

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

+ **Crl.A. No.821/2001**

% **Date of Decision: 24.12. 2010**

Jai Singh & Anr. .... Appellants  
Through Ms. Ritu Gauba, Advocate

Versus

The State (Delhi Admn) .... Respondent  
Through Mr.Jaideep Malik, APP

**CORAM:**

**HON'BLE MR. JUSTICE ANIL KUMAR**

**HON'BLE MR.JUSTICE S.L.BHAYANA**

- |    |                                                                       |     |
|----|-----------------------------------------------------------------------|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not?                                | NO  |
| 3. | Whether the judgment should be reported in the Digest?                | NO  |

**ANIL KUMAR, J.**

\*

1. The appellants, Jai Singh and Smt.Savitri Devi, husband and wife, have challenged their conviction by judgement dated 11<sup>th</sup> October, 2001 under Sections 302/34 of Indian Penal Code for murdering Rakesh Kumar and their sentence to life imprisonment and a fine of Rs.1,000/- each and in default to undergo rigorous imprisonment for one year by order dated 12<sup>th</sup> October, 2001 in Sessions Case No.350 of 1996, titled as 'State v. Jai Singh & Another'

arising from the FIR No.434 of 1992, under Sections 307/302/342/34 of the Indian Penal Code, PS S.P. Badli.

2. According to the prosecution, a vacant piece of land at the back of the house of the appellants, which was also behind the house of Rakesh, deceased and his family members had led to disputes between the appellants and the family of Rakesh, the deceased. The disputes were going on for some time and on 27<sup>th</sup> October, 1992, appellant No.1 allegedly went to the house of Rakesh, deceased, and asked him to settle the disputes amicably. At the instance of the appellants, Rakesh, the deceased allegedly accompanied appellant No.1 to his house.

3. At about 6/6.15 pm, 10 minutes after Rakesh had left for the settlement of disputes with appellant No.1, PW-8 Sh. Mahender Singh the elder brother of Rakesh heard his voice saying “Bachaa Bachaa”. According to PW-8 Sh. Mahender Singh, he went to the house of appellant No.1 and he found the doors of the house closed from inside. He also heard the appellants shouting loudly and saying that they would eliminate Rakesh. Sh. Mahender Singh, therefore,

pushed open the door and witnessed the appellants holding the lathies in their hands and Rakesh lying in a pool of blood. According to him, on account of fear he could not muster courage to extricate his brother from the clutches of the appellants and he went to make a call to the police station from a PCO located at a distance of about one and half kilometers on foot. When he had gone to call the police from the PCO, a PCR Van came and removed Rakesh to the hospital. Later on Mahender Singh also went to the hospital where his brother succumbed to his injuries. An FIR No.434 of 1992 was registered.

4. On 27<sup>th</sup> October, 1992 the police challaned the appellants for illegally confining Rakesh in their house and for attempt to murder him by causing injuries on him. The injuries caused to the deceased resulted into his death in the hospital on 28<sup>th</sup> October, 1992 and so the appellants were challaned under Sections 307/302/342/34 of the Indian Penal Code.

5. The appellants pleaded not guilty and claimed trial. During the trial, the prosecution examined 14 witnesses including doctor

L.T.Ramani, PW-1 who had conducted the post mortem on 28<sup>th</sup> October, 1992 and noticed 19 external injuries as under:

**EXTERNAL INJURIES**

1. *Stitched wound 5 cm long, vertically placed on the right side of fore-head area/frontal area.*
2. *Stitched wound 1 cm long transversally placed on the right tempo region with abrasion around.*
3. *Stitched wound 1 cm long just below the right eye.*
4. *Defused bruising over the lips.*
5. *Stitched wound on the muscous surface of both limbs 1 cm and 1.5 cm long.*
6. *Stitched wound 2.5 cm long on the right side of chin.*
7. *Bruise 6 cm x 5 cm with abrasion on the right temporal region.*
8. *Abrasion 2.5 cm x 2.5 cm on the epigastric region of abdomen.*
9. *Abrasion 2.05 cm x 1 cm on the right lumber region of abdomen.*
10. *Abrasion 3 cm x 2 cm on the top of right shoulder.*
11. *Abrasion 5 cm x 5 cm on the left hip region.*
12. *Abrasion 4 cm x 2 cm on the right knee.*
13. *Multiple abrasion scattered on the front of left knee.*
14. *Lacerated 1 cm x 0.5 cm with abrasion on the left leg shin.*

