

[2012] 13 S.C.R. 517

GURMAIL SINGH

v.

STATE OF PUNJAB & ANR.

(Criminal Appeal No. 1782 of 2008 etc.

NOVEMBER 21, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Penal Code, 1860:

ss. 302/149 - Death caused by 8 accused - By fire-arm and sharp-edged 'gandasa' - Land dispute between rival parties - Leading to one murder by a relative of the accused - Prosecution against three of the accused abated due to their death - Trial court convicted one appellant-accused u/s. 324 and u/s. 25 of Arms Act and acquitted the other appellant-accused of all the charges - Another accused was convicted u/s. 304 (Part I) - High Court convicted all the accused including the two appellants-accused u/s. 302/149 - On appeal, held: The conviction of the appellants-accused u/s. 302/149 is correct - The facts of the case prove that the accused assembled with a common object of committing murder - Arms Act, 1959 - s. 25.

s. 149 - Applicability of - Held: To bring a case within s. 149, there must be in existence an unlawful assembly; an offence is committed by a member of such assembly and the offence committed must be in prosecution of a common object of the unlawful assembly or must be such that the members of the unlawful assembly knew that it was likely to be committed in prosecution of the common object.

The two appellants-accused alongwith six others were prosecuted for having caused death of one person and for causing injuries to others. The prosecution case was that there was a land dispute pending in a court

A between the accused party and the complainant party. The dispute had also led to murder of the son of the deceased by a relative of the accused party to which the deceased was the eye-witness. One of the appellant-accused also sustained injuries during the incident.

B During trial, three of the accused died and thus the prosecution abated against them. The trial court believed the prosecution story. However, it held that no case was made out that the accused persons formed unlawful assembly with any common object. The Court convicted

C one accused u/s. 304 (Part-I) IPC. Appellant-accused in Appeal No. 1782/2008 was punished u/s. 324 IPC and the appellant-accused in Appeal No.1783/2008 was acquitted of all the charges. Appeals were filed by the convicts as well as the State. High Court upheld all the conclusions

D of the trial court except the conclusion regarding formation of unlawful assembly with a common object and held that presence of eight persons armed with guns and gandasas with a motive to wreak vengeance on the deceased and his family, pointed to the existence of an

E unlawful assembly having a common object and thus the ingredients of s. 149 IPC were made out. Further it held that an offence u/s. 302 IPC was made out against the accused (including the two appellants) and sentenced them to life imprisonment. Hence the present appeals.

F Dismissing the appeals, the Court

HELD: 1. The appellants are liable to be convicted for an offence punishable u/s. 302 IPC. The record does not show any undue delay either in lodging the FIR or in dispatching the special report to the Ilaqa Magistrate. It

G is wrong to make a fetish out of every delay in lodging an FIR. Given the facts of this case, there was no unreasonable or unexplained delay in lodging the FIR. [Paras 37, 40 and 71] [530-C; 531-B; 540-F]

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Jitender Kumar v. State of Haryana (2012) 6 SCC 204: A
2012 (4) SCR 408 - relied on.

2. It is not correct to say that there was no motive for the appellants to commit the crime. It is quite clear that there was a land dispute between the families of rival parties. Evidence in this regard was led by PW-3, a Court Ahlmad working in the concerned court. The existence of a land dispute was also testified to by PW-4. That the land dispute was not a trivial matter is clear from the fact that it even led to the murder allegedly by a relative of the accused. The deceased was an eye-witness to the murder. Thus, not only was there a motive for committing the crime but the motive had already led to a murder on an earlier occasion. [Paras 41 & 42] [531-C-E] B C

3. The courts below have not doubted the presence of PW4 -complainant at the scene of the crime and there is no reason to differ with this concurrent finding only because he did not suffer any injuries or that his presence was not mentioned by the deceased in his dying declaration. Under the circumstances of the case that his sister was married to the son of the deceased, the presence of PW-4 in the village is explained. [Paras 45 and 48] [532-B-F] D E

4. The prosecution's "failure" to explain the injuries on the accused would not disprove the case of the prosecution. Although the accused in his statement u/s. 313 Cr.P.C. says that complainant party attacked him with gandasas, the evidence on record does not indicate that any of the victims were armed. On the contrary, the evidence indicates that the accused received injuries at the hands of his co-accused in the darkness. As long as the evidence on record is trustworthy, the failure of the prosecution to explain the injuries on an accused may not necessarily impact on its case. [Paras 49 and 50] [532-G-H; 533-A-C] F G H

A *Mano Dutt v. State of U.P.* (2012) 4 SCC 79: 2012 (3)
SCR 686 - relied on.

