, all the injuries sustained by the three deceased and other three injured persons could have been caused at the time of the incident.

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Accused Prabhu was examined by Dr. N.K. Bhardwaj, Assistant Surgeon, District Hospital, Morena (DW-2), on 2.10.1984, on being referred by P.S. Bagchini, accompanied by Constable Ram Dayal. He was found to have sustained the following injuries :-

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(1) Incised wound, size 3" x 1" x 1/2", on the left side of head, caused by sharp edged weapon.

(2) Contusion on left forearm size 3" x 3-1/2", caused by hard and blunt weapon.

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- (3) Contusion on left chest size 2" x 1-1/2", caused by hard and blunt weapon. A
- (4) Contusion on the right side of the chest 2" x 1", caused by hard and blunt weapon.
- (5) Injury below the chin on the right side size 1/2" x 1/4" x 4".

Dr. Bhardwaj opined that injuries no. 3, 4 and 5 were simple in nature while injuries no. 1 and 2 were referred for x-ray examination. Dr. Yogendra Singh, DW-3, did the x-ray of the head and the right forearm of Prabhu and found that there was fracture of frontal bone with radio opaque shadow below mandible area. There was also fracture of styloid process of radius in fore arm in front side. The radio opaque shadow of rounded metallic density below mandible area could be due to any pellet etc. A foreign body was found to be present there. B C

According to the medical opinion, as brought on record by the prosecution and the defence witnesses, the injuries sustained by those who had died or were injured on the side of the prosecution as also the injuries sustained by the accused Prabhu could have been caused at or about the time of the incident. In fact, during the course of hearing, it was not disputed that the injuries on both sides were sustained during the course of the same incident. This has also been the stand of the parties in the Trial Court as also before the High Court. D

On behalf of the prosecution, there were 13 witnesses examined including Sundera, PW-7, Mahendra Singh, PW-8 and Siyaram, PW-9. On the side of the defence, the two doctors referred to hereinabove and Ram Gopal, DW-1 who had taken Prabhu to the police station, were examined. E

A perusal of the judgment of the Trial Court shows that the prosecution witnesses were confronted with the factum of the accused Prabhu having sustained injuries in the same incident but none of the prosecution witnesses offered any explanation or stated circumstances in which accused Prabhu might have sustained injuries. D.D. Sharma, PW-12, who had investigated into the incident admitted that during the investigation he had found that the injuries sustained by accused Prabhu were so sustained in that very occurrence. However, he made no effort at contacting the accused Prabhu and recording his statement. F G

The Trial Court made an effort at finding out the location of the place of the incident by appreciating evidence in this regard. The site plan, Exbt. H

- A P/23 indicated the place wherefrom accused Ramesh had fired his gun as that which was just below the neem tree, outside his house. The place at which Jamuni Bai's blood had fallen was just in front of the house of the accused Ramesh. The recovery memo, Exbt. P/36 showed the place wherefrom empty cartridges of mouser and 12 bore gun were recovered was near a neem tree standing in front of, and just outside, the house of accused Ramesh. A few pellets of 12 bore were found embedded in the mud wall of Nadira adjacent to the house of Bhagwan Lal, which is in front of the house of accused Ramesh. Tika Ram, PW 10 who had reached the scene of occurrence soon after the incident had found dead body of Jamuni Dhoban lying at the door of Bhagwan Lal which is in front of the house of Ramesh and Brindawan. Injured Brindawan and Lakhan were also lying at a distance of 4 to 5 yards away from Jamuni Dhoban. This indicated that injuries of all the three persons who died in the incident were caused when they were in front of the house of the accused Ramesh and in all probability the gun and the mouser were fired from or near the house of accused Ramesh. The prosecution case that the place of incident was situated near the houses of prosecution witnesses Sundera, Siyaram and Mahendra Singh was thus circumstantially belied. The trial Court held that there was an unsuccessful attempt on the part of the prosecution witnesses to shift the place of incident from near the house of accused Ramesh to a distant place near the houses of the prosecution witnesses. The Trial Court minutely examined the nature of the injuries especially their location on the parts of the bodies of the injured in the light of testimony of Dr. R.S. Sikarwar, PW 1 and found that the gun shot wounds were inflicted by accused Ramesh in a sitting posture and that is why the track of pellets in gun shot wounds was from lower part of the body of injured to upwards. Disbelieving in part the statements of three eye-witnesses, i.e., Sundera, Siya Ram and Mahendra Singh and on a cumulative effect of four prominent features of the case, i.e., non-examination of any independent witness, the testimony of the prosecution witnesses having been found to be unreliable as to genesis of the incident, an unsuccessful attempt on the part of the prosecution witnesses to shift the place of the incident and complete non-explanation by the prosecution witnesses of the injuries sustained by accused Prabhu, the learned Trial Judge drew an inference that the members of the prosecution party had opened an attack on the accused Prabhu and accused Ramesh had fired in exercise of right of private defence of the person of accused Prabhu. Relying on a number of decisions of this Court and Madhya Pradesh High Court, dealing with the effect of non-explanation of injuries of accused person by prosecution witnesses, the learned Trial Judge concluded that none of the accused persons could be said to have committed
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any offence and whatever they did was protected by Section 95 of Indian Penal Code. All the accused persons were therefore directed to be acquitted of the offences charged.