15. *Defused swelling on the back of rt. Hand with abrasion 2 cm x 1 cm on the dorsem of wrist and 6 cm x 4 cm on the dorsem of hand.*
16. *Abrasion 1 cm x 1 cm on the right elbow.*
17. *Abrasion 2 cm x 1 cm on the lateral surface of left elbow.*
18. *Irregular ligature marks present horizontal on the right postero-lateral aspect of neck of 2 and a half x 1/2", intermittently seen on the left postero-lateral aspect of neck.*
19. ***Small incised wound 1 cm muscle deep on the back at the level of 8<sup>th</sup> thoracic vertebra.***

6. PW-1 had opined that the injuries were ante mortem and injury No.19 on the back of the chest was caused by sharp penetrating weapon and injury No.18 was possible with some rough ligature material whereas all other injuries were caused by blunt object force. The Doctor had also opined that the injury on the skull was sufficient in the ordinary course of nature to cause death.

7. The post mortem was conducted on 28<sup>th</sup> October, 1992 and the death had occurred 6 hours prior to the post mortem and was on account of coma resulting from head injury. There was one stitched wound 5 cms long. Other stitched wounds were of 1 cm and 1.5 cm and other injuries were the abrasions and lacerations. Original post

mortem report was not traceable and, therefore, the photocopy of the post mortem was exhibited as Ex.PW1/A. The prosecution had examined Head Constable Krishan Kumar as PW-3 who was given information by PCR van about a quarrel in the village Khera Kalan and that three persons had been injured. In his statement recorded on 2<sup>nd</sup> March, 1998 he stated that he had accompanied the PCR van and had removed deceased Rakesh and appellant and one lady Natho to Hindu Rao Hospital. The said witness was not cross examined on that day and his statement was concluded. However, without any request or application by either of the parties, he was recalled for examination when he deposed that condition of Rakesh was very bad when he was taken in the PCR van and he had told HC Krishan Kumar that he was beaten up by accused Jai Singh and Savitri by lathis. This witness was cross examined on 6<sup>th</sup> July, 2000 after about four months. In his cross examination he denied that on the way to hospital Rakesh was saying that jelly of his own brother had struck him in the back. He also denied that Rakesh was unconscious and could not have given any statement. About not deposing these facts earlier when he was examined on 2<sup>nd</sup> March, 1998, he stated that he did not remember these facts at the time and, therefore, he had not deposed about the same and had deposed later on about them.

8. Dr. Alexander of Safdarjung Hospital Forensic Science Department was examined as PW-7 who deposed that on 27<sup>th</sup> October, 1992 he was posted as casualty medical officer when he had examined Mukesh (he referred to Rakesh as Mukesh) who was admitted by Constable Krishan Kumar and at that time he was unconscious. He also opined that most of the injuries were caused by blunt objects.

9. The elder brother of the deceased Rakesh, Sh. Mahender Singh was examined as PW-8 who deposed that the disputed land was behind their house and behind the house of the appellants. He further deposed that Jai Singh had come to his house and had taken his younger brother Rakesh in order to settle the dispute about the concerned land. According to him his brother was beaten by lathis and jelly or such like object and on seeing him the appellant had moved towards him also, which had scared him. Apprehending trouble he ran away and went to PCO and informed the police. When he came back to the house of the appellant, he came to know that his brother Rakesh had already been removed to the hospital by PCR van. According to him his brother expired during the night and his death was declared in the morning. He categorically deposed that two lathis and the blood were lifted from the house of the appellant.

According to him one lady's salwar suit was also seized from the spot. In his cross examination he deposed that the settlement of the land was to be arranged with his brother and not with him though he was living jointly. He also admitted that Ram Singh was his elder brother and he was living with him. He deposed that both the appellants were taken in the PCR van with the dead body of Rakesh. He also admitted that the telephone booth was at a distance of 1 or 1½ Kms from the spot and that he had gone running to the telephone booth and it had taken him about 10-15 minutes to reach there and return to the spot. According to him he had telephoned police station Samaipur Badli and he got the number of the police station Samaipur Badli from the booth owner. He disclosed that the distance between the place of incident and police station Samaipur Badli is about 6-7 kms.