B 5. Section 149 IPC constructively criminalizes all the
members of an unlawful assembly, if a member of that
assembly commits an offence in prosecution of a
common object of that assembly or if the members of that
assembly knew likely to be committed in prosecution of
C that object. To bring a case within Section 149 IPC, three
features must be present. Firstly, there must be in
existence an unlawful assembly within the meaning of
Section 141 IPC. This is a mixed question of fact and law,
which was overlooked by the trial Judge. Secondly, an
D offence must have been committed by a member of the
unlawful assembly. Thirdly, the offence committed must
be in prosecution of a common object of the unlawful
assembly or must be such as the members of the
unlawful assembly knew likely to be committed in
prosecution of that object. [Para 54] [535-A-D]

E 6. In the present case, eight persons had assembled
with guns and sharp-edged gandasas. There cannot be
any conclusive proof with regard to what was in the
contemplation of the unlawful assembly, but it is clear that
the assembly was not without a purpose. Their getting
F together and firing a few shots in the air before the
incident actually took place suggests that they gathered
to either display a show of strength or commit an offence.
It is unlikely that they would have gathered in the village
from two other villages, only for a show of strength. Even
if they did, the explanation to Section 141 IPC makes it
G clear that an assembly, not unlawful when it assembled,
may subsequently become an unlawful assembly. Thus,
the accused persons had assembled with a common
object of committing an offence and not merely as a show
of strength and, therefore, they constituted an unlawful
H assembly. [Paras 56 and 59] [536-E-G; 537-C-D]

7. The trial court held that offences under part I of Section 304 of the IPC and under Section 324 of the IPC were committed. The trial court proceeded on the basis that since the injuries inflicted on the deceased were not on any vital part of his body, it cannot be said that the common object of the unlawful assembly was to kill him. It is not possible to overlook the fact that at least one injury caused to the deceased with a firearm was on a vital part of his body. That apart, he had as many as 116 lacerated wounds and 15 pellets were found in his body. He also had a couple of incised wounds, though not on any vital part of his body. It is not as if only one gunshot was fired or one gandasa blow given to him. The evidence is clear that the offence committed was murder. Assuming this was not so, in view of the third clause of Section 300 IPC, there can be no doubt that if the unlawful assembly did not murder the deceased, it certainly caused such bodily injury to the deceased and others with him as to result in his death. Given the number and nature of injuries, it is difficult to come to any conclusion other than that the injuries were sufficient in the ordinary course of nature to cause death. [Paras 60, 61 and 63] [537-D-G; 538-C-E]

Lalji v. State of U.P. (1989) 1 SCC 437; 1989 (1) SCR 130; *Chanakya Dhibar (dead) v. State of West Bengal* (2004) 12 SCC 398; 2003 (6) Suppl. SCR 1181; *Roy Fernandes v. State of Goa* (2012) 3 SCC 221; 2012 (1) SCR 477 - relied on.

Case Law Reference:

2012 (4) SCR 408	Relied on	Para 38	G
2012 (3) SCR 686	Relied on	Para 50	
1989 (1) SCR 130	Relied on	Para 65	
2003 (6) Suppl. SCR 1181	Relied on	Para 65	H

A 2012 (1) SCR 477 Relied on Para 65

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1782 of 2008.

B From the Judgment & Order dated 10.10.2006 of the High
Court of Punjab & Haryana at Chandigarh in Crl. Appeal Nos.
445-DBA, 232-SB of 1995 and in Criminal Revision No. 514
of 1995.

WITH

C Crl. A. No. 1783 of 2008.

Rajeev Sharma, Rupesh Kumar, Sukh Deo Singh for the
Appellant.

V. Madhukar, AAG, Paritosh Anil (for Kuldip Singh) for the
Respondents.

D The Judgment of the Court was delivered by

E **MADAN B. LOKUR, J. 1.** The substantive question before
us is whether the High Court was right in reversing the view
expressed by the Trial Court that the provisions of Section 149
of the Indian Penal Code (for short IPC) did not apply to the
facts and circumstances of the case. Our answer is in the
affirmative and we uphold the decision of the High Court in this
regard. The appeals before us require to be dismissed.

The appeals:

F 2. Two appeals are before us: The first appeal is Criminal
Appeal No. 1782 of 2008 filed by Gurmail Singh son of Bachan
Singh. He has challenged his conviction by the High Court for
an offence punishable under Section 302 of the IPC for which
G he was earlier acquitted by the Trial Court. He has also
challenged the upholding of his conviction by the High Court for
an offence under Section 324 of the IPC for causing injuries to
Kaka Singh and Piaro.

