CASE NO.:
Appeal (crl.) 1430-1431 of 2003

PETITIONER:
Bishna @ Bhiswadeb Mahato & Ors.

RESPONDENT:
State of West Bengal

DATE OF JUDGMENT: 28/10/2005

BENCH:
S.B. Sinha & R.V. Raveendran

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

Bhadsa is a small village situate at a distance of 12 kms. from the district headquarters known as Purulia in the State of West Bengal. On 1.12.1982, Prankrishna, deceased and Chepulal (PW-14) heard some sounds coming from the side of their Shivatara land situate in the said village. They informed their brother Nepal Mahato (PW-25) about the same. They also informed Haradhan Mahato (PW-2) and who in turn informed Subhas Mahato (PW-13). When the three brothers were proceeding towards their land, Sambhu Mahato (PW-1) met them on the road. When they reached near the land in question, being Plot No. 550, they found some persons were engaged in cutting of paddy therefrom. Nilkantha, Bhiswa alias Bishna, Manmatha alias Mathan, Kalipada, Bulu, Patal, Lalbas, Haralal, Ramanath, Majhi, Chinbas alias Srinibas (Accused Nos.1 to 11 respectively) were standing on the ail (Ridge on the agricultural land). The accused persons were variously armed. They were asked not to cut paddy but did not pay any heed thereto. Altercations started. All of a sudden, Bulu (Appellant No. 3) threw an arrow which struck Nepal Mahato (PW-25). They also exhorted shouting "Marsaladiga". The complainant party retreated to some extent. They were chased near the bed of tank called 'upper bundh'. Nepal Mahato (PW-25) was surrounded by the accused. He was hit on his left leg with tabla by Mathan whereas Haralal hit him with a tabla on his back. Bhiswa (Appellant No. 1) assaulted on his head with a lathi. He fell down on the ground whereupon Patal struck him with a sword causing injury on his hand. Ramanath and Nilkantha assaulted him with lathi. Prankrishna, deceased rushed to save his younger brother whereupon he was assaulted by Mathan on his right leg with tabla and Bhiswa with lathi. Sambhu Mahato protested to such assault on the deceased whereupon Lalbas assaulted him with a lathi. Kalipada (Appellant No. 2) and Nilkantha and Bhiswa (Appellant No. 1) exhorted that he should be finished whereupon Ramanath took a tabla from Haralal and struck the deceased at his neck. The deceased succumbed to his injuries. Further, Bulu threw arrow which struck Chepulal at his head and Kalipada gave order to finish him whereupon Nilkantha assaulted Sambhu (PW-1) and Chepulal (PW-14) with lathies in their hand.

Sambhu Mahato (PW-1) came to the district town of Purulia to hire a vehicle for shifting the injured persons to Purulia Sadar Hospital. In the meantime, the officer-incharge (PW-28) of the Police Station, Purulia received a telephonic message that some incident had taken place in the village. He entered the said information in the diary being G.D. Entry No. 17. He thereafter reached the village round about at 11.40 a.m. and noticed the dead body of Prankrishna, deceased lying at eastern extremity of the said tank. J.L. Pahari, a sub-inspector of police who accompanied the officer-incharge held the inquest on the dead body. Nepal Mahato (PW-25), who was lying unconscious, was brought to Purulia Hospital in the hired vehicle. He was accompanied by Chepulal Mahato. Nepal Mahato was admitted in the said hospital. Sambhu Mahato and Chepulal thereafter went to the police

station and lodged a first information report.

Upon completion of the investigation, 11 persons named in the first information report were chargesheeted for commission of various offences.

It is also not in dispute that one of the accused, namely, Mathan also sustained injuries on his person. The defence of the Appellants and other accused was that they were the owner of the plot No. 550 of the said village wherein as one of them was attacked and sustained injuries, they exercised the right of private defence.

The learned Trial Judge acquitted the Appellants and others for commission of all offences except one under Section 148 of the IPC inter alia holding that : (i) the eye-witnesses cannot be relied upon as injury of Mathan (Accused No.3) had not been explained by the prosecution; (ii) and there was no evidence of any overt act by Kalipada; and (iii) the prosecution had failed to fix the responsibility for the death of Prankrishna and injuries to Nepal, Chepulal, Siju and Sambhu, on any particular accused. Consequently the Trial Court sentenced all the accused to undergo rigorous imprisonment for 3 years under Section 148 IPC.

The appeals were preferred thereagainst both by the State of West Bengal as also by all the accused (except Ramanath, who it is stated has absconded). The High Court in its impugned judgment, on the other hand, held that there is no reason to disbelieve the evidence of the eye-witnesses and in particular the injured witnesses. Lalbehari Mahato (PW-16) and Ramdulal Mahato (PW-19) came immediately after the occurrence and as such their presence at the scene of the occurrence cannot be disputed. Incitement by Kalipada was found to be existing and there was sufficient evidence in support thereof.

The High Court allowed the State's appeal. In addition to upholding the conviction and sentencing of all the accused under Section 148 IPC, the High Court convicted the Appellant Kalipada under Section 302 read with Section 109; Mathan, Bhiswa and Ramanath under Section 302 read with Section 34; and sentenced the four of them to undergo rigorous imprisonment for life. Mathan, Haralal, Ramanath and Patal were convicted under Section 326 read with Section 34 of the IPC and were sentenced to undergo rigorous imprisonment for five years. Bulu was convicted under Section 324 read with Section 34 and was sentenced to undergo rigorous imprisonment for two years. Lalbas was convicted for commission of an offence under Section 325 of the IPC and was sentenced to undergo rigorous imprisonment for three years. Patal was convicted of an offence under Section 324 and was sentenced to undergo rigorous imprisonment for two years. The appeal preferred by the Accused from the judgment and conviction under Section 148 of the IPC was dismissed. In retard to Mahji and Chinibas, the decision of the Trial Court was not disturbed.

The accused Nilkantha passed away during the pendency of the appeal before the High Court. After the judgment of the High Court, Mathan has also died. Ramanath did not prefer any appeal against the judgment of the trial Court or the High Court, nor did Mahji and Chinibas.

Bishna, Kalipada, Bulu, Patal, Lalbas and Haralal (Accused Nos. 2, 4, 5, 6, 7 & 8) who have been convicted by the High Court are before us.