10. PW-8 Mahender Singh denied that his brother Rakesh was friendly with Jai Kumar and Raj Kumar, however, he admitted that Raj Kumar was killed in an encounter with police on 6<sup>th</sup> January, 1993. He also admitted that he had read in the newspaper that Raj Kumar was accused of murdering Inspector Pratap Singh Rana of Delhi Police. He denied the suggestion that on 27<sup>th</sup> October, 1992 at about 6.30 PM his brother deceased Rakesh with Jai Kumar and Raj

Kumar had trespassed in the house of the appellants and had tried to kill Jai Singh. However, he admitted that a cross case was pending where his deceased brother and his friends Jai Kumar and Raj Kumar were the accused persons and the appellant No.1 was the complainant.

11. SI Ramesh Narang who was under suspension was examined as PW-14, and he admitted that at the spot he had found three injured persons, the appellants and deceased Rakesh who were removed to the hospital in the police van. According to him blood samples were lifted from two places i.e room and the verandah. He also deposed about finding a blood stained rope behind the trunks in the house. He further deposed about finding two lathies and one lady's suit in the house which was seized and sealed vide memo Ex. PW14/G. The said police witness during cross examination admitted that he was under custody and earlier he was arrested in a case under Section 451 and 509 of IPC. At the time of his cross examination he was in custody in a case under Section 304 of IPC. He denied the suggestion that nothing was recovered from the house of the appellants and that the recoveries were planted by him.

12. In the statement under Section 313 of the Criminal Procedure Code, the appellant No.2 stated that there is only one door in the house and so there was no question of closing the door from inside. She denied that Rakesh the deceased was tied with the rope and was beaten up by lathis. She deposed that she and her husband are innocent as the deceased and his brothers were aggressors and they wanted to kill them after trespassing in their house. Appellant no.1 Jai Singh in his statement under Section 313 of the Criminal Procedure Code also deposed that he and his wife are innocent and the deceased and his brothers were aggressors and they wanted to kill them after committing a trespass in their house. The witness examined by the appellants as defence witness brought the record of FIR No.459/1992 registered under Section 308/452/34 of IPC P.S. Samaipur Badli and proved the copy of the FIR as exhibit Ex. DW1/A.

13. On the basis of the evidence in this case and the record of FIR No.459/1992 under Section 308/452/34 which was registered against the deceased and his accomplices, Jai Kumar and Raj Kumar who were killed in police encounters, it is contended by the learned counsel, Ms. Gauba that the appellants had acted on account of their right of private defence as deceased Rakesh and his friends Raj

Kumar and Jai Kumar had trespassed in their house with a view to kill them and even had fired at them. Relying on the copy of the case diary produced on the record she has pointed out that three blank cartridges with the inscription .8 MM were recovered and another blank cartridge of .12 bore was also recovered. She has also contended that though the allegation of the prosecution is that the appellants had attacked the deceased with a lathi and a jelly or a like substance, however, neither the jelly nor any article similar to jelly or having a sharp edge which could have caused a sharp edged injury was recovered from their house. Reliance has also been placed on the post mortem report indicating that the deceased had suffered an injury at the back which was 1 cm deep at the level of eighth thoracic vertebra caused by a sharp penetrating weapon and not by the lathis.

14. According to the learned counsel the right of self defence need not be taken by the appellants specifically and she placed reliance on Satya Narain Yadav vs. Gajanand and Anr. AIR 2008 SC 3284. According to her the right of self defence can be established on the preponderance of probabilities. To augment her argument that deceased Rakesh with his friends had been the aggressors and had come to their house, she relied on the FIR No.459/1992 which was

registered on a later date of 15th November 1992. She contended that as Rakesh Kumar died and his two accomplices also died in police encounter, one of whom was even accused of murdering a police Inspector, the case had abated and in the circumstances she requested that this Court should exercise its power and call for the case relied on and case diary of FIR No.459/1992.