3. The second appeal is Criminal Appeal No. 1783 of 2008
filed by Gurmail Singh son of Nahar Singh. He has challenged

his conviction by the High Court for an offence punishable under Section 302 of the IPC read with Section 149 thereof as well as for an offence under Section 148 of the IPC. Gurmail Singh son of Nahar Singh has also challenged his conviction under Section 324 read with Section 34 of the IPC for causing simple injuries to Kaka Singh and Piaro as well as his conviction under Section 326 read with Section 149 of the IPC for causing grievous injuries to Gurmail Kaur. Gurmail Singh son of Nahar Singh had earlier been acquitted of all charges by the Trial Court.

The facts:

4. There was a dispute between the families of Gurdial Singh and Nachhatar Singh. The disputants are related. The dispute pertained to ownership of land and a civil suit is pending between the parties in this regard in Mansa.

5. It appears that as a result of the land dispute, Nachhatar Singh allegedly murdered Gurdial Singh's son Mohinder Singh on 20th February 1989. Gurdial Singh was an eyewitness to the alleged murder. We are told that the trial is still pending.

6. On 10th March 1989 at about 9/9.30 p.m. Gurdial Singh and his two brothers, Kaka Singh and Dial Singh along with Joginder Singh, the complainant (whose daughter is married to Gurdial Singh's son) were irrigating their fields in village Heeron Kalan, Police Station Bhikhi, District Bhatinda (Punjab). They were informed by Gurmail Kaur and Piaro (both daughters of Gurdial Singh) that some shots were fired in the village near Nachhatar Singh's house. On receiving this information, all of them left for the village.

7. When they were about to enter their house, a lalkara (a challenge) was given by Gurmail Singh son of Nahar Singh (and nephew of Nachhatar Singh) and Bibi (Nachhatar Singh's sister) to the effect that no one from Gurdial Singh's party would be spared. On this, eight persons (the accused) which included Nachhatar Singh's nephews, their associates and Nachhatar Singh's sister Bibi attacked them. It needs to be mentioned

A here that some of these eight persons were residents of village Shahpur Kalan, while others were residents of village Jharon, both under Police Station Longowal, District Sangrur (Punjab).

B 8. During the attack, Jarnail Singh (nephew of Nachhatar Singh) allegedly fired a shot with a 12-bore double barrel gun at Gurdial Singh and injured him on his left thigh. He allegedly fired another shot at Gurdial Singh and injured him on the finger of his right hand. Jarnail Singh has been convicted by the High Court of an offence punishable under Section 302 of the IPC, but we say nothing in this regard since he has filed a separate
C petition in this Court against his conviction.

D 9. Gurmail Singh son of Bachan Singh (an associate) fired at Piaro with a 12-bore double barrel gun and injured her left ankle. He also fired two shots at Kaka Singh which hit him on the front side of his right shoulder and behind his right upper arm.

E 10. Gurmail Singh son of Nahar Singh (and nephew of Nachhatar Singh) along with Pargat Singh (an associate) gave gandasa blows to Gurdial Singh on his right shoulder and on his right arm. Shingara Singh (husband of Bibi) also gave Gurdial Singh a gandasa blow on the left side of the forehead.

F 11. Shingara Singh and Raju gave gandasa blows to Gurmail Kaur (daughter of Gurdial Singh) from the blunt end of the gandasa. Dial Singh also received some injuries.

F 12. In the scuffle that took place, Gurmail Singh son of Bachan Singh received some injuries.

G 13. After the attack and on cries being raised by the victims, the assailants left the scene. The injured were taken to the Civil Hospital where Gurdial Singh succumbed to his injuries. Necessary medical attention was provided to Kaka Singh, Dial Singh, Gurmail Kaur and Piaro who had sustained injuries. Joginder Singh (complainant) went to the police station and lodged a first information report (FIR for short) at about
H 11.30 p.m. This reached the Ilaqa Magistrate the next morning

at about 6.30 a.m.

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14. Based on the FIR, investigations were carried out and a charge sheet was filed against eight persons. During the trial, three accused Shingara Singh, Bibi and Raju died and the prosecution abated against them. Of the remaining five accused, we are concerned only with the appeals of Gurmail Singh son of Bachan Singh (an associate) and Gurmail Singh son of Nahar Singh and nephew of Nachhatar Singh.

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15. As can be seen, Gurmail Singh son of Bachan Singh had injured Piaro and Kaka Singh with a 12-bore double barrel gun. He also received some injuries in the scuffle that took place. Gurmail Singh son of Nahar Singh was responsible for giving gandasa blows to Gurdial Singh.