Before adverting to the rival contentions, we may notice the admitted facts, which are:

Plot No. 550 is situate in the village Bhadsa measuring 1.05 acres. It belonged to Kartick Chodhury. Indisputably, 0.65 acres of the said land had been purchased by the complainants party and they were in possession thereof. In respect of balance 0.40 acres, the accused persons laid a claim that they had been cultivating the same as bargadar of the original owner. The said 0.40 acres of land was purchased by Neelakanta, Manmath and

Bhiswa under a sale deed executed by Kartick Chodhury.

It is also not in dispute that proceedings under Section 145 of the Code of Criminal Procedure (for short "the Code") was initiated before an Executive Magistrate at the instance of the complainants and he had passed an order that they were to continue in possession of the land in question. On a criminal revision having been filed by one of the Appellants, the said order was set aside and the matter was remitted for a fresh finding in accordance with law.

The finding of fact arrived at by the courts below is that there was no demarcation between the land purchased by the complainants and the land purchased by the Appellants, which the complainants were claiming to have been in their possession. The complainants cultivated the said land and grew paddy thereupon.

Enmity between the two groups about the possession of the said land is also not in dispute. A concurrent finding of fact has been arrived that the allegations made against the Appellants under Section 148 of the IPC for forming an unlawful assembly has been established.

Despite the same, Mr. Jaideep Gupta, learned senior counsel appearing on behalf of the Appellants would submit that the said finding should not be sustained by us as the place of occurrence had not been established by the prosecution, as according to the Appellants the incident had taken place in their own land, namely, plot No. 674 and 669.

Mr. Gupta would urge that the prosecution furthermore had not been able to prove that Joyram, father of Prankrishna, Chepulal Mahato and Nepal Mahato, was a bargadar in relation to the 40 decimals of land and cultivated the same. Joyram has also not been examined as a witness.

We do not find any reason to arrive at a different finding that Joyram and his sons were not in possession of the land in question as bargadar and had cultivated the same.

In relation to commission of the offences under Section 302 and Sections 323 to 326 of the IPC, Mr. Gupta would urge:

(i) The witnesses' account were unnatural insofar as their statements are almost photographic in nature which should not be accepted as admittedly they have run away from the place of occurrence being in a state of fear. The description of the incident given by the witnesses is also suspect as some of the statements made by them had not been disclosed to the investigating officer as would appear from the evidence of the investigating officer.

(ii) The prosecution having not explained the injuries of the accused Mathan, adverse inference must be drawn against the prosecution in view of the decision of this Court in Lakshmi Singh and Others Vs. State of Bihar [(1976) 4 SCC 394].

(iii) The evidence of the Gandhi Mahatani (PW-22) suffering from serious infirmities cannot be relied upon.

(iv) There is no sufficient evidence to show that Kalipada incited any person to cause death of Prankrishna, deceased nor any evidence has been brought out to establish that any assault took place in furtherance of a common intention.

(v) The judgment of the High Court suffers from a serious infirmity insofar as it held that before proving the contradictions it was necessary for the defence to put the said statements to the prosecution witnesses while cross-examining them particularly in view of the fact that a suggestion was given that they had been deposing falsely. Section 145 of the Evidence Act, in a situation of this nature, will have no application inasmuch as what was sought to be established by the defence was that the witnesses had made statements in the course of the trial which had not been stated by them

before the investigating officer and, thus, the defence did not want to bring on records any contradictions made by the witnesses.

(vi) The High Court further fell in error as it failed to take into consideration that the prosecution witnesses approached the place of occurrence from the eastern side whereas the accused were chasing them from the western side, and as such they were attacked, they must have run away towards the east but yet the deceased was found near the upper bundh which admittedly was situated in the northern side of the paddy field. Our attention in this behalf has been drawn to the statements of Sambhu Mahato, Ambuj, Subhas Mahato who stated that they had been running towards south.

(vii) A further infirmity has been committed by the High Court in arriving at its finding without considering the fact that the injuries on the person of Mathan had not been explained despite statements made in the first information report to the effect that one or two members of the complainants side had lathi with them and might have assaulted some of the aggressors in order to save their lives, but the same could not have been relied upon inasmuch as at the trial all the witnesses denied thereabout.

(viii) The seriousness of injury on the person of Mathan is evident from the statements of the investigating officer that he was lying unconscious so much so arrangements were made to record his dying declaration and in fact a dying declaration was recorded by a Magistrate on the night of 1.12.1982. A right of private defence, thus, could validly be exercised by the Appellants and others.

(ix) So far as Kalipada is concerned, there is nothing on records to show that he inflicted any blow on Prankrishna, deceased. He was not involved in any land dispute between the parties and, thus, could not have derived any benefit therefrom. There was no allegation that he had been leading the group. He did not make any exhortation. At the first instance and the exhortation "finish the salas" as ascribed to him by the eye witnesses did not find place in the first information report. In any event, no blow appears to have been struck on the deceased after Kalipada made the said exhortation.

(x) At all events, even if the entire prosecution evidence is accepted, the conviction could have been only under Section 307 or 304 and not under Section 302

(xi) So far the Appellant, Bhiswa, is concerned, the prosecution has merely established that he inflicted a blow on Prankrishna on his leg which was not the cause of his death and as such that no common intention could have been formed at the spur of the moment by him and other accused as regard murder of Prankrishna.

Mr. Tara Chandra Sharma, learned counsel appearing on behalf of the State, on the other hand, took us through the evidence of the witnesses and would contend that the reasonings given by the Trial Court in not relying upon the eye-witnesses are based up conjectures and surmises as well as on misreading of evidence on record inasmuch as:

(i) the prosecution witnesses are natural and truthful and they have given the true version of the occurrence;
(ii) non-explanation of the injuries on the accused (Mathan alias Manmath) by the prosecution by itself may not affect the prosecution case in its entirety, particularly, when the evidence led by the prosecution is absolutely clear and cogent;
(iii) the prosecution case is consistent with the facts disclosed in the first information report. During investigation, the weapons of assault were seized, blood-stained earth from the place of occurrence was recovered and the evidence of the doctors who held the autopsy as also those who examined the injured eye-witnesses, namely, PW-1, PW-14, PW-18 and PW-25 fully supported the prosecution case;

(iv) the Trial Court wrongly excluded the evidence of Sambhu Mahato (PW-1), Subhas Mahato (PW-13), Chepulal Mahato (PW-14), Siju Mahato (PW-18) and Nepal Mahato (PW-25) in arriving at a finding that Kalipada did not incite any person to cause the death of the deceased which is perverse in nature. It was submitted that before the evidence of the prosecution as regard improvements made by them from the statements made under Section 161 of the Code of Criminal Procedure can be challenged, it was incumbent upon the defence to confront the prosecution witnesses therewith in view of Section 145 read with sub-section (3) of Section 155 of the Evidence Act. As Kalipada was carrying a gun whereas other accused persons were armed with various deadly weapons, namely, lathi, tabla, bow, arrows and sword and as such the judgment of the High Court be faulted.