15. The learned Additional Public Prosecutor who had the record and the case diary of FIR No.459/1992 after perusing the same very fairly conceded that the case diary records the statement of Sh. Raj Kumar stating that due to anger he had attacked with jelly at Jai Singh and by chance he had injured Rakesh during attack and he succumbed to his injuries later on. He also stated that he was having enmity over a piece of land situated behind the house of Jai Singh. The FIR No.459/1992 was registered pursuant to complaint of Smt. Nathu Devi, wife of Sh. Sheo Chand under Section 308/452/34 of IPC who had disclosed that she along with her son Jai Singh and his wife Savitri Devi and children were present in her house when suddenly Rakesh son of Har Lal and his accomplices Raj Kumar and Jai Kumar both sons of Chote Lal who were also residents of the same village entered their house using abusive language and attacked her son Jai Singh with lathis and jelly as her family is

having a dispute over a piece of land at the back of their house. She disclosed that she ran and couldn't save her son from getting injured. She saw deceased Rakesh having a lathi whereas Jai Kumar had a jelly and Raj Kumar was having a pistol in his hand. According to her she along with her daughter-in-law Savitri Devi sustained injuries and accidentally jelly of Jai Kumar had hit Rakesh in his back and he had fallen on the ground in the verandah of the house.

16. This Court had directed the learned Additional Public Prosecutor to file the copies of the police file and case diary of FIR No.459/1992 under Section 308/452/34 of IPC dated 15<sup>th</sup> November, 1992 P.S. Samaipur Badli, Delhi. The copies were filed, which were taken on record and perused, especially the alleged statement of Jai Kumar that on account of anger he had attacked Jai Singh with jelly and by chance during one of his attack he had injured Rakesh with the jelly. The learned counsel, Ms. Gauba also contended that the incident was reported by the appellants to police on number 100 which is substantiated from the statement of PW-10 HC Usha No.1179 regarding the receipt of information on telephone about the incident of stabbing. However on the complaint of mother of the appellants, the FIR was not registered and it was registered

only with the intervention of the higher police officials on 15<sup>th</sup> November, 1992.

17. The learned counsel for the appellant, Ms. Gauba has also relied on the report dated 20<sup>th</sup> July, 1993 of Central Forensic Science Laboratory, Central Bureau of Investigation stipulating receipt of parcel Nos.1 to 7 containing one .12 bore fired cartridge case marked C/1 and three .315/8 mm fired cartridge cases marked C/2 to C/4 which were sent in connection with FIR No.434/1992 dated 28<sup>th</sup> October, 1992 under Section 307/342/34 P.S. Samaipur Badli to contend that the blank cartridges were recovered from the house of the appellant and could be recovered only if the guns/pistols were fired by the deceased and his friends. The learned counsel relying on the charge sheet in the case FIR No.459/1992 has also drawn our attention to MLC, X-Ray report of Jai Singh and Nathu. According to her these reports have not been produced deliberately by the respondent nor was constable Naresh examined to whom the blank cartridges were given by a boy to suppress the relevant material and implicate the appellants.

18. The learned counsel for the appellants has very emphatically contended that the version of the solitary witness PW-8 brother of

the deceased is highly unreliable and incredulous and should not be relied on to inculcate the appellants. According to her he has made grave contradictions in his testimony and his conduct is not natural. In the first information report it was disclosed that the appellants were holding lathis in their hands whereas in the Court PW-8 had deposed that the deceased Rakesh was beaten with lathi or jelly or such like object. According to her this is a vital inconsistency and contradiction which makes his statement unreliable. According to her he had also not witnessed the incident and his version that he intimated the police from the booth after taking the phone number of the police, is also not substantiated as the information was received at police number 100 pursuant to which DD No.20 was recorded and it has not been established that a complaint was registered pursuant to the alleged call made by Mr. Mahender Singh, PW-8 brother of the deceased to the police station Samaipur Badli. According to the learned counsel as it has been established beyond all reasonable doubt that the appellants had also received injuries, consequently the appellants had a grave apprehension and if they had acted in self defence with lathis, they cannot be inculpated in the facts and circumstances. Relying on AIR 2009 SC 1262, Ravishwar Manjhi & Ors v. State of Jharkhand the learned counsel contended that if the accused had sustained injuries and they were also removed to the

hospital and their MLCs were recorded which is apparent from the charge sheet of FIR No.459/1992 then it casts a duty on the prosecution to explain the same and in its absence the plea of the appellant for entitlement of private defence would deserve serious consideration.

