

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 20th MARCH, 2015

DECIDED ON : 15th MAY, 2015

+ **CRL.REV.P. 162/2014 & CrI.M.A.4214/2014**

STATE

..... Petitioner

Through : Mr.Atul Kumar Shrivastava, SPP.
Insp.Vijay and Insp.Jitender, Crime
Branch.

Versus

BHUPINDER SINGH BISHT & ORS.

..... Respondents

Through : Mr.Manu Sharma, Advocate with
Mr.Abhir Datt and Ms.Ridhima
Mandhar, Advocates for R1,R5 &
R6.
Mr.Sushil Bajaj, Advocate with
Mr.Harsh Bora, Advocate for R2 &
R3.
Ms.Rebecca M.John, Sr.Advocate
with Mr.Vishal Gosain,
Ms.Rudrani Tyagi & Mr.Nikhil
Ahjuja, Advocates for R4 & R12.
Mr.R.S.Malik, Advocate with
Mr.Sahil Malik, Advocate for R7.
Mr.R.S.Yadav, Advocate for R8.
Mr.K.K.Manan, Advocate with
Mr.Nipun Bhardwaj and
Mr.Ankush Narang, Advocates for
R11.
Ms.Rebecca M.John, Sr.Advocate
with Mr.Kushdeep Gaur, Advocate
for R13 to R18.

Ms.Rebecca M.John, Sr.Advocate
with Mr.Bhavook Chauhan,
Advocate for R19 & R20.

AND

+ **CRL.REV.P. 298/2014 & CrI.M.A.8062/2014 (Stay)**

NARENDER KUMAR AHLAWAT Petitioner

Through : Mr.K.K.Manan, Advocate with
Mr.Nipun Bhardwaj and
Mr.Ankush Narang, Advocates.

Versus

THE STATE NCT OF DELHI Respondent

Through : Mr.Atul Kumar Shrivastava, SPP.
Insp.Vijay and Insp.Jitender, Crime
Branch.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Revision Petition 162/2014 has been preferred by the State to challenge the legality and correctness of an order dated 13.01.2014 of learned Addl. Sessions Judge-02 (South), New Delhi, by which various charges were framed against the respondents. Among others, charge under Sections 304/34 IPC was ordered to be framed against respondents No.7 & 8. Grievance of the petitioner is that there was ample material to charge

respondents No.7 & 8 for commission of offence under Sections 302/34 IPC. All the respondents were required to be charged under Section 302 read with Section 120B IPC. It is further pleaded that the Trial Court committed an error in omitting to frame charge under Section 412 IPC against respondent No.4 and charge under Sections 27/30 Arms Act against respondent No.6. The respondents have contested the petition. Crl.Rev.P.298/2014 has been preferred by Narender Kumar Ahlawat to impugn the order on charge.

2. I have heard the learned Spl. Public Prosecutor for the State, learned Senior counsel for the respondents (Crl.Rev.P.162/2014); learned counsel for the petitioner (Crl.Rev.P.298/2014) and have examined the Trial Court records minutely.

3. A shoot out incident took place on 17.11.2012 in which two real brothers Gurdeep Singh Chadha @ Ponty Chadha (herein referred to 'Ponty') and Hardeep Singh Chadha (herein referred to 'Hardeep') were killed. Two FIRs 496/2012 & 497/2012 were registered. FIR No.496/2012 against 'Hardeep' was closed as he had succumbed to the injuries sustained by him in the said shootout. Investigation was carried out indepth in case FIR No.497/2012 and charge-sheet / supplementary charge-sheets against the assailants / respondents have been filed in the

Court. The investigation revealed that there was long standing property dispute between the brothers 'Hardeep' and 'Ponty'. The family consisted of three brothers and their father. So long Kulwant Singh Chadha, deceased's father was alive, he was able to control the situation. After his demise, serious differences arose between the two brothers 'Ponty' and 'Hardeep' and they stopped talking to each other. Relatives had intervened in vain on many occasions to resolve the differences. On 16.11.2012 at Civil Lines, Delhi, an attempt was made by the relatives to bring an end to the dispute. It did not materialise.