The basic fact of the matter is not in dispute. Presence of all the prosecution witnesses except PW-22 is not seriously disputed. The only criticism levelled against the eye-witnesses including injured witnesses is : (i) that of graphic description of the incident has been given by them; and (ii) that they retreated towards east and the incident took place towards south of the plot in dispute.

It is also not in dispute that as regards injury on the person of accused Mathan, a counter-case was filed. Strangely enough, the defence had not brought the said first information report on record. The said counter-case is said to be pending trial. The prosecution in this case examined 32 prosecution witnesses. PW-1, PW-14, PW-18 and PW-25 are injured eye-witnesses whereas PW-2, PW-3, PW-13 are eye-witnesses. As the testimony of PW-22 is disputed on the ground that she could not have been an eye-witness, it may not be necessary to the consider the same.

The death of Prankrishna and the injuries sustained by the prosecution witnesses have indisputably been proved by Dr. D.L. Kar, who examined Chepulal Mahato (PW-14), Dr. S. Chatterjee, who conducted post mortem on the body of Prankrishna. Dr. Ajoy Kumar Pakrashi (PW-31) who was on emergency duty on that day examined Nepal Mahato (PW-25). He indisputably was admitted as an indoor patient in Purulia Sadar Hospital, under the supervision of Dr. Amal Kumar Ghosh, from 1.12.1982 and was discharged from the hospital on 24.12.1982. Dr. Amal Kumar Ghosh could not be examined as after he left the government service his whereabouts were not known. Dr. S. Chatterjee (PW-6) proved the handwritings of Dr. Pakrashi and Dr. Amal Kumar Ghosh from the records of the hospital.

Sambhu Mahato (PW-1) gave a categorical statement inter alia to prove the prosecution case in the following terms:

"The alleged / incident took place on 1.12.82 at about 8/8.30 A.M. in Mouza Bhadsa within Purulia (M) P.S. I was present in the vegetable field near my house at Bhadsa. I heard a cry coming from the western side of our village. I came to village road. I met Nepal, Prankrishna and Chepulal on the road. I heard from them that Nilkantha Mahato and some other persons were cutting paddy in their barga land. They requested me to protest against it. Accordingly, I accompanied them to their barga land mouza Bhadsa. I found many persons cutting paddy in the barga land of Joyram Mahato. I found there Nilkantha Mahato, Mathan Mahato, Bhisma Mahato, Haralal Mahato, Ramanath Mahato, Patal Mahato, Srinibash Mahato. Lalbas Mahato, Kalipada Mahato, Bulu Mahato and Majhi, Sahis being armed with lathi, tabla, arrows etc. present near the barga land. Nilkantha, Bishma, Srinibash, Ramanath Majhi Sahis had lathi is in their hand. Haralal and Mathan had tabla. Patal had sword. Bulu had bow and arrows, Kalipada Mahato had gun. Some labourers were cutting paddy. I

cannot say their names. We protested against such cutting of paddy. An altercation started. Then Bulu threw arrow. It struck Nepal. He was then standing on the barga land. The arrow struck the mouth of Nepal. Blood was coming out from the mouth of Nepal. Then all persons named above, shouted 'maro saladiga'. These persons then chased us. We retreated to some extent. There is a tank namely 'uppar bundh' contiguous to the barga land. Nepal was gheraoed at the bed of the tank by these persons. Mathan then struck Nepal with a tabla causing injury at his leg. Nepal fell down on the ground. Patal struck Nepal with a sword causing injury at his hand. Haralal struck Nepal with a tabla. Ramanath assaulted Nepal with a lathi. Prankrishna, the brother of Nepal, came to the rescue of Nepal. Prankrishna was assaulted by Mathan with tabla at his leg. Bhishma assaulted Prankrishna with lathi. I protested against the assault on Prankrishna but Lalbas assaulted me with lathi on my head causing bleeding injury therein. Bulu threw arrow. It struck Chepulal at his head. Kalipada gave order to finish him. Nilkantha assaulted Chepulal with lathi on his head. Prankrishna died at the spot due to head injury. I returned home. On my way I met Lalbehari, Nabin and others. I narrated the incident to them. Then, I again returned to the spot with Lalbehari, Nagen and others. I noticed injury on leg and neck of Prankrishna, who was found dead. Nepal was lying unconscious."

Chepulal Mahato (PW-14) was son of Joyram, who was a bargardar of plot No. 550. Joyram died during trial and as such he was not examined. He had lodged a first information report as the accused persons had cut away the paddy from their barga land on the previous day. He stated:

"My father, Jairam died during the pendency of this case. He died due to old age. Tangi is also known to us as tabla. Prankrishna was my elder brother. Prankrishna had been murdered. The incident took place on 15th Agrahayan. 5/6 years ago at about 8 a.m. On the day of incident, at morning I accompanied my brother, Nepal, to our paddy field in Sibotoor land in Mouza, Bhadsa to inspect as to what extent the paddy of that land had been cut by Nilkantha and others on the previous day. It was then 6 am. We returned to our home from the field. I heard a hulla while I was in the house I saw from our kitchen garden that many persons were present in our Sibottor land which was cultivated by us as bargadar. These persons were cutting paddy. I informed the matter to Nepal and Prankrishna. I came out of the house with my brothers and met Digam, Ambuj, Dashrath, Haradhan. My brothers asked these persons to go to our barga land as paddy was being cut there. While we are proceeding to the field we met Subhas. Subhas also accompanied us on our request. My uncle, Sibu also followed us. We reached our field. Nilkantha, Biswa and other were cutting paddy. We asked them not to do so. The paddy was being cut by hired labourers while Nilkantha Biswa and others were on the ail on the land. We asked the labourers also not to cut paddy. An altercation started. Then Bulu Mahato threw arrow towards us which struck mouth of Nepal. Nepal was then on our land. Nilkantha and others then shouted "Mar Salake". We retreated, but Nilkantha and his companions threw arrows towards us. Nilkantha and others gheraoed us on the bank of Uppar Bundh. Mathan