19. The learned counsel, Ms. Ritu Gauba relying on AIR 2008 SC 3284, Satya Narain Yadav v. Gajanand & Anr regarding the right of private defence contended that the appellants were not required to raise a specific plea and the Court can consider its availability even in absence of a specific plea by the appellants. In any case, according to her it has even been put to the witnesses of the prosecution, with regards to what has been categorically stated by the appellants in their statement under Section 313 of the Criminal Procedure Code that the deceased and his two companions Raj Kumar and Jai Kumar who were killed in an encounter with the police were aggressors and that they had trespassed in the house of the appellants and attacked them by lathis, jelly and guns and that both the appellants had acted only in self defence. The learned counsel also asserted that though the burden of proof of self defence lies on the appellants, however, the burden of proof of self defence is not as onerous as on the prosecution to prove the guilt of the appellants

beyond reasonable doubt as the right of self defence can be established even on the basis of the preponderance of probabilities. According to her in order to find whether right of private defence is available or not what is to be seen is whether the injuries were received by the accused; imminence of the threat to their safety and in the circumstances whether the appellants had time to take recourse to public authorities. According to her all these factors are present and have been established on the basis of record in the case of the appellants and, therefore, they are entitled to the plea of self defence and are liable to be acquitted. It is further submitted that since the aggression on the appellants was in their own house and they had used only lathis whereas the deceased and his companions Raj Kumar and Jai Kumar had come with pistols, jelly and lathis it cannot be inferred that the appellants have used the right of self defence as a weapon of retribution or aggression though there have been disputes in respect of land at the back of their houses. The learned counsel has also relied on AIR 1975 SC 1674, Puran Singh and Ors v. The State of Punjab to contend that in the facts and circumstances of the present case, appellants had not used more force than what was necessary and the deceased and his friends were the aggressors as they had come and trespassed in their house with guns and deadly weapons whereas the appellants had tried to

defend themselves only with lathis and though the deceased died of a wound on his head which was on account of a blunt weapon, however, he was also injured by his own friend Jai Kumar, which was admitted by him and which fact has also been established from the post mortem report which proves that an injury at the back was sustained by the deceased by a sharp edged weapon.

20. Regarding the testimony of PW-8, elder brother of the deceased and his conduct where instead of saving his brother on account of alleged attack by the appellants he went on foot to complain to the police at a distance of 1½ kms instead of going to his own house which was opposite to the house where the alleged attack had taken place where admittedly his father and elder brother were also staying, it is apparent that he had not witnessed anything and has been planted by the prosecution. The inconsistencies in the version given in the FIR and in the Court also make his deposition unreliable and his conduct also is apparently unnatural and in the circumstances such conduct raises doubt about him being an eye witness. According to her PW-8 is a planted witness and on the basis of his testimony the appellants cannot be convicted and sentenced. Reliance has also been placed by the learned counsel on AIR 2010 SC 3398 Birappa & Anr v. State of Karnataka

21. Per contra the learned Additional Public Prosecutor has very vehemently contended that the appellants cannot take the plea of self defence as the same is not established merely on the basis of exhibit DW1/A which is the copy of the FIR proved by the witness of the appellants. It is further contended that Ramesh Narang Investigating officer had not found any cartridges in the room of the appellants where the alleged attack by the deceased and his alleged companions had been mounted. Relying on the recovery of the rope, the learned counsel also contended that if the deceased was tied with a rope and beaten by the appellants then the appellants could not have been injured as is sought to be contended on their behalf.

22. The learned Additional Public Prosecutor has also emphasized on the testimony of the real brother of the deceased who was examined as PW-8 and has contended that in view of his testimony the plea of self defence of the appellants cannot be sustained nor are they entitled to take benefit of the same. According to him in the circumstances even on the allegation of the appellants, it cannot be inferred that they had reasonable apprehension of death or grievous hurt from deceased Rakesh so as to attack him with lathis. Relying on the post mortem report it is submitted that the death of the deceased occurred on account of the injuries inflicted by a blunt

object on the head of the deceased and consequently the appellants cannot propound the right of private defence.