4. Prosecution case is that after amicable solution eluded the parties, 'Ponty' hatched a criminal conspiracy with his associates to forcibly take possession of farm house No.42, Central Drive, Chhattarpur, the real bone of contention between the parties. He, on 16.11.2012 immediately contacted his confident Sukhdev Singh Namdhari (herein referred 'Namdhari') and asked him to mobilise his resources and reach Delhi to dispossess 'Hardeep'. He also instructed his subordinates through Narender Ahlawat, General Manager to mobilise his resources. 'Namdhari' wasting no time, mobilised his men and material and asked them to reach Delhi. Narender Ahlawat gave various directions to his subordinates and Ponty's employees to accomplish the object. On

17.11.2012, a meeting was held in the farm house of 'Ponty' where 'Namdhari', Narender Ahlawat, Bhupender Singh Bisht, Udai Raj Singh @ Anna and one sikh gentleman participated. Pursuant to the said meeting, 30/ 40 persons called by 'Namdhari' and those gathered by Narender Ahlawat; Bhupender Singh Bisht and Udai Raj Singh, etc. reached farm house No.42 Chattarpur and committed trespass by breaking its lock. It is significant to note that the assailants were armed with deadly weapons / firearms including AK-47 rifle, swords, lathis etc. To scare the inmates, gun shots were fired. Nandlal was abducted and confined in another farmhouse. Goods belonging to the employees / inmates were transported in Tata 407 bearing No.DL-1LR-6167. The assailants snatched the mobile phones and assaulted the occupants. They put their own locks on the gate.

5. Further case of the prosecution is that 'Hardeep' was apprised about the occurrence by the employees who managed to flee the spot. By that time, 'Hardeep' had reached his office at Sector 18, Noida. He rushed to the spot and on the way contacted several persons including his father-in-law and subordinates to lodge complaint to the police. In the meantime, to consolidate their possession 'Ponty' and 'Namdhari' along with Sachin Tyagi arrived in a Land Cruiser at the farm house which was

locked from outside. When Narender Ahlawat was in the process of opening its lock, 'Hardeep' who happened to arrive there by that time, fired at him (Narender Ahlawat). Thereafter, he focussed attention towards 'Ponty' and pumped in him several bullets. 'Namdhari' and his official bodyguard from Uttarakhand Police Sachin Tyagi (respondent No.7) then fired at 'Hardeep' who sustained two gunshot injuries. In order to save himself, 'Hardeep' went inside the farm house and succumbed to the injuries. 'Namdhari' took 'Ponty' to hospital where he was declared brought dead. Therefore, he lodged complaint at Police Station Mehrauli and FIR No.496/2012 was registered. On the statement of complainant Nand Lal, FIR No. 497/2012 was lodged. During investigation of FIR No.497/2012, the respondents were arrested. Statements of the witnesses conversant with the facts were recorded. Licensed / unlicensed arms in possession of the assailants were recovered. Call Details Records (CDRs) were collected. After completion of investigation, charge-sheets for commission of offences under Section 120B read with Section 302/307/147/148/323/325/342/365/368/395/397/450/452 IPC coupled with Sections 201/203 IPC and Sections 25/27/30 Arms Act and under Section 120B IPC were filed against the respondents. After hearing

detailed arguments from all the sides, learned Trial Court by the impugned order ordered to frame various different charges.

6. Learned Spl. Public Prosecutor urged that the impugned order cannot be sustained to the extent charge under Sections 304/34 IPC instead of Sections 302/34 IPC was framed against respondents No.7 & 8. The other accused persons / respondents have not been proceeded under Section 120 B read with Section 302 IPC. The Trial Court erred to record findings at the stage of charge that the shootout was a sudden and unexpected development. Number of persons involved, nature of weapons used and the manner of execution of the plan showed clear intent in the conspiracy to execute it at all costs and to remove all and any obstacle including to cause death. It is further urged that the Trial Court prejudged the issue and proceeded on erroneous premise that firing by 'Hardeep' was without any provocation. The entire sequence of events was preplanned, premeditated and death of an individual was a foreseeable event. The Trial Court ought to have framed charge under Section 302/34 IPC. At the stage of framing of charge, the Trial Court was expected to sift the evidence, for the limited purpose to decide if the facts on record constituted the offence charged. The Trial Court erred to record findings

on the issue of self-defence or sudden quarrel at the stage of charge when such issues ought to have been pleaded and proved during trial.