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16. In the trial before the Additional Sessions Judge, Bhatinda, the prosecution examined twelve witnesses while the defence examined one witness. The Trial Judge convicted Jarnail Singh under part I of Section 304 of the IPC. Gurmail Singh son of Bachan Singh was convicted under Section 25 of the Arms Act for possessing an unlicensed gun. He was also convicted under Section 324 of the IPC for causing injuries to Kaka Singh and Piaro. Gurmail Singh son of Nahar Singh was acquitted of the charges against him.

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Decision of the Trial Court:

17. The Trial Judge held that there was a land dispute between Gurdial Singh and Nachhatar Singh. He relied on the statement of PW-3 Darshan Singh, a Court Ahlmad who confirmed the pendency of the civil suit between Gurdial Singh and Nachhatar Singh. The Trial Judge also relied on the evidence of PW-4 Joginder Singh (complainant) to hold that there was a land dispute between Gurdial Singh and Nachhatar Singh. He also noted his testimony to the effect that Mohinder Singh son of Gurdial Singh was murdered by Nachhatar Singh and that Gurdial Singh was an eyewitness to the alleged murder. On this basis, the Trial Judge concluded that there some enmity between the two families and that the appellants

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A and others had a motive for committing the offences for which they were charged.

B 18. Before the Trial Judge, it was contended that there was a delay in lodging the FIR of the incident and in sending a report to the Ilaqa Magistrate. The Trial Judge did not attach much significance to this and observed that the FIR was lodged after a delay of about 1½ hours and it is not as if the delay was unreasonable. Moreover, the offence was first registered under Section 307 of the IPC but on the death of Gurdial Singh, it was converted into one punishable under Section 302 of the IPC. C It was held that there was no challenge to the genuineness of the FIR nor was there any allegation that it was fabricated or doctored.

D 19. On the merits of the case, the Trial Judge relied on the evidence of the eyewitnesses, PW-4 Joginder Singh, PW-5 Gurmail Kaur and PW-6 Piaro. Kaka Singh did not enter the witness box (he was apparently won over by the defence) but the testimony of the eyewitnesses was relied on to hold that Gurmail Singh son of Bachan Singh had injured him. The Trial Judge rejected the contention that PW-5 Gurmail Kaur and PW-6 Piaro were interested witnesses and therefore they ought not to be believed. E

F 20. It was urged that Joginder Singh (complainant) was not present when the occurrence took place since he did not receive any injury. The Trial Judge rejected this contention, taking note of the fact that Joginder Singh (complainant) hid himself.

G 21. The Trial Judge also rejected the contention that there were improvements in the statements of PW-5 Gurmail Kaur and PW-6 Piaro and held that there could be discrepancies with the passage of time.

H 22. The medical evidence indicated that Gurdial Singh had received two injuries caused by a firearm and injuries from a sharp weapon. The post-mortem examination of the body of Gurdial Singh showed as many as 116 lacerated wounds and

15 pellets were found in his thigh. The injuries were ante mortem in nature. The medical evidence also showed that Kaka Singh received two injuries through a firearm and similarly a firearm caused the injury received by Piaro. The injuries on Gurmail Kaur from a blunt object were confirmed by the medical evidence.

23. Therefore, on the facts alleged by the prosecution, the Trial Judge agreed with the prosecution and believed all its witnesses. On the issues raised regarding the motive for the crime and the alleged delay in lodging the FIR and submitting a report to the Ilaqa Magistrate, the Trial Judge ruled in favour of the prosecution.

24. However, on the substantive legal issue before him, the Trial Judge pithily observed that the prosecution did not lead any evidence to show the formation of an unlawful assembly by the accused persons nor was any evidence led to show that the assembly had any common object. Individual convictions were, accordingly, handed down.

25. The Trial Judge was of the view that since the firearm and gandasa injuries caused to Gurdial Singh were on non-vital parts of his body, they were not dangerous to life and so there was no intention on the part of Jarnail Singh and Gurmail Singh son of Nahar Singh to kill him. Under these circumstances, Jarnail Singh was convicted of an offence punishable under part I of Section 304 of the IPC.

26. As far as Gurmail Singh son of Nahar Singh is concerned, it was held that since the accused party was armed with guns, causing injuries to Gurdial Singh with gandasas does not arise. Therefore, Gurmail Singh son of Nahar Singh was acquitted of the charges against him.

27. With regard to the firearm injuries caused to Kaka Singh and Piaro on non-vital parts of their body, it was held that Gurmail Singh son of Bachan Singh was guilty of an offence punishable under Section 324 of the IPC.

A Decision of the High Court:

28. Against the decision of the Trial Judge, the convicts filed appeals and the State also preferred appeals, though against the acquittal and for enhancement of the sentence awarded. The High Court of Punjab and Haryana disposed of the appeals by judgment and order dated 10th October 2006 (under appeal).