23. This Court heard the learned counsel for the parties in detail and has perused the trial Court record especially the testimonies of the witnesses and the relevant documents. This has been established that the DD No.20A which was exhibited as Ex PW 14/A reflected that HC Usha No.1179 had passed on a wireless message that one lady has been stabbed and that the police may be sent which was passed on to P.S.Samaipur Badli. The case of the appellants is that when they were attacked by the deceased Rakesh and his two accomplices Jai Kumar and Raj Kumar, a telephone call was made by their mother, whereas the testimony of PW-8 brother of the deceased is that from the place of incident he went on foot for about 1½ kms to a PCO booth and from there after taking the phone number of P.S.Samaipur Badli he made a complaint. The call alleged to have been made by PW-8 to Samaipur Badli has not been established. Rather the testimony of PW-10 HC Usha No.1179 is categorical in stating that she was working in PCR and had received an information on telephone about the incident of stabbing which information was passed on to P.S.Samaipur Badli on the basis of which DD No.20A was recorded.

24. The trial Court has based the conviction of the appellants solely on the basis of the testimony of PW-8 brother of the deceased Rakesh Kumar and has not considered the plea of self defence of the appellants who have proved a copy of the FIR No.459/1992 pertaining to the incident of 27<sup>th</sup> October, 1992 at 6.30 AM which was proved as exhibit DW 1/A. The trial Court was of the view that the defence of the appellants has not been proved by them by examining all the witness and that the FIR does not prove that the accused had acted in self defence and as no other evidence has been produced by the accused persons, so they have not been able to prove their plea of self defense. From the perusal of the cross examination of the witnesses of the prosecution and the statement of the appellants under Section 313 of the Criminal procedure Code it cannot be denied that the appellants have taken the plea that they acted in self defence when deceased Rakesh and his accomplices Jai Kumar and Raj Kumar trespassed in their house and attacked them with pistol, jelly and a lathi.

25. This cannot be disputed that even in absence of direct evidence the Court may infer compulsion of the appellants to act in self defence from the attendant circumstances. Rather it is not necessary

for the appellants to have led the evidence on the point as they can rely on the evidence adduced before the Court even by the prosecution. It is not that the appellants have not led any evidence as they examined DW-1 Shri Daya Chand who proved the copy of the FIR 459/1992. Though DW 1/A copy of FIR No.459/1992 per se does not prove the plea of the appellants but this FIR coupled with other evidence on record does establish the right of the appellants on the preponderance of probability that they acted in self defence. The other evidence on record is report dated 20<sup>th</sup> July, 1983 sent by Central Forensic Science laboratory regarding 9 parcels which were sent to the laboratory in connection with the FIR No.434/1992 dated 28<sup>th</sup> October, 1992 P.S.Samaipur Badli. The respondent had sent parcel nos.1 to 7 the contents of which are described as, 12 bore fired cartridge case (marked C/1) and three .315 inch/8 mm fired cartridge cases marked C/2 to C/4. Though this report was not proved by calling the concerned Senior Scientific officer, Ballistic division or leading any other evidence, however, this report is filed by the prosecution and it is admissible under Section 293 of the Criminal Procedure Code. Reliance can be placed on the same in support of the plea raised by the appellants that they had acted in self defence. If the cartridges were recovered and they were sent by the prosecution to Central Forensic Science Laboratory, then they

must have been recovered from the site. It was for the prosecution to explain as to from where these fired cartridges had come. Though the learned Additional Public Prosecutor has contended that these fired cartridges were given to constable Naresh Kumar by a child who had deposited the same in the Malkhana which is apparent from the case diary, a copy of which is produced on the record of the case. The photograph of the case diary at page 235 of the trial Court record stipulates that the three fired cartridges of brass with the inscription 8 mm and 1 fired cartridge of .12 bore were deposited by him which was given to him by one child. The prosecution for the reason best known to them did not examine constable Naresh Kumar who could have deposed as to from where the child had brought these fired cartridges, if not from the site of the incident. This is also not disputed and cannot be disputed that constable Naresh Kumar was involved with the case and in the circumstances it will be difficult to infer that the fired cartridges were brought by the child from somewhere else other than the place of incident. In any case it was for constable Naresh Kumar to have enquired from the child who had given the fired cartridge to him as to from where he had picked up those cartridges. This would also be relevant to consider that a police constable will not just pick up any fired cartridge given by a child in a particular case without enquiring whether the fire cartridge handed