struck Nepal with tabla on his leg. Patal struck Nepal with sword. Nepal fell down on the ground. Haralal struck Nepal with sword. Biswa assaulted Nepal with lathi and so also Nilkantha. Prankrishna left to rescue Nepal. But Mathan struck Prankrishna with tabla at his right leg. Biswa assaulted Prankrishna with lathi on left leg. Kalipada was present. Prankrishna fell down on the ground. Kalipada gave order to finish. Ramanath took a table from Haralal and struck Prankrishna at his shoulder. I came to the rescue of my brothers, but Nilkantha assaulted me with lathi on my head. Bulu threw an arrow to me. It struck my hand. Sambhu also protested against the assault. But, Lalbas assaulted Shambhu with an iron rod. Patal, struck Siju with sword. We retreated to some extent due to this assault. After assault, the accused fled away."

The evidences of other two injured witnesses Siju Mahatao (PW-18) and Nepal Mahatao (PW-25) are to the same effect.

It is noteworthy that Nepal Mahato in his cross-examination described the history of the ownership of the land and/ or bargadarship of Joyram in the following terms:

"In May, 1980 we have purchased the remaining portion of plot no. 550 from Kartick Chowdhury. My father applied for barga recording on 12.5.80. My father applied for such recording in respect of plot nos. 669, 674 and entire of 550.

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These three plots are contiguous\005In 1980 we three brothers and father were in the same mess. Nagen Mahato, Paresh Sahis are aware of the fact that we grew paddy on these three plots in 1980.

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Not a fact that the incident did not take place on plot no. 550. Not a fact that accused were cutting paddy on their purchased land on plot nos. 669 and 674 on the day of alleged incident. Not a fact that on the day of incident we forcibly resisted the accused as the accused cut paddy on our barga land on previous day. Not a fact that we went to the case land with prearranged plan."

The fact that evidence of other independent witnesses also points out the overt acts played by each one of the accused is also not in dispute. Nothing has been brought to our notice to show that the presence of the eye-witnesses who were independent witnesses are wholly unreliable. Two of the injured witnesses were sons of Joyram.

Besides the eye-witnesses, two more witnesses, namely, Lalbehari Mhato and Ramdulal Mahato, were examined by the prosecution being PWs.16 and 19. Tthey came to the place of occurrence immediately after the incident had taken place and found the dead body of Prankrishna and injured Napal in an unconscious state. Lalbehari Mahato (PW-16) found the mother of Prankrishna and Nepal weeping as also Chepulal and Shambhu present there. He heard about the entire incident from Chepulal including the role played by each of the Appellants and others. PW-19 also corroborated the testimonies of the prosecution witnesses. He heard about the incident from Subhas Mahato.

The evidence of these two witnesses corroborate the evidence of the prosecution witnesses as also the allegations made in the F.I.R. Their evidence is admissible in terms Section 6 of the Indian Evidence Act. The evidence of other independent witnesses who are not inimically disposed of towards the accused is sufficient to concur with the findings of fact arrived at by the High Court.

Mr. Gupta made strong criticism as regard the following findings of the High Court :

"From the evidence discussed above we have seen that almost all the eye-witnesses have named Mathan and Bishma as having assaulted Prankrishna with tabla and lathi respectively. So far as the accused, Ramanath, is concerned, the PWs. 2, 3, 13, 14, 18, 22 and 25 have stated that when Prankrishna fell down on being assaulted by Mathan and Bishma, the accused Ramanath took a table (Tangi or spear is called Tabla by these people) from Haralal and assaulted Prankrishna on his shoulder (some say "shoulder", some say "neck") causing bleeding injury there. It is to be noted that in the cross-examination of the PWs. 2, 13, 14 & 18, against such statements of them they have been asked if they made such statements to the I.O., when all of them have answered in the affirmative. But as against such positive statements no further cross-examination has been made. What is done by the defence is putting the same question to the I.O. when he has said that no such statement was made by these witnesses to him. But this answer of the I.O. will not have any legal effect in favour of the defence, because in such a case the legal requirement is that the defence should have to cross-examine this statement by first giving a suggestion to such a witness to the contrary effect that he has not made any such statement to the I.O. and then would put the question to the I.O. and take his answer. Otherwise the statement made by the witnesses concerned in his cross-examination in positive from will confirm to be taken as admitted. But, what is more in support of the prosecution in this regard is the fact that the evidence of P.W.3, Ambuj, P.W.22, Gandhi Mahatani, and P.W.25 Nepal Mahato, on this point has not been challenged in the lest\005"

Section 145 of the Indian Evidence Act is attracted when a specific contradiction is required to be taken; but we may point out that in certain cases omissions are also considered to be contradictions [See Shri Gopal & Anr. Vs. Subhash & Ors. [JT 2004 (2) SC 158]; Sekar alias Raja Sekharan vs. State Represented by Inspector of Police, T.N.; and State of Maharashtra vs. Bharat Chaganlal Raghani and Others [(2001) 9 SCC 1, para 51]

But It is not necessary for us to dilate on the said question in this case. The High Court noticed that the evidence of PW-3. Ambuj, and PW-25, Nepal Mahato, had not been put to test of cross-examination, in that behalf. It found that Ambuj has not been subjected to any cross-examination at all in regard to his statement that Ramanath took a tabla from Haralal and with it hit the deceased. As we have not placed any reliance on the statement of PW-22, we need not refer to her statement, although even her statement in this behalf was not challenged. As regard PW-5, the High Court noticed that it had only been put to the I.O., PW-28 in the cross examination, stating :

"\005P.W.25 did not state before me that Kalipada issued orders for finishing the complainant’s party prior to Ramanath assaulted Pran Krishna with tangi on his

shoulder".

When an incident takes place in a village in the morning and that too at the harvesting time, presence of the villagers and in particular those who claim right, title, ownership as well as possession of the land in question is not unnatural. An occurrence took taken place on the previous day. The witnesses did not say that they had run away from their land to some other place. They merely said that they retreated to some extent and thereafter they were chased. The assault on the deceased as also other prosecution witnesses took place almost at the same place. The investigating officer found the dead body of Prankrishna as also Nepal Mahato in an unconscious condition near about the same place.