7. Learned Senior Counsel for the accused persons / respondents urged that the impugned order based upon fair and proper appraisal of the material on record cannot be faulted. In the charge-sheet, the prosecution itself had alleged that the central object of the conspiracy hatched by the respondents was to dispossess 'Hardeep' by all means. Once that object was achieved, the conspiracy came to an end automatically. There was no conspiracy by the respondents at any stage to murder 'Hardeep' whose arrival at the spot was not anticipated. 'Hardeep' armed with weapons in both hands was responsible for firing at his brother 'Ponty' and Narender Ahlawat without any provocation. Respondents No.7 & 8 in their self-defence exercised their statutory right to fire at him to protect themselves. Respondent No.8 was an official bodyguard provided to respondent No.7 and it was his duty to protect his protectee at any cost. The shooting incident had resulted suddenly and unexpectedly at the spot. The Trial Court has correctly divided the whole transaction into three different stages. For the third stage when the actual shooting took place, some of the respondents were not present at the spot.

Respondents No.7 & 8 themselves were responsible for their individual

acts. 'Hardeep' himself was an accused in FIR No.496/2012 registered on Namdhari's complaint. She urged that the prosecution cannot be permitted to change its stand midway. It was concluded in the FIR No. 496/2012 that 'Hardeep' caused grievous injuries to Narender Ahlawat and death of 'Ponty' due to shots fired by him. PW-12 (Shiv Kumar Verma) and PW-11 (Ajeet) though had allegedly sustained injuries but their MLCs have not been placed on record. It is unclear if they sustained gunshots injuries. It is further urged that charge-sheet is silent about commission of offence under Section 149 IPC. No charge under Sections 27/30 Arms Act can be framed against respondent No.6, he, being in possession of a licensed weapon which was never used for illegal purpose.

8. Learned counsel for the respondent No.7 Mr.R.S.Malik urged that the bullets fired at the spot have not been connected to him. No bullet was found in the body of the deceased 'Hardeep'. Section 304 IPC is not attracted qua him.

9. It is significant to note that none of the respondents except Narender Singh Ahlawat has challenged the impugned order by filing revision petition. The impugned order cites various judgments to the effect that while exercising power under Section 227 Cr.P.C. the Court is required to evaluate the material and documents on record with a view to

finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the Court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence. The law cited by the learned Trial Court is indisputably correct. However, it appears that the Trial Court did not correctly apply it on facts emerging on record. In a recent judgment ‘*State vs. A.Arun Kumar and Another*’, 2015 (2) SCC 417, the Supreme Court has discussed the law on this aspect:

*“8. The law on the point is succinctly stated by this Court in **Sajjan Kumar v. CBI** : (2010) 9 SCC 368 wherein after referring to **Union of India v. Prafulla Kumar Samal** (1909) 3 SCC 4 and **Dilawar Balu Kurane v. State of Maharashtra** : (2002) 2 SCC 135, this Court observed in para 19 thus:*

19. It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

9. This Court the went on to cull out principles as regards scope of Sections 227 and 228 of the Code, which in our view broadly apply to Sections 238 and 239 of the Code as well. It was observed thus in para 21:

21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges Under Section 227 of the Code of Criminal Procedure has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be

fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

(Emphasis given)

10. In Crl.A.Nos.285-287 of 2015 (Arising out of S.L.P. (Crl.) Nos.300-302 of 2013) ‘Sonu Gupta vs. Deepak Gupta & ors.’ decided on 11.02.2015, Supreme Court held :

“It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.”