over to him are relevant to that particular case or not. In any case in order to clear the doubt which is sought to be created now at this stage by the learned Additional Public Prosecutor, the respondent ought to have examined constable Naresh Kumar. Since the fired cartridges were sent for forensic analysis with reference to the FIR which was registered at the instance of the brother of the deceased, it has to be inferred that the cartridges were recovered from the site where the deceased was injured otherwise the respondent would not have sent these cartridges for analysis with the reference of FIR no. 434 of 1992. In the absence of any cogent or reliable explanation by the respondent, the inevitable inference is that the cartridges were picked up by a child from the spot, that is the house of the appellants and handed over to constable Naresh Kumar as the appellants had been injured in the incident and admittedly were removed by PW-3 Krishan Kumar in the PCR van along with the deceased Rakesh Kumar to the hospital.

26. This Court had directed the respondents to produce the case file of FIR No.459/1992 which was registered later on, even though the complaint was made by the mother of the appellants at the same time when the incident had taken place indicating that there had

been a stabbing incident and that a man was injured. The FIR No. 459 of 1992 which was registered at the instance of the mother of the appellants stipulates about an MLC, X ray report of Jai Singh and MLC, X-ray report of Natho. It cannot be disputed in the circumstances that the MLC of appellant no.1 was done on his admission in the hospital. However, the report has not been produced by the respondent. Even if the report has not been produced, a fact can be inferred that the appellants were injured in the incident. Had the MLC been produced, it could have only established the extent of injuries suffered by the appellants. In the circumstances on the preponderance of probabilities it cannot be held that Jai Singh appellant No.1 had not suffered any injury because if he had not suffered any injury there would not have been any MLC of Jai Singh which also necessitated taking his X-rays.

27. This is no more res integra that the burden which rests on the appellants to prove self defence is not of the same rigor as the burden of the prosecution to prove the guilt of the appellants as the standard of proof required to discharge the burden of proof resting on the accused propounding the plea of self defence is not proof beyond reasonable doubt but is one of preponderance of

probabilities. A plea of private defense stands discharged by showing preponderance of probabilities in favor of the plea. These propositions are authoratively settled by the decisions of the Supreme Court in *Munshi Ram and ors. v. Delhi Administration*, AIR 1968 SC 702; *Mohinder Pal Jolly v. State of Punjab*, AIR 1979 SC 577 and *State of Punjab v. Gurbux Singh and ors.* (1996) SCC (CrL.) 88. The absence of a specific plea invoking the right of private defense or any affirmative evidence to prove the same is, therefore, inconsequential. What is important is whether the evidence available on record probalilises the plea raised. If it does reasonably do so, the appellants must have the benefit of the same no matter if the plea is not proved to the hilt. A division Bench of this High Court in *Maya v. State*, 2004 (3) C.C.Cases (HC) 149 had held so especially in para 17 at page153. In AIR 2008 SC 3284, *Satya Narain v. Gajanand & anr.* the Supreme Court had held that abstract test for availability of right of self defense cannot be laid down. It being a question of fact, the Court has to consider all surrounding circumstances for determining its availability and accused need not raise a specific plea and the Court can consider its availability even in absence of plea by accused. The Supreme Court in *Surendra & anr. v. State of Maharashtra* (2006) 11 SCC 434 in paras 26 had commented about

the duty of the prosecution to explain the injuries on the part of the accused. The Supreme Court had held as under:

‘26. We are not unmindful of the fact that in all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific plea of right of private defence has been raised. It may be true that in the event prosecution discharges its primary burden of proof, the onus would shift on the accused **but the same would not mean that the burden can be discharged only by examining defence witnesses.**

27. The learned courts below committed a manifest error of law in opining that the appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. **The courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case.**

32. In regard to the duty of the prosecution to explain the injuries on the part of the accused, this Court observed: (SCC pp. 683-84, paras 78-80)

“78. Section 105 of the 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.**

79. 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 hypertechnical approach should be avoided.

80. 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.”

If that be so then on the basis of the evidence on record on the preponderance of probabilities it is inevitable to infer that the appellants were injured in the incident in their house and there was firing which is established from the fired cartridges which were recovered and had been sent by the prosecution for analysis to the Forensic Laboratory. It is also established by the documents on record especially post mortem report which was exhibited as PW 1/A that the deceased was also inflicted with an injury in his back by a sharp edged weapon which could be a jelly or such similar object having a sharp edge.