The presence of the accused with deadly weapons at the place of occurrence and the fact that they had been harvesting the paddy grown by the complainant being not in dispute, there is absolutely no reason as to why the account of the prosecution witnesses should be discarded particularly when sufficient material have been brought on record to show that despite the fact that they retreated to some extent, they were chased and caused death to Prankrishna and injuries to others which would lead to only one conclusion that the said act was in furtherance of their common intention.

It is not, therefore, possible to accept the submission of Mr. Gupta that we should ignore the testimonies of all the eye-witnesses including the injured witnesses.

Considered as a whole, we find the evidence of the prosecution witnesses to be clear and cogent. They are consistent and creditworthy. Some of the witnesses, as noticed hereinbefore, are independent and disinterested. There may be certain omissions on their part but if considered as a whole and in particular with the medico-legal evidences, we do not find any reason to disbelieve the same.

First Information Report, it is well settled, need not be an encyclopedic one. It need not contain all the details of the incident.

Furthermore, little bit of discrepancies or improvement do not necessarily demolish the testimony. [See Arjun and others Vs. State of Rajasthan AIR 1994 SC 2507]. Trivial discrepancy, as is well-known, should be ignored. Under circumstantial variety the usual character of human testimony is substantially true. Similarly, innocuous omission is inconsequential.

The testimony of an injured witness vis-'-vis improvement and inconsistencies in their evidence as regard part played by each of the accused may not itself be a ground to disbelieve the witnesses when having regard to prove injuries on them it would have been impossible to give a detail ground of the incident. [See Navganbhai Somabhai and others Vs. State of Gujarat AIR 1994 SC 1187]

It has been established that even when the first protest was made, Nilkantha shouted "Mar Salake" whereupon the prosecution witnesses retreated and different accused persons chased them with respective weapons. Once again, Kalipada gave an order to finish all whereupon Ramanath took a tabla from Haralal and struck Prankrishna and Prankrishna succumbed to his injuries. Subhas Mahato (PW-13) also deposed to the similar effect that Ramanath took a table from Haralal and assaulted the deceased on his shoulder whereupon Prankrishna fell down. PW-14 is also an injured witness. PW-14 stated:

"Nilkantha and others then shouted, 'mar salaki'. We retreated, but Nilkantha and his companions threw arrows towards us. Nilkantha and others gheraoed us on the bank of Uparbunds. Mathan struck Nepal with tabla on his leg. Patal struck Nepal with sword. Nepal fell

down on the ground. Haralal struck Nepal with sword. Biswa assaulted Nepal with lathi and so also Nilkantha. Prankrishna left to rescue Nepal, but Mathan struck Prankrishna with tabla at his right leg. Biswa assaulted Prankrishna with lathi on left leg. Kalipada was present. Prankrishna fell down on the ground. Kalipada gave order to finish. Ramnath took a table from Haralal and struck Prankrishna at his shoulder."

Siju Mahato (PW-18) who was also an injured witness categorically stated that Kalipada was present with a gun and Bikal and Kalipada gave order to finish whereupon Ramanath took a table from Haralal and assaulted Prankrishna at his neck. In his cross-examination, Siju Mahato also categorically stated that Kalipada and Bikal gave order to finish.

Another injured witness was Nepal Mahato (PW-25). In his deposition before the court he corroborated the prosecution case stating:

"Then Mathan came and struck me at my left leg with a tabla from back side. Simultaneously Haralal struck me with a tabla on my back. Bhiswa assaulted me with a lathi on my head. I fell down on the ground. Thereafter Nilkantha assaulted me with lathi. My elder brother Prankrishna tried to save me. While he was trying to come near me, Mathan struck Prankrishna at his right leg with tabla. Bhiswa assaulted Prankrishna with lathi at his left leg. Prankrishna fell down on the ground. Kalipada, Nilkantha, Bishwa shouted to finish. Thereafter, Ramanath took a table from Haralal and struck Prankrishna at his neck. I was thereafter assaulted and lost my senses. Prankrishna succumbed to his injuries. I regained my senses at hospital after 5/6 days. I was examined by police later on. I narrated the incident to police. I was detailed at the hospital for about 24 days."

Thus, about incitement by Kalipada, five witnesses, namely, Sambhu Mahato (PW-1), Subhas Mahato (PW-13), Chepulal Mahato (PW-14), Siju Mahato (PW-18) and Nepal Mahato (PW-25), categorically stated the role played by Kalipada whereafter only Ramanath took a tabla from Haralal and assaulted Prankrishna at his neck.

Sambhu Mahato (PW-1), Chepulal Mahato (PW-14), Siju Mahato (PW-18) and Nepal Mahato (PW-25) categorically stated that all the accused persons shouted "marosaladiga".

The depositions of the said witnesses clearly establish that the accused persons armed with deadly weapons went to the plot of complainant party with a common object to harvest the paddy and when asked not to do so they were attacked and when they retreated to some extent they chased and caused injuries to the deceased and other witnesses. This clearly establishes that the said act was in furtherance of a common intention.

As the Appellants herein and other accused persons were aggressors, no right of private defence could be claimed by them particularly when it has been proved beyond any reasonable doubt that the prosecution witnesses were first chased and then assaulted.

The prosecution evidences further clearly establish that the land was in possession of Joyram, who was bargadar of Kartick Chodhury.

The First Information Report, it is well-settled, need not be encyclopedia of the events. It is not necessary that all relevant and irrelevant facts in details should be stated therein. In the First Information Report, it has been specifically stated that Kalipada Mahato was standing behind armed with a gun and when they objected, all the accused persons attacked

the prosecution witnesses saying 'Maro Saladigokay' (assault the salas). The prosecution witnesses in their statements before the court had categorically stated that Kalipada Mahato also exhorted more than once. It may be true that he had no axe to grind. He was not claiming ownership of the plot in question; but there are materials on record to show that the complainant party and the accused belong to two rival political groups. Thus, Kalipada Mahato might have a political score to settle, as otherwise it is difficult to accept that although those claiming the ownership of the land in question would go there with lathis, he would be present at the spot with a gun.

It must be taken note of that the exhortation by Kalipada Mahato might be general in character. From the evidence of the witnesses, it appears that Kalipada Mahato has used the word 'finish' only after Prankrishna fell down having been assaulted by the other accused persons, named by them.