(Emphasis given)

11. Facts emerging from the charge-sheet reveal that there was a long standing bitter property dispute between the two brothers 'Ponty' and 'Hardeep'. After amicable settlement to resolve the differences did not materialise, a conspiracy was hatched on 16.11.2012 in which many assailants including 'Namdhari', Narender, Bhupender Singh Bisht, Udai Raj Singh @ Anna participated to dispossess 'Hardeep' from farm house No.42 forcibly. To execute the plan, 'Ponty' instructed his confident 'Namdhari' and General Manager Narender Ahlawat to mobilise their men and materials. On 17.11.2012, assailants numbering 30 to 40 heavily armed with deadly / formidable weapons including AK-47 rifle / carbines, swords, lathis etc. reached the spot in 4 – 5 vehicles. The complainant Nandlal identified some of the assailants and named them in the FIR. Gunshots were fired to scare inmates; they were beaten and injured; their mobile phones were snatched; goods belonging to them were robbed and loaded in Tata 407; Nandlal was abducted and confined in another farm. The assailants succeeded to take forcible possession and put lock on the gate in Hardeep's absence. Considering these facts and circumstances, the Trial Court rightly charged all the respondents for committing offences

under Section 120B IPC read with Sections

307/147/148/149/323/325/342/365/368/395/397/452 IPC; under Sections 25/27/30 Arms Act being in possession of unlicensed or fake licences.

12. After the assailants were successful in putting lock on the main gate of the farm house, 'Ponty' and 'Namdhari' along with his PSO Sachin Tyagi reached gate No.3 of farm house No.42 at about 12.30 P.M. in a Land Cruiser driven by Raj Dev to consolidate their possession. They were also armed with various lethal weapons. In the meantime, 'Hardeep' on getting intimation about forcible trespass and eviction arrived there and found Narender Singh Ahlawat opening its gate to allow 'Ponty' and 'Namdhari' enter inside the farm house. It is alleged that 'Hardeep' first fired at Narender Singh Ahlawat and then at 'Ponty' sitting on the left rear seat. Thereafter, both 'Namdhari' and Sachin Tyagi fired at 'Hardeep'; he was hit with bullets and succumbed to the injuries. Apparently, the conspiracy earlier hatched to dispossess inmates of farm house No.42 had not come to an end. The shootout incident in which both the brothers lost their lives was in continuation of the previous events. To my view, prima facie the events from the beginning to the end were interconnected and were part and parcel of the same transaction due to proximity of time, continuity of actions and community of purpose / design. No sound reasons existed before the Trial Court to split the entire transaction in

three different and distinct stages. Undoubtedly, the central object of the assailants armed with deadly and sophisticated weapons was to take forcible possession by all means including violence. They all had gathered and arrived at the spot to execute the plan to dispossess 'Hardeep'. Most of them were outsiders and had travelled to Delhi with unlicensed / fake licences to support 'Ponty' in his plan. The shooting incident on the face of it was direct result of forcible dispossession. The larger and bigger object of the assailants / conspirators was to get forcible possession by all means. In that endeavour, there was no hesitation to remove every obstruction by any means. It cannot be said that the assailants were not to use weapons / arms in their possession to ward off the impending danger. It cannot be said that forcible possession was going to be a smooth affair without any resistance by equally powerful 'Hardeep' or his men. Violence was expected to take place at the spot and it happened exactly the same. The assailants were prepared to meet any eventuality. It cannot be said that the accused persons were not aware of the consequences of their act or result of the act that was likely to be resulted on account of the overt act committed by any of the member of that assembly. If all the circumstances are taken into consideration, it cannot be held that the respondents had not participated to prosecute a common 'object'.

Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. The common object of an unlawful assembly has to be gathered from the nature of the assembly, arms possessed by them and the behaviour of the accused at or before the occurrence. It is not necessary that common 'object' should directly be to commit a particular offence. It is sufficient that the particular result was such that the members of the unlawful assembly knew the offence to be likely committed in the prosecution of that 'common object'.

13. When 'Hardeep' arrived the spot and found Narender Ahlawat opening the gate to allow 'Ponty' and his henchman enter inside it, natural and spontaneous reaction on his part was to prevent it. To achieve that, he immediately fired at Narender Ahlawat and thereafter, at 'Ponty'. It is relevant to note that at that stage, he did not fire at 'Namdhari' and Sachin Tyagi sitting in the Land Cruiser. At that moment, 'Namdhari' and Sachin Tyagi alighted from the Land Cruiser and fired at 'Hardeep' on vital organs i.e. chest and back causing his death instantaneously. The Trial Court has noted that 'Namdhari' and Sachin Tyagi had exceeded their right of private defence and killed 'Hardeep'. They were charged under Sections 304/34 IPC as their case was covered within the domain of exception 4 to Section 300 IPC. The findings of the

Trial Court in this regard cannot be sustained at this stage. It committed error to presume without any evidence on record that firing by ‘Namdhari’ and Sachin Tyagi at ‘Hardeep’ was in the exercise of self-defence or that their case fell in exception 4 to Section 300 IPC. It was for the accused persons to prove during trial that the firing at their hands was not intentional to commit murder or was in the exercise of self-defence.