29. The contentions urged by the accused persons before the High Court were essentially a reiteration of the contentions urged before the Trial Court.

30. The High Court held that the accused had a motive for committing the crime. The motive being the land dispute between the families and also that Gurdial Singh was an eyewitness to the alleged murder of his son Mohinder Singh by Nachhatar Singh. It was held that there was no delay in lodging the FIR by Joginder Singh. The High Court found that there was no substance in the contention that Joginder Singh was not present at the scene of the crime. The High Court did not give much significance to the contention that had Joginder Singh been present, he too would have suffered some injuries. The High Court was of the view that the witnesses had withstood their cross examination and it could not be said that they had given an incorrect version of the events because of inimical relations. The High Court found no merit in the contention that the investigating officer was biased.

31. With regard to the injuries suffered by Gurmail Singh son of Nahar Singh, it was held that the evidence showed that the injuries were caused by his co-accused in the darkness. In any case, it was held that the question was not about the injuries suffered by Gurmail Singh son of Nahar Singh but the murder of Gurdial Singh and the injuries to his brother and two daughters.

32. In other words, the High Court agreed with and upheld the conclusions arrived at by the Trial Judge on all issues.

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33. However, with regard to the constitution of an unlawful assembly, the High Court disagreed with the Trial Court. It was held that the presence of eight persons armed with guns and gandasas with a motive to wreak vengeance on Gurdial Singh and his family clearly pointed to the existence of an unlawful assembly having a common object. That Gurdial Singh was the target is clear from the number and nature of injuries received by him, which subsequently resulted in his death. Alternatively, it was held that the members of the unlawful assembly knew that an offence against Gurdial Singh was likely to be committed. As such, the ingredients of Section 149 of the IPC were made out.

34. With regard to an offence under part I of Section 304 of the IPC, it was held that the intention of the appellants was to cause the death of Gurdial Singh or to inflict such bodily injury as is likely to cause death. Consequently, it was held that an offence punishable under Section 302 of the IPC was made out. Accordingly, the appellants were sentenced to imprisonment for life.

Submissions and discussion:

35. Learned counsel for the appellants reiterated the contentions urged before the High Court. But we find no merit in them.

Peripheral issues:

(a) Delay in lodging the FIR:

36. It was contended that there was considerable delay in lodging the FIR and also in sending the special report to the Ilaqa Magistrate. The incident took place on 10th March, 1989 at about 9/9.30 p.m. and the FIR was lodged at about 11.30 p.m. There was, therefore, a delay of about two hours in lodging the FIR. We do not think this delay is per se unreasonable.

37. In situations such as the present, a realistic and pragmatic approach is necessary. It is not as if the incident of firing and inflicting of gadasa blows was over within a minute

A or so. The entire incident would have taken some time, and
 thereafter, the victims would have to recover from the shock and
 trauma caused by injuries suffered by them and make
 arrangements for medical treatment. Often several emergent
 issues need attention and so, it is not as if the moment an
 B incident is over, someone is expected to rush to the police
 station for lodging an FIR. However, if there is an unreasonable
 or unexplained delay in lodging a complaint, an argument can
 surely be made, but it is wrong to make a fetish out of every
 delay in lodging an FIR. Given the facts of this case, we do not
 C think there was any unreasonable or unexplained delay in
 lodging an FIR.

38. In this context, we may only refer to a recent decision
 of this Court (authored by one of us, Swatanter Kumar, J) in
Jitender Kumar v. State of Haryana, (2012) 6 SCC 204 in
 D which it was held:

“It is a settled principle of criminal jurisprudence that mere
 delay in lodging the FIR may not prove fatal in all cases,
 but in the given circumstances of a case, delay in lodging
 the FIR can be one of the factors which corrode the
 E credibility of the prosecution version. Delay in lodging the
 FIR cannot be a ground by itself for throwing away the
 entire prosecution case. The court has to seek an
 explanation for delay and check the truthfulness of the
 version put forward. If the court is satisfied, then the case
 F of the prosecution cannot fail on this ground alone.”