For the purpose of attracting Section 149 and/or 34 IPC, a specific overt act on the part of the accused is not necessary. He may wait and watch inaction on the part of an accused may some time go a long way to hold that he shared a common object with others.

Mr. Gupta laid emphasis on the fact that serious injuries on the accused Mathan have not been explained. We may, at this juncture, only notice that in the first information report, Sambhu Mahato (PW-1) stated:

"Amongst us, some one might have assaulted some of the aggressors with lathi in order to save life."

The witnesses indisputably in their cross-examinations did not accept the said fact presumably because they were accused in the counter-case, presumably on the premise that if they admitted the same, they would have accepted their guilt. It is now well-settled that it is not imperative to prove the injuries on the person of the accused irrespective of the facts and circumstances of the case including the admitted facts. Normally such a plea is entertained when the right of self defence is accepted by the court.

The fact as regard failure to explain injuries on accused vary from case to case. Whereas non-explanation of injuries suffered by the accused probabilises the defence version that the prosecution side attacked first, in a given situation it may also be possible to hold that the explanation given by the accused about his injury is not satisfactory and the statements of the prosecution witnesses fully explain the same and, thus, it is possible to hold that the accused had committed a crime for which he was charged. Where injuries were sustained by both sides and when both the parties suppressed the genesis in the incident, or where coming out with the partial truth, the prosecution may fail. But, no law in general terms can be laid down to the effect that each and every case where prosecution fails to explain injuries on the person of the accused, the same should be rejected without any further probe. [See Bankey Lal and others Vs. The State of U.P. AIR 1971 SC 2233 and Mohar Rai Vs. The State of Bihar [AIR 1968 SC 1281]

In Lakshmi Singh (supra), whereupon Mr. Gupta placed strong reliance, the law is stated in the following terms:

"\005It seems to us that taking the entire picture of the narrative given by the witnesses, in the peculiar facts of this case, the contention cannot be said to be without substance. The most important fact which reinforces this conclusion is that the accused headed by Jagdhari Singh had absolutely no motive, no reason and no concern with the deceased or their relations and there was absolutely no earthly reason why they should have made a common cause with Ramsagar Singh and Dasrath Singh over what was a purely domestic matter between Dasrath Singh and his cousins. It seems to us that having regard to the

serious enmity which PWs 1 to 4 had against the appellants headed by Jagdhari Singh, they must have made it a condition precedent to depose in favour of the prosecution or support the case only if Dasai Singh PW 6 would agree to implicate the appellants Jagdhari Singh and others and to assign them vital roles in the drama staged so that the witnesses could get the best possible opportunity to wreak vengeance on their enemies. In fact the prosecution evidence itself shows that to begin with a dispute started only between Dasrath Singh and Ramsagar Singh on the one hand and Chulhai Singh and Brahmdeo on the other and the other accused persons appeared on the scene later on. This dramatic appearance of the other accused persons seems to have been introduced as an embellishment in the case at the instance of PWs 1 to 4. There are other infirmities in the prosecution case also which throw a serious doubt on the prosecution case."

In Dashrath Singh Vs. State of U.P. [(2004) 7 SCC 408], it was stated:

"19\005 It is here that the need to explain the injuries of serious nature received by the accused in the course of same occurrence arises. When explanation is given, the correctness of the explanation is liable to be tested. If there is an omission to explain, it may lead to the inference that the prosecution has suppressed some of the relevant details concerning the incident. The Court has then to consider whether such omission casts a reasonable doubt on the entire prosecution story or it will have any effect on the other reliable evidence available having bearing on the origin of the incident. Ultimately, the factum of non-explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non-explanation of serious injuries may prima facie make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predicate which version is true, then, the factum of non-explanation of the injuries assumes greater importance. Much depends on the quality of the evidence adduced by the prosecution and it is from that angle, the weight to be attached to the aspect of non-explanation of the injuries should be considered. The decisions abovecited would make it clear that there cannot be a mechanical or isolated approach in examining the question whether the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version."

In Shriram Vs. State of M.P. [(2004) 9 SCC 292], it was observed:

"8. We shall next deal with the aspect relating to injuries on the accused and the question of right of private defence. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused

persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries found were suffered in the same occurrence and that such injuries on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See Lakshmi Singh v. State of Bihar1.) A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting\005"

Such is not the position here.

We have furthermore noticed the concurrent finding of both the courts that the accused were guilty of commission of an offence under Section 148 of the IPC. The fact that they were aggressors and initiated the attack on the deceased and other witnesses on the land in question and thereafter at the bed of the tank, thus, stands established.

At this juncture, we may notice some of the decisions relied upon by Mr. Gupta.

In Mohar Rai (supra) the prosecution case is that the Appellant therein was chased and caught and at that time he was having revolver in his hand. The defence plea was that no shot was fired from his revolver and in fact he having been seriously injured was not in a position to fire any shot from the revolver. The reports of the ballistic expert examined by the prosecution and defence were contradictory in nature. He was also acquitted under the provisions of the Arms Act. In that situation, it was observed:

"6. The trial court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of PW 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probablised. Under these circumstances the prosecution had a duty to explain those injuries. ..."

In Amar Malla and Others Vs. State of Tripura [(2002) 7 SCC 91], this Court held:

"9\005 It is well settled that merely because the prosecution has failed to explain injuries on the accused persons, ipso facto the same cannot be taken to be a ground for throwing out the prosecution case, especially when the same has been supported by eyewitnesses, including injured ones as well, and their evidence is corroborated

by medical evidence as well as objective finding of the investigating officer."

The said decision runs counter to the submissions of Mr Gupta.

In Subramani and Others Vs. State of T.N. [(2002) 7 SCC 210] again a positive case of exercise of right of private defence was made out. Therein the question was as to whether the accused persons exceeded the right of private defence. They were held to have initially acted in exercise of their right of private defence of property and in exercise of the right of private defence of person, observing :

"21\005 In the instant case we are inclined to hold that the appellants had initially acted in exercise of their right of private defence of property, and later in exercise of the right of private defence of person. It has been found that three of the appellants were also injured in the same incident. Two of the appellants, namely, Appellants 2 and 3 had injuries on their head, a vital part of the body. Luckily the injuries did not prove to be fatal because if inflicted with more force, it may have resulted in the fracture of the skull and proved fatal. What is, however, apparent is the fact that the assault on them was not directed on non-vital parts of the body, but directed on a vital part of the body such as the head. In these circumstances, it is reasonable to infer that the appellants entertained a reasonable apprehension that death or grievous injury may be the consequence of such assault. Their right of private defence, therefore, extended to the voluntarily causing of the death of the assailants."