14. After hatching conspiracy on 16.11.2012, on 17.11.2012, a meeting was convened in the farm house of ‘Ponty’ and a comprehensive plan was chalked out to execute it. The accused persons accordingly formed an unlawful assembly with the common object to take forcible possession of the farm house. In furtherance of that common object, the assailants with deadly / lethal weapons went to farm house No.42. After they succeeded in their object to take forcible possession, at 12.30 p.m. ‘Ponty’, ‘Namdhari’ and Sachin Tyagi arrived there to consolidate their possession and then the shooting incident took place. These circumstances, prima facie would attract provisions of Section 149 IPC.

15. Quoting ‘*Bhagwan Singh and ors. vs. State of M.P.*’, 2002 (4) SCC 85, in a recent case of ‘*Prathap and anr. Vs. State of Kerala*’, 2011 (2) SCC (Cri.) 450, the Supreme Court observed :

“Common object, as contemplated by Section 149 of the Indian Penal Code, does not require prior concert or meeting of minds before the attack. Generally, no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons attacked the victim, had the common object for an offence which was known to be likely to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons or being a by-stander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances be deemed to be the members of the unlawful assembly. In this case, the accused persons have been proved to be on inimical terms with the complainant-party. The enmity between the parties had been aggravated on account of litigation with respect to the dispute over the mango trees. Accused persons who came on the spot are shown to have come armed with deadly weapons. The facts and circumstances of the case unequivocally prove the existence of the common object of such persons forming the unlawful assembly, who had come on the spot and attacked the complainant party in consequence of which three precious lives were lost. The High Court was, therefore, justified in holding that the accused persons, involved in the occurrence, had shared the common object.”

(Emphasis supplied)

16. In ‘*Sikandar Singh and Ors. Vs. State of Bihar*’, 2010 (7)

SCC 477, the Supreme Court discussed law under Section 149 IPC :

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

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

15. In *Mizaji and Anr. v. State of U.P.* : AIR 1959 SC 572 explaining the scope of Section 149 IPC, this Court had observed thus:

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

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

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

by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.”

(Emphasis supplied)

17. Again, in ‘*Ramachandran and Ors. etc. vs. State of Kerala*’, 2011 (4) JCR 147 (SC), observations of the Supreme Court are relevant in similar circumstances :

“12. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under second part of Section 149 IPC 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 if a body of persons go armed to take forcible possession of the land, it would be right to say that 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 IPC.

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14. However, once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some

overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [See: Daya Kishan v. State of Haryana : (2010) 5 SCC 81; Sikandar Singh v. State of Bihar : (2010) 7 SCC 477, and Debashis Daw v. State of W.B. : (2010) 9 SCC 111].

15. The crucial question for determination 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 specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons which 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. (Vide: Masalti v. State of Uttar Pradesh : AIR 1965 SC 202)

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19. Regarding the application of Section 149, the following observations from Charan Singh v. State of U.P. : (2004) 4 SCC 205, are very relevant:

13. The crucial question to determine 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 in Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be

common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter.?

21. Thus, this Court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident."

(Emphasis given)

18. In view of the settled preposition of law referred above, it was not permissible for Trial Court to exonerate respondents No.7 & 8 of the offence under Section 302/34 IPC at the stage of consideration of charge when there were specific allegations that by firing repeatedly at 'Hardeep', they had killed him. Learned Spl. Public Prosecutor categorically pointed out that two bullet injuries were found on Hardeep's body. The bullets had exited and as such, no bullet was recovered from inside the body. The Ballistic report indicated that empty cartridges recovered at the spot have been matched with the weapons possessed by Sachin Tyagi and 'Namdhari'. One bullet with no deformity recovered at the spot has been matched with the weapon of Sachin Tyagi.