39. As far as the delay in sending the special report to the
 Illaqa Magistrate is concerned, it has come on record that
 Gurdial Singh was shifted to a Civil Hospital, along with other
 injured persons. The victims of the incident were being treated
 till sometime after 2.00 a.m. the next morning. Initially, an offence
 under Section 307 of the IPC was made out, but after Gurdial
 G Singh succumbed to his injuries, it was converted to an offence
 punishable under Section 302 of the IPC. It is then that
 information about the death was conveyed to the Illaqa
 H Magistrate. The fact that the Illaqa Magistrate was informed at

about 6.30 a.m. the next morning indicates that the information was not unnecessarily delayed. A

40. We are satisfied that the record does not show any undue delay either in lodging the FIR or in dispatching the special report to the Illaqa Magistrate. The concurrent findings of both the courts are upheld. B

(b) Motive:

41. It was then contended that there was no motive for the appellants to commit the crime. We do not agree. It is quite clear that there was a land dispute between the families of Gurdial Singh and Nachhatar Singh. Evidence in this regard was led by PW-3 Darshan Singh, a Court Ahlmad working in the concerned court at Mansa. The existence of a land dispute was also testified to by PW-4 Joginder Singh. C

42. That the land dispute was not a trivial matter is clear from the fact that it even led to the murder of Mohinder Singh son of Gurdial Singh on 20th February, 1989 allegedly by Nachhatar Singh. Gurdial Singh was an eyewitness to the murder. Therefore, not only was there a motive for committing the crime but the motive had already led to a murder on an earlier occasion. D E

43. We, therefore, reject the submission advanced by learned counsel for the appellants in this regard and uphold the concurrent opinion of both the courts below. F

(c) Presence of complainant:

44. Learned counsel for the appellants submitted that the presence of PW-4 Joginder Singh at the scene of the crime was doubtful and therefore the complaint lodged by him with the police ought not to be taken note of. In this context, it was contended that the absence of any injury on PW-4 Joginder Singh strongly suggests that he was not present when the incident occurred. G

45. We are of the opinion that too much is being read into H

A this aspect of the case. Joginder Singh's sister, Charanjit Kaur
 was married to Mohinder Singh son of Gurdial Singh. After
 Mohinder Singh's murder on 20th February 1989, Charanjit
 Kaur married Kewal Singh, another son of Gurdial Singh. Under
 the circumstances, the presence of Joginder Singh in the village
 B is explained.

46. Joginder Singh would surely have been aware of the
 enmity between the parties and when the attack took place, he
 hid himself so as to escape the wrath of the appellants. This is
 quite natural, considering the unfortunate events that had taken
 C place only a few weeks earlier. It is for this reason that Joginder
 Singh did not receive any injury, as explained by him.

47. At this stage, we may mention that learned counsel also
 sought to take advantage of the absence of any mention of
 Joginder Singh in the dying declaration Exhibit PW8/A given
 D by Gurdial Singh. The dying declaration has not been relied on,
 either way or for any purpose, both by the Trial Court and the
 High Court. Therefore, we also do not think it appropriate to
 deal with the contents of the dying declaration. We may,
 however, only note that the failure of Gurdial Singh to mention
 E the presence of Joginder Singh does not necessarily mean that
 Joginder Singh was not present at the scene of the crime.

48. We may also note that both the courts below have not
 doubted the presence of Joginder Singh at the scene of the
 crime and we see no reason to differ with this concurrent finding
 F only because Joginder Singh did not suffer any injuries or that
 his presence was not mentioned by Gurdial Singh in his dying
 declaration.

(d) Injuries on Gurmail Singh:

G 49. Learned counsel for the appellants contended that
 Gurmail Singh son of Bachan Singh had suffered serious
 injuries and the prosecution has not explained these. Although
 Gurmail Singh son of Bachan Singh in his statement under
 Section 313 of the Criminal Procedure Code says that Gurdial
 H Singh, Dial Singh and Kaka Singh attacked him with gandasas,

the evidence on record does not indicate that any of the victims were armed. On the contrary, the evidence indicates that Gurmail Singh son of Bachan Singh received injuries at the hands of his co-accused in the darkness. In these circumstances, the prosecution's "failure" to explain the injuries on Gurmail Singh son of Bachan Singh would not disprove the case of the prosecution, namely, that Gurdial Singh was killed and some of those with him had been seriously injured.

50. As long as the evidence on record is trustworthy (and it has found to be so by both the courts below) the failure of the prosecution to explain the injuries on an accused person may not necessarily adversely impact on its case. In a recent decision *Mano Dutt v. State of U.P.*, (2012) 4 SCC 79 (authored by one of us, Swatanter Kumar, J) it was held as follows:

"..... this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.

Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to 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 also of a serious nature; and
- (ii) that such injuries must have been caused at the time of the occurrence in question.

Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be

A the sole basis to reject the testimony of the prosecution
witnesses and consequently, the whole case of the
prosecution. Reference in this regard can be made to
Rajender Singh v. State of Bihar [(2000) 4 SCC 298],
B *Ram Sunder Yadav v. State of Bihar* [(1998) 7 SCC 365]
and *Vijayee Singh v. State of U.P.* [(1990) 3 SCC 190].”