Dharminder Vs. State of H.P. [(2002) 7 SCC 488] was also a case where a plea of right of private defence as regard property was put forward. Although in view of a decision of this Court in Takhaji Hiraji Vs. Thakore Kubersing Chamansing [(2001) 6 SCC 145], it was observed that the prosecution is under duty to explain the injuries on the accused persons but the court noticed the following observations in paragraph 17 thereof:

"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 side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

Despite a serious injury on the person of the accused and despite the fact that the factum of injury has not been disclosed in the first information report but only in the statement under Section 161 of the Code of Criminal Procedure by one of the witnesses, the court held that the factum of the accused was not improper. The said decision also is of no assistance to the prosecution.

In Raghunath Vs. State of Haryana and Another [(2003) 1 SCC 398], this Court did not rely upon only two witnesses having regard to the fact that the nature of injuries sustained by the complainants party would clearly suggest that such injuries could only be caused in a melee which is the version of the defence that injuries sustained by the deceased and other members of the complainant party have been caused by a mob consisting of 300-350 people while trying to rescue accused No. 1. It was further held:

"32\005Considering the nature of the injuries sustained by the complainant party it is quite probable that they

sustained injuries accidentally while being involved in a mob fight\005"

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

In Mizaji and another Vs. The State of U.P. [(1959) Supp 1 SCR 940], it was observed:

"\005Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all\005"

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

"\005What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained long with the other members of the assembly the common object as defined by Section 141 IPC Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly\005"

It was further observed:

"In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

Yet again in Bhajan Singh and Others Vs. State of Uttar Pradesh [(1974) 4 SCC 568], it was held:

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

In Shri Gopal & Anr. Vs. Subhash & Ors. [JT 2004 (2) SC 158], it was stated:

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

Sections 149 and 34, however, stand on some different footings although application of both the sections may be held to be mandatory.

In Ram Tahal and Others Vs. The State of U.P. [(1972) 1 SCC 136], a Division Bench of this Court noticed:

"\005A 5-Judge Bench of this Court in Mohan Singh v. State of Punjab has further reiterated this principle where it was pointed out that like Section 149 of the IPC Section 34 of that Code also deals with cases of constructive liability but the essential constituent of the vicarious criminal liability under Section 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless common intention, which Section 34 has its basis, is different from the common object of unlawful assembly. It was pointed out that common intention

denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention..."

It may be true that the right of private defence need not specifically be taken and in the event the court on the basis of the materials on records is in a position to come to such a conclusion, despite some other plea had been raised that such a case had been made out, may act thereupon.

In Laxman Singh Vs. Poonam Singh and Others [(2004) 10 SCC 94], this Court observed:

"7\005 But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See Lakshmi Singh v. State of Bihar) A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting\005"

Yet again in Chacko alias Aniyan Kunju and Others Vs. State of Kerala [(2004) 12 SCC 269],

"7\005 Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable."

In Vajrapu Sambayya Naidu and Others Vs. State of A.P. and Others [(2004) 10 SCC 152], whereupon Mr. Gupta placed strong reliance, is distinguishable on facts. Therein a finding of fact was arrived at that not only the complainant's decree for eviction was obtained against the informant, actual delivery of possession was also effected and accused No. 13 came in a possession of land. In the said factual backdrop, this Court observed that the complexion of the entire case changes because in such an event the Appellants cannot be held to be aggressors. The fact of the present case, however, stands on a different footing.

Once it is established that the complainant party were in possession of the land in question as also cultivated the same and grew paddy thereupon the question of the Appellant's exercising of right of private defence as

regard property does not arise. Such a right could only be claimed by the complainant. So far as the purported right of private defence of a person is concerned, it has been proved beyond any shadow of doubt that the accused were the aggressors. They came to the land in question to harvest paddy through hired labourers. They were armed fully when they were asked not to harvest paddy, they chased and assaulted the prosecution witnesses. In this situation the Appellants were not entitled to claim right of private defence.

SELF-DEFENCE

'Right of private defence' is not defined. Nothing is an offence in terms of Section 96 of the Indian Penal Code, if it is done in exercise of the right of private defence. Section 97 deals with the subject matter of private defence. The plea of right of private defence comprises the body or property. It, however, extends not only to person exercising the right; but to any other person. The right may be exercised in the case of any offence against the body and in the case of offences of theft, robbery, mischief or criminal trespass and attempts at such offences in relation to property. Sections 96 and 98 confer a right of private defence against certain offences and acts. Section 99 lays down the limit therefor. The right conferred upon a person in terms of Section 96 to 98 and 100 to 106 is controlled by Section 99. In terms of Section 99 of the Indian Penal Code, the right of private defence, in no case, extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 provides that the right of private defence of the body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein, namely, "First \026 Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly \026 Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.

Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body as well as property. It commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until there is reasonable apprehension. In other words, the right lasts so long as the reasonable apprehension of the danger to the body continues.

So far as exercise of right of private defence of property extended to causing death is concerned, the same is covered by Section 103 of the Indian Penal Code. Such a right is available if the offence, the commission of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions enumerated, viz., robbery, house-breaking by night, mischief by fire committed on any building, theft, mischief or house-trespass. The said provision, therefore, has no application.

Section 104 provides that in relation to the offences as enumerated in Section 103, the right of private defence can be exercised to the voluntary causing to the wrong-doer of any harm other than death. Section 105 provides for commencement and continuance of the right of private defence of property which reads as under:

"105. Commencement and continuance of the right of private defence of property \026 The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt, or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission or criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues."

Section 105 of the Indian Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.

In a large number of cases, this Court, however, has laid down the law that a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force. All circumstances are required to be viewed with pragmatism and any hyper-technical approach should be avoided.

To put it simply , if a defence is made out, the accused is entitled to be acquitted and if not he will be convicted of murder. But in case of use of excessive force, he would be convicted under Section 304 IPC.