A perusal of the judgment of the High Court shows that the findings arrived at by the High Court are oscillating to some extent. Vide para 41, the High Court has held that there was no evidence to suggest the attack having been opened by the complainant's side and it appeared to be "natural" that the accused persons "had arrived at the place of the incident armed with deadly weapons and the complainant's side must have resisted the attack and while making such resistance, the accused Prabhu had also received some injuries". Vide para 44, the High Court has criticised the defence for the plea of self-defence having not been specifically taken by any of the accused persons in their statements under Section 313 of Cr.P.C. and also accused 'Prabhu' for having 'not dared to examine himself as a defence witness'. Vide para 57, the High Court has expressed an opinion that even taking the worst side of the prosecution case and the probable defence of the accused-respondents as suggested to the prosecution witnesses, if it is presumed that any of the injured had caused some injuries to accused Prabhu and accused Ramesh was compelled to fire at deceased Brindawan in defence of accused Prabhu even then there was no justification to fire another gun shot by accused Ramesh towards complainant Sundera which accidentally hit Jamuni Bai and therefore "by no stretch of imagination" it can be presumed that accused Ramesh had fired in self-defence of his brother Prabhu. The High Court has concluded by saying "since none of the accused-respondents had taken a specific plea in their examination under Section 313 Cr.P.C. that the injured had come to assault them at their house and they were compelled to fire in self-defence, the theory of self-defence all the more becomes baseless and false". Strangely enough, vide para 63, the High Court holds - "further in our opinion although it is alleged against accused respondent Prabhu that he inflicted a farsa injury on the head of Mahendra, but since injuries of Prabhu were not properly explained by the prosecution, his act of causing injury to Mahendra may be justified in self-defence. In these circumstances, Prabhu alone deserves benefit of doubt from the charges levelled against him".

At the hearing the learned counsel for the accused-appellants submitted that the factum of accused Prabhu having sustained serious injuries including those on vital part of the body was well established and the trial court as also the High Court have not doubted such injuries having been received by the

A accused Prabhu in the same incident in which those on the side of the prosecution suffered the injuries and such injuries of Prabhu having not been explained by the prosecution witnesses, the prosecution story should have been discarded and all the accused persons should have been acquitted. In our opinion such a submission is too tall a submission and hence cannot be accepted. In *State of U.P. v. Mukunde Singh and Ors.*, [1994] 2 SCC 191, it has been held that merely on the ground that the prosecution witnesses have not explained the injuries on the accused, the evidence of the prosecution witnesses ought not to be rejected outrightly if the Court finds it probable that the accused might have acted in exercise of right of self-defence, the Court ought to proceed to consider whether they have exceeded the same. In *Thakhaji Hiraji v. Thakore Kubersing Chamansing and Ors.*, [2001] 6 SCC 145, this Court has held that Court ought to make an effort at searching out the truth on the material available on record with a view to find out how much of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful and the approach of rejecting prosecution case in its entirety for non-explanation of the injuries sustained by the accused persons is erroneous. This Court further held, "It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injuries on the person of the accused were of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution."