51. It is interesting to note that the issue of injuries suffered
by Gurmail Singh son of Bachan Singh was not raised by the
appellants at the trial stage and has, therefore, not even been
adverted to by the Trial Judge.

C **Substantive issue of Section 149 of the IPC:**

52. The final and more significant contention urged by
learned counsel for the appellants was that the ingredients of
Section 149 of the IPC were not made out. It was pointed out
D that the Trial Court concluded that there was no evidence of an
unlawful assembly, nor was there any evidence to show that the
appellants and those with them had any common object to
commit the murder of Gurdial Singh and injure Kaka Singh,
Piaro and Gurmail Kaur. It was submitted that this finding was
E reversed by the High Court without any sufficient material on
record.

53. Before proceeding any further, it is worthwhile to quote
in entirety what the Trial Judge had to say on the issue:

F “No evidence has been led by the prosecution to show that
unlawful assembly was formed by the accused with the
common object of those composing such assembly. They
can be convicted under S. 149 IPC only if the prosecution
by way of evidence proved that the persons forming
unlawful assembly should be animated by common object.
G In the instant case no evidence has come forward to spell
out that all the accused formed an unlawful assembly in
prosecution of the common object of that assembly to inflict
injuries to Gurdial Singh deceased etc. and in view of all
this it is not possible to hold that (accused) guilty under
H sections 148/149 IPC.”

54. Section 149 of the IPC constructively criminalizes all members of an unlawful assembly if a member of that assembly commits an offence in prosecution of a common object of that assembly or if the members of that assembly knew likely to be committed in prosecution of that object. To bring a case within Section 149 of the IPC three features must be present. Firstly, there must be in existence an unlawful assembly within the meaning of Section 141 of the IPC. This is a mixed question of fact and law, which was overlooked by the Trial Judge. Secondly, an offence must have been committed by a member of the unlawful assembly. Thirdly, the offence committed must be in prosecution of a common object of the unlawful assembly or must be such as the members of the unlawful assembly knew likely to be committed in prosecution of that object. Once these ingredients are satisfied, the provisions of Section 149 of the IPC will come into play and cover every member of the unlawful assembly.

55. Section 141 of the IPC is reproduced for convenience:

141. Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right

A of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

B

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

C

Section 149 of the IPC is reproduced for convenience:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

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56. Insofar as the present case is concerned, as many as eight persons had assembled with guns and sharp-edged gandasas. There cannot be any conclusive proof with regard to what was in the contemplation of the unlawful assembly, but it is clear that the assembly was not without a purpose. Their getting together and firing a few shots in the air before the incident actually took place suggests that they gathered to either display a show of strength or commit an offence. It is unlikely that they would have gathered in village Heeron Kalan (District Bhatinda) from two other villages, Shahpur Kalan and Jharon (District Sangrur) only for a show of strength. Even if they did, the explanation to Section 141 of the IPC makes it clear that an assembly, not unlawful when it assembled, may subsequently become an unlawful assembly.

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57. Also, given the fact that the assembly was armed, it

would not be off the mark to expect it to be for a somewhat disreputable purpose and not merely by way of a show of strength. This view is fortified by what actually transpired at the scene of occurrence, namely, the lalkara given members of the assembly that no one from Gurdial Singh's party will be spared.

A

58. Additionally, it is also necessary to keep in mind the antecedent circumstances, namely, the land dispute between the parties and the murder of Mohinder Singh on 20th February 1989.

B

59. In our opinion, if all the facts are looked at conjunctively and not disjointedly, an overall picture of compelling circumstances would emerge that the accused persons had assembled with a common object of committing an offence and not merely as a show of strength and, therefore, they constituted an unlawful assembly.

C

60. What is the offence committed by members of the unlawful assembly? The Trial Court would have us believe that offences under part I of Section 304 of the IPC and under Section 324 of the IPC were committed. The Trial Court proceeded on the basis that since the injuries inflicted on Gurdial Singh were not on any vital part of his body, it cannot be said that the common object of the unlawful assembly was to kill him.

D

61. The High Court has not agreed with this view and we endorse the opinion of the High Court in this regard. It is not possible to overlook the fact that at least one injury caused to Gurdial Singh with a firearm was on a vital part of his body. That apart, Gurdial Singh had as many as 116 lacerated wounds and 15 pallets were found in his body. He also had a couple of incised wounds, though not on any vital part of his body. It is not as if only one gunshot was fired or one gandasa blow given to Gurdial Singh - two shots were fired at him and gandasa blows given.