19. The Trial Court misdirected itself to find respondents No.7 & 8's case falling within exception 4 to Section 300 IPC in the absence of any such plea or evidence. It was for these accused during trial to establish that their case was covered within the said exception and firing at their instance was in self-defence or that the shooting incident was a sudden and unexpected event / development. 'Hardeep' had not caused any harm to respondents No. 7 & 8. Settled law is that the initial burden to establish the complicity of the accused is on the prosecution but the burden of

proving circumstances so as to bring the case within the exceptions of right of private defence is on the accused. Of course, the standard of proof required to discharge the burden of proof is not proof beyond reasonable doubt but preponderance of probabilities. In my considered view, prima facie there was ample material to proceed against respondents No.7 & 8 under Section 302/34 IPC. The other respondents were also prima facie equally liable for the said acts of respondents No.7 & 8 with the aid of Section 149 IPC. The three stages referred to by the Trial Court in the impugned order were not mutually exclusive to each other and were interconnected. Series of acts were linked together to present a continuous whole. It was not a case of trespass or dispossession simplicitor. The common object of the unlawful assembly was to get possession of farmhouse No.42 by any means whatsoever even using violence. It was a pre-planned well thought conspiracy or else there was no occasion for 'Ponty' to direct 'Namdhari' and Narender Ahlawat to mobilise resources to achieve the object.

20. In '*Ghanshyam Sharma vs. Surendra Kumar Sharma & ors.*', 2014 STPL (Web) 551 SC, Supreme Court observed :

"11. Whether the respondents are guilty under Section 379 IPC or not is a matter of evidence. The fact that the police chose to file a chargesheet

under Section 406 and 420 IPC is not conclusive regarding the offences for which the respondents-accused are to be tried. The trial Court can always frame an appropriate charge if there is sufficient material from the report of the police available before it. In case where the material is insufficient to frame a charge, the trial Court may either discharge the accused or may direct further investigation in the matter. Before deciding as to which one of the three courses of action mentioned above is to be resorted to, the trial Court must examine the content of the complaint, the evidence gathered by the investigating agency and also scrutinize whether the investigating agency proceeded in the right direction.”

(Emphasis given)

21. Omission of Section 149 IPC in the charge-sheet, is inconsequential.

22. Charge is required to be framed under Section 412 IPC against respondent No.4 as he was allegedly found in possession of robbed mobiles phones. The impugned order is silent as to why charge under Section 412 IPC was not framed against respondent No.4. Regarding prosecution's plea to frame charge under Sections 25/27 Arms Act against respondent No.6, it has come on record that it was a licensed weapon and was not used at the time of commission of crime. Hence, at this stage, no charge under Sections 25/27 Arms Act is made out against him.

23. In the light of discussion in CrI.R.P.162/2014, CrI.R.P.298/2014 filed by Narender Kumar Ahlawat does not survive. His presence at the spot is not in dispute. Various roles have been attributed to him by the prosecution in the hatching of the conspiracy and its execution. He was in regular / constant touch on phone at the relevant time with 'Ponty' and actively participated in the occurrence facilitating the execution of plan. At the time of shooting occurrence, he was present at the spot and allegedly was opening the gate of the farmhouse to allow 'Ponty', 'Namdhari' and Sachin Tyagi to enter inside the farmhouse to consolidate their possession. It will be during trial to find out if he was merely following the instructions of his employer bonafide as claimed.

24. In the light of above discussion, CrI.R.P.No.162/2014 filed by the State is allowed in the above terms. Charge under Sections 302/34 IPC shall be framed against respondents No.7 & 8. The other respondents shall be charged under Section 302 IPC read with Section 149 IPC. Respondent No.4 shall also be charged under Section 412 IPC.

25. CrI.R.P.No.298/2014 filed by Narender Kumar Ahlawat is dismissed.

26. Observations in the order shall have no impact on the merits of the case.

27. The criminal revision petitions stand disposed of accordingly.

Pending applications also stand disposed of.

28. Trial Court record be sent back immediately with the copy of the order.

(S.P.GARG)
JUDGE

MAY 15, 2015 / tr