We find the judgment of the High Court suffering from several infirmities. The High Court was dealing with an appeal against acquittal. Though the High Court while hearing an appeal against an acquittal has powers as wide and comprehensive as in an appeal against a conviction and while exercising its appellate jurisdiction the High Court can re-appraise the evidence, arrive at findings at variance with those recorded by the trial court in its order of acquittal and arrive at its own findings, yet, the salutary principle which would guide the High Court is — if two views are reasonably possible, one supporting

the acquittal and the other recording a conviction, the High Court would not interfere merely because it feels that sitting as a trial court its view would have been one of recording a conviction. It follows as a necessary corollary, as has been held by this Court in *Chandu v. State of Maharashtra* (2001) 4 Scale 590, it is obligatory on the High Court while reversing an order of acquittal to consider and discuss each of the reasons given by the trial court to acquit the accused and then to dislodge those reasons. Failure to discharge this obligation constitutes a serious infirmity in the judgment of the High Court.

A few relevant factual and legal aspects overlooked by the High Court may not 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.

Section 105 of 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 and Ors.*, [1995] Suppl. 3 SCC 734, *Vijayee Singh v. State of U.P.*, AIR (1990) SC 1459). In *Vijayee Singh's* case 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 suc-

A ceed. "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".

B 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 Cr.P.C. 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
C 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 Cr.P.C. or by adducing defence evidence. And, even if the plea is not
D 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's* case (supra). 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.

E 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 Indian Penal Code and re-state only a few-relevant and settled principles. Section 96 provides that nothing is an offence which is done in
F 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
G 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
H 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.

Reverting to the case at hand, we have already noted the injuries caused to accused Prabhu. These injuries are not explained by any of the prosecution witnesses. We have also found, and as was found by the trial Court as well, that the scene of the incident was near the house of the accused persons and therefore it is highly probable that the incident which resulted in injuries to both the sides did not take place either near the houses of anyone belonging to the prosecution party or on village commonway where the accused Ramesh had tried to unload from the tractor-trolley and spread the mustard straw. There was only some verbal exchange at that place. The accused Ramesh had returned to his house. It is Brindawan, Lakhan, Siya Ram, Sundera and Mahendra, the members of the prosecution party who had assembled near the house of the accused persons and were armed with such weapons as had resulted in injuries on the person of accused Prabhu. At least one of the persons of the prosecution party was armed with a sharp weapon with which was caused an incised wound on head, a vital part of the body, coupled with fracture of frontal bone of accused Prabhu. One of the injuries caused to accused Prabhu could have been the result of a gun shot leaving a pellet embedded below mandible area. Other injuries caused to him could not have been self-inflicted. A grievous hurt was caused and therefore an apprehension that the prosecution party would persist in assault which could have resulted in further grievous hurt or death being caused was reasonably caused in the mind of accused Prabhu. Accused Ramesh, real brother of Prabhu and other persons present there were justified in exercising right of private defence and causing reasonable harm to the members of the prosecution party who were joining in assault wherefrom a reasonable apprehension could be anticipated. 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, PW7 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.

A The injuries on the side of the prosecution party is a circumstance revealing the real story to some extent. On the person of Siya Ram there are two abrasions and one incised wound on occipital back part of the head, all simple in nature. Sundera has sustained one incised wound on lower part of head. Other injuries are contusions, abrasion and swelling on non-vital parts of the body. Mahendra has sustained one incised wound and two swellings. The injury caused by sharp weapon was minor in nature though he had sustained a fracture on left wrist. Brindawan, the deceased had sustained pellet injuries caused by a single fire which were on the thigh. So also Lakhan, the deceased had sustained a single gun shot wound on the thigh. Neither Brindawan nor Lakhan had sustained gun shot injury on any vital part of the body. Dr. R.S. Sikarwar admitted during the cross-examination that injury to Brindawan should have been caused while he was in a standing position and the person firing the shot was in a sitting position. Similar is the opinion, expressed by Dr. Sikarwar, as to the injury sustained by deceased Lakhan.

D In *Dev Raj and Anr. v. State of Himachal Pradesh*, AIR (1994) SC 523 this Court has held that where the accused received injuries during the same occurrence in which 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.

E The High Court has on appreciation of evidence, so far as the injuries caused by the accused persons and the specific roles assigned to them are concerned held that accused Ramesh and Inder Lal resorted to firing towards the victim who were running for shelter and therefore their offences fell under Sections 148 and 302/149 IPC and Section 27 of the Arms Act. As to accused Inder Lal, the High Court has refused to record any specific finding in view of his having expired during the pendency of the appeal. As to accused Nanak Ram the High Court held that although he had fired aiming at injured Mahendra who had a narrow escape but as there was no charge under Section 307 IPC framed against him he could not be convicted thereunder though he was liable to be convicted under Section 148 IPC and Section 27 of the Arms Act.