A right of private defence cannot be claimed when the accused are aggressors, when they go to complainant’s house well prepared for a fight and provoke the complainant party resulting in quarrel and taking undue advantage that the deceased was unarmed causes his death. It cannot be inferred that there was any sudden quarrel or fight, although there might be mutual fight with weapons after the deceased was attacked. In such a situation, a plea of private defence would not be available [See Preetam Singh and Others vs. State of Rajasthan \026 (2003) 12 SCC 594]

In Sekar alias Raja Sekharan vs. State Represented by Inspector of Police,T.N. [(2002) 8 SCC 354], a Bench in which one of us was a member, observed :

"10. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered."

In Laxman Singh (supra), this Court opined:

"6\005Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record\005"

In Gpttipulla Venkatasiva Subbarayanam and Others vs. The State of Andhra Pradesh and Another [(1970) 1 SCC 235], Dua, J. speaking for the Bench stated the law thus :

"\005Section 100 lays down the circumstances in which the right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailants. They are: (1) if the assault which occasions the exercise of the right reasonably causes the apprehension that death or grievous hurt would otherwise be the consequence thereof and (2) if such assault is inspired by an intention to commit rape or to gratify unnatural lust or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause apprehension that the victim would be unable to have recourse to public authorities for his release. In case of less serious offences this right extends to causing any harm other than death. The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. The right of private defence of property under Section 103 extends, subject to Section 99, to the voluntary causing of death or of any other harm to the wrongdoer if the offence which occasions the exercise of the right is robbery, house-breaking by night, mischief by fire on any building etc. or if such offence is, theft, mischief or house trespass in such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. This right commences when reasonable apprehension of danger to the property commences and its duration, as prescribed in Section 105, in case of defence against criminal trespass or mischief, continues as long as the offender continues in the commission of such offence. Section 106 extends the right of private defence against deadly assault even when there is risk of harm to innocent persons."

[See also State of M.P. vs. Ramesh (2005) 9 SCC 705]

Private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. So far as defence of land against trespasser is concerned, a person is entitled to use necessary and moderate force both for preventing the trespass or to eject the trespasser. For the said purposes, the use of force must be the minimum necessary or reasonably believed to be necessary. A reasonable defence would mean a proportionate defence. Ordinarily, a trespasser would be first asked to leave and if the trespasser fights back, a

reasonable force can be used.

Defence of dwelling house, however, stand on a different footing. The law has always looked with special indulgence on a man who is defending his dwelling against those who would unlawfully evict him; as for "the house of every one is to him as his castle and fortress".

In Hussey [(1924) 18 Cr. App. Rep. 160], it was stated it would be lawful for a man to kill one who would unlawfully dispossess him of his home.

Private defence and prevention of crime are sometimes indistinguishable. Such a right is exercised because "there is a general liberty as between strangers to prevent a felony". The degree of force permissible should not differ, for instance, the in the case of a master defending his servant from the case of a brother defending his sister, or that of a complete stranger coming to the defence of another under unlawful attack.

In Kenny's 'Outlines of Criminal Law' by J.W. Cecil Turner, it is stated :

"It is natural that a man who is attacked should resist, and his resistance, as such, will not be unlawful. It is not necessary that he should wait to be actually struck, before striking in self-defence. If one party raise up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak)."

The learned author further stated that self-defence, however, is not extended to unlawful force :

"But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery. The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen, where a person is attacked in such a way that his life is in danger he is justified in even killing his assailant to prevent the felony. But an ordinary assault must not be thus met by the use of fire-arms or other deadly weapons\005."

In Browne [(1973) NI 96 at 107], Lowry LCJ with regard to self-defence stated :

"The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need."

As regard self-defence and prevention of crime in 'Criminal Law' by J.C. Smith & Brian Hogan, it is stated :

"Since self-defence may afford a defence to murder, obviously it may do so to lesser offences against the person and subject to similar conditions. The matter

is now regulated by s. 3 of the Criminal Law Act 1967. An attack which would not justify D in killing might justify him in the use of some less degree of force, and so afford a defence to a charge of wounding, or, a fortiori, common assault. But the use of greater force than is reasonable to repel the attack will result in liability to conviction for common assault, or whatever offence the degree of harm caused and intended warrants. Reasonable force may be used in defence of property so that D was not guilty of an assault when he struck a bailiff who was unlawfully using force to enter D's home. Similar principles apply to force used in the prevention of crime."

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

CONCLUSION :

Except the Appellants, the other accused have not preferred any appeal.

In view of our findings aforementioned, ordinarily we would have upheld the conviction of the Appellants under Sections 302/109 and 302/34 IPC, but the High Court has found the accused guilty as under :

i) Mathan, Bhishwa and Ramanath Mahato under Section 302/34 IPC for committing the murder of Prankrishna Mahato;
ii) Kalipada Mahato under Section 302/109 IPC;
iii) Mathan, Haralal, Ramanath and Patal Mahato under Section 326/34 IPC for causing grievous hurt to Nepal Mahato;
iv) Bulu Mahato under Section 324 IPC for causing hurt to Nepal and Chepualal Mahato;
v) Lalbas Mahato under Section 325 for causing grievous hurt to Shambhu Mahato; and
vi) Patal Mahato under Section 324 IPC for causing hurt to Siju Mahato.

It is difficult to reconcile this part of the judgment of the High Court. If common object/common intention of an offence under Section 149 or 34 IPC was to be invoked, the same should have been invoked against those who shared common object/intention. The High Court has also not assigned any reason as to why Mathan, Bhiswa and Ramanath Mahato have been found guilty under Section 302/34 IPC and not under Section 302/149 IPC.

Furthermore, although in this case right of private defence was not exercisable; having regard to the peculiar facts and circumstances of the case, we are of the opinion that the possibility of the Appellants committing the crime without any intention to cause death cannot be ruled out.

We are, therefore, of the opinion that keeping in view the peculiar facts and circumstances of this case, the Appellant Nos. 1 and 2 should be convicted for an offence under Section 304 Part I read with Section 34 IPC instead of Section 302/34 and 302/109. They are directed to undergo a sentence of rigorous imprisonment for seven years. The conviction and sentence of Appellant Nos. 3, 4, 5 and 6 by the High Court is not disturbed. The judgment of conviction and sentence of the Appellants under Section 148 is upheld. All the sentences shall run concurrently.

The appeals are allowed to the extent as mentioned hereinabove.