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62. The High Court has referred to the third clause of Section 300 of the IPC which reads as follows:

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A “300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.— xxx xxx xxx

B 3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.— xxx xxx xxx”

C 63. In our opinion, the evidence is clear that the offence committed was the murder of Gurdial Singh. Assuming this was not so, the High Court has drawn attention to the third clause of Section 300 of the IPC. There can be no doubt that if the unlawful assembly did not murder Gurdial Singh, it certainly
D caused such bodily injury to Gurdial Singh and others with him as to result in his death. Given the number and nature of injuries, it is difficult to come to any conclusion other than that the injuries were sufficient in the ordinary course of nature to cause death. In fact, Gurdial Singh did succumb to the injuries.

E 64. We have no doubt that the offence committed by the unlawful assembly was the murder of Gurdial Singh and injuries to other members of his party.

F 65. Did the unlawful assembly have, as a common object the murder of Gurdial Singh, or knew that he was likely to be killed in prosecution of that common object? It was pointed out in *Lalji v. State of U.P.*, (1989) 1 SCC 437 (and approved in *Chanakya Dhibar (dead) v. State of West Bengal*, (2004) 12 SCC 398 and *Roy Fernandes v. State of Goa*, (2012) 3 SCC
G 221) that,

H “Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.”

66. From the facts and circumstances of the case, it is quite clear that the assembly of eight had come from two different villages (Shahpur Kalan and Jharon) to Heeron Kalan at about 9/9.30 p.m. That they came with an aggressive intent is clear from the fact that two of them were armed with 12-bore double barreled guns and others with sharp-edged gandasas. Two members of the assembly (Gurmail Singh, nephew of Nachhatar Singh and Bibi, sister of Nachhatar Singh) gave a lalkara (a challenge) to effectively "finish off" Gurdial Singh and his party. Following up on this, shots were fired at Gurdial Singh, Kaka Singh and Piaro. Gurdial Singh, Dial Singh and Gurmail Kaur were subjected to gandasa blows. No one from Gurdial Singh's party (all of whom were unarmed) was spared, except Joginder Singh who had hidden himself. As already noted, Gurdial Singh succumbed to his injuries.

67. That the death of Gurdial Singh was the common object of the unlawful assembly would be clear from the result of the post mortem examination conducted on Gurdial Singh. This showed the following injuries as recorded by PW-2 Dr. H.S. Lumba, Senior Medical Officer, Civil Hospital, Sangrur:

1. There were 116 lacerated wounds varying from 0.5 cm to 0.5 cm and 0.75 cm to 0.75 cm in size on the front of left thigh in the middle part in an area of 25 cms x 27 cms. The thigh was swollen. On dissection clotted blood was present and the muscle and vessels were found lacerated 15 pallets were found & packed.

2. Incised wound 2 cms x 0.2 cm on the back of proximal inter-phalangeal joint of right index finger. The underlying bone was fractured.

3. Lacerated wound 4 in number on the back of right index finger 0.5 cm x 0.5 cm (2) and other two 0.5 cm x 0.75 cm. There was no bone injury.

4. Lacerated wounds 2 in number on the back of right middle finger 0.5 cm x 0.5 cm. There was no bone injury.

A 5. Incised wound 3 cms x 0.2 cm x 0.75 cm on the lateral side of proximal phalanx of the left index finger. On dissection there was no bone injury.

6. Lacerated wound 0.5 cm x 0.75 cm on the front and middle of penis.

B 68. Surely, these injuries are severe enough to lead to a reasonable conclusion that the common object of the unlawful assembly was the murder of Gurdial Singh.

C 69. In addition to the above, we need to recall that the appellants had a cause for wreaking vengeance upon Gurdial Singh. As mentioned above, the motive was the land dispute between Gurdial Singh and Nachhatar Singh in respect of which a case was pending. The additional reason was the fact that Gurdial Singh was an eyewitness to the murder of his son D Mohinder Singh, allegedly by Nachhatar Singh.

E 70. The inference, on a totality of the facts and circumstances of the case, is compelling that the attack on Gurdial Singh was with the object of killing him and injuring those with him. The third requirement of Section 149 of the IPC is also met in this case.

F 71. All the ingredients of Section 149 of the IPC having been met, we have no doubt that the High Court arrived at the correct conclusion that the appellants are liable for an offence punishable under Section 302 of the IPC.

Conclusion:

G 72. Under the circumstances, we find no reason to interfere with the judgment and order under appeal. Accordingly, both the appeals are dismissed. However, we make it clear that since Jarnail Singh is not before us, we should not be understood to have made any comment on his role in the incident.

K.K.T.

Appeals dismissed.