G Accused Suresh and Ratna having been found to have caused some simple injuries by *lathi*, have been convicted under Section 147 and 323/149 IPC. Accused Prabhu has been found to have inflicted a farsa injury on the head of Mahendra and his act of causing such injury has been held justifiable in self defence and hence he has been extended 'benefit of doubt' from the charges levelled against him.

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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 one. 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, there 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 one 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 just hereinafter) caused any injury to anyone after the right of private defence had ceased to be available.

The only accused whose act needs to be determined for the purpose of finding out what offence, if any, he has committed, is accused Ramesh. Exception II to Section 300 IPC provides that culpable homicide is not murder if the offence, in the exercise in good faith of the right private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he has exercised such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. We have found the deceased Brindawan having sustained injury by gun shot fired by accused Ramesh. Such injury was caused

A when the members of the prosecution party were fleeing away though to begin with the accused Ramesh had available to him the right of private defence of person. The right was exceeded and therefore the act of accused Ramesh would be covered by Exception II to Section 300 of IPC. The injuries caused to Brindawan show the pellets having injured lower part of the body of Brindawan.

B It cannot be said that accused Ramesh intended to cause death or cause such bodily injury as was likely to cause death though he should be attributed with the knowledge that the injury caused by him was likely to cause death. His individual act of causing injury to deceased Brindawan is therefore punishable under Section 304 Part II IPC. So also his subsequent fire aimed at complainant Sundera but which accidentally hit Jamuni Bai Dhoban would also be punishable under Section 304 Part II of the IPC with the aid of Section 301 IPC. If he had injured the complainant Sundera, he would have been liable to be convicted under Section 302 Part II IPC. In spite of complainant Sunder alias Sundera having escaped unhurt and yet Jamuni Bai Dhoban having been injured though not aimed at, on the doctrine of 'transferred malice' as contained in Section 301 IPC the liability of the accused remains the same. In the FIR, the version of Sundera was that Jamuni Bai had intervened to rescue him when she got injured. This story was abandoned by Sundera whilst in witness box and he maintained that though the second shot by accused Ramesh was aimed at him it hit Jamuni Bai instead of him. No prosecution witness states where the gun held by accused Ramesh was aimed at. Prosecution version coming through the three eye witnesses that accused Ramesh was in standing posture, facing them, when he fired the gun, is not supported by, rather belied by, medical evidence. The fact remains that Jamuni Bai was neither aimed at nor intended to be harmed by accused Ramesh. In case of accidental injury attracting applicability of 'transferred malice' under Section 301 IPC and having held that the act of the accused was covered by Section 304 IPC, the Court should lean in favour of convicting the accused under Part-II of Section 304 if it is in doubt as to which one of the two parts of Section 304 IPC would be attracted. This would be consistent with the basic tenet of extending benefit of doubt in criminal jurisprudence. Accordingly, we hold the accused Ramesh guilty under Section 304 Part-II for causing the death of Jamuni Bai.

G In similar circumstances this Court has held in *Yogendra Morarji v. State of Gujart*, AIR (1980) SC 660, *Dev Raj v. State of Himachal Pradesh* (supra) and *Tara Chand and Anr. v. State of Haryana*, AIR (1971) SC 1891 the act of the accused falling under Exception II to Section 300 IPC and hence punishable under Section 304 IPC and not under Section 302 IPC. In *Yogendra*

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Morarji's this Court has also observed that this was a circumstances which could be taken into account in mitigation of the sentence.

For the foregoing reasons Criminal Appeal No. 320/2000 filed by Kashiram, Teekaram, Suresh, Ratna @ Ratanlal and Nanakram is allowed. Criminal Appeal No. 63/2000 filed by accused Ramesh is partly allowed. All the convictions recorded and sentences passed by the High Court are set aside. Instead accused Ramesh is held liable to conviction under Section 304 Part II IPC on two heads. He is convicted accordingly and sentenced to 7 years' rigorous imprisonment each on the two counts. His conviction and sentence under Section 27 Arms Act is maintained. All the sentences are directed to run concurrently. Accused Ramesh shall surrender to serve the sentence if not already served out. All the other accused-appellants, i.e. other than Ramesh, are acquitted. Their bail bonds are discharged.

S.K.S.

Appeal partly allowed.