28. From the record it is also apparent that what is recovered from the residence of the appellants are two lathis and not one lathi and one jelly or a similar thing having a sharp edge which could be used as sharp edged weapon. If the jelly or a similar thing having a sharp edge had not been recovered from the residence, where the incident had taken place, it cannot be concluded that the appellants had used lathis and jelly both to inflict injury on the deceased. If the injuries 1 to 17 are in the front of the deceased by a blunt edged weapon and only one injury was at the back of the deceased which was from the sharp edged weapon, the probability that the sharp edged injury at the back was inflicted by the companions of the deceased cannot be ruled out.

29. Although the case diary of first information report No.459/1992 which was summoned by this Court had been perused where it is stated that Sh.Jai Kumar, accomplice of the deceased had admitted that when he attacked appellant No.1 with jelly, by chance in one of his attack he had injured the deceased who succumbed to his injuries later on. This case diary, however, is not admissible in evidence.

30. The fact that the deceased died due to injuries and his accomplices against whom the FIR No.459/1992 was registered under Section 308/325/452/34 of IPC had died in police encounters, cannot be ignored altogether. These facts enumerated hereinbefore give credence to the plea of the appellants that the deceased and his accomplices had attacked them with a firearm, a jelly and a lathi and that the appellants defended themselves with lathis in their own property. On the basis of preponderance of probability the plea of self defense in the facts and circumstances by the appellants cannot be ruled out altogether and creates a doubt in the version as propounded by the prosecution.

31. The statement of PW-3, HC Krishan Kumar was recorded on 2<sup>nd</sup> March, 1998 who deposed that he was given information by PCR van that a quarrel had taken place in village Khera Kalan and that three persons had been injured pursuant to which he accompanied the PCR van and removed the deceased and the appellants to Hindu Rao Hospital. On 2<sup>nd</sup> March, 1998 he did not depose about any statement given by deceased Rakesh to him. On 2<sup>nd</sup> March, 1998 since nothing adverse was deposed by HC Krishan Kumar to the appellants, he was not cross examined on behalf of appellants and

his statement was closed. Though his statement was closed and none of the parties, it appears from the record had recalled him for further examination, his statement was again recorded on 6<sup>th</sup> March, 2000 when he improved from his earlier statement and deposed that the deceased Rakesh Kumar was in a bad condition, however, he was speaking intermittently and in a feeble voice he told PW-3 that he was beaten up by appellants in their house after being tied with a rope and he was called to their house by appellant Jai Singh. This witness, thereafter, was cross examined almost after 4 months when he said that he did not depose about the alleged statement of the deceased made in a feeble voice in the first instance on 2<sup>nd</sup> March, 2000 when he had appeared in the witness box, as he did not remember all the facts on that date. The alleged statement allegedly made to him by the deceased was not recorded by him anywhere. According to HC Krishan Kumar the deceased Rakesh Kumar was in a bad condition and was speaking intermittently. The testimony of the doctor who attended to him when he was admitted in the hospital, however, reveals that when he was admitted in the hospital he was in an unconscious state. The brother of the deceased PW.8 Mahender Kumar had rather deposed that when Rakesh Kumar was removed from the house of the appellants to the hospital he was already dead. If according to PW-8 his brother was already dead

when he was removed in the PCR van to the hospital, then PW-3 could not have heard his statement. PW-3 also did not disclose about this alleged statement on 2<sup>nd</sup> March, 2000 when his statement was recorded and closed. Hence his statement recorded again later on is not reliable and cannot be accepted in the entirety of the facts and circumstances. PW-8 Sh.Mahender Singh in his cross examination was categorical that both the accused (appellants) were taken to the hospital by the police with the dead body of Rakesh Kumar. In the circumstances, the statement of Krishan Kumar that the deceased had told him in a feeble voice that he was beaten up by the appellants after being tied with the rope cannot be believed. Mere recovery of alleged rope also does not establish that the deceased was tied up with the rope as PW-18 has not deposed as to how the deceased was tied up though the injury No.18 is an irregular ligature mark on the right posterior lateral aspect of the neck but it has not been established that the said injury had been caused from the alleged rope recovered from the house of the appellants.

32. While considering the right of the appellants of self defence the cardinal principles which must be kept in mind are that: 1) everyone has a right to defend one's person and the property and the law does

not require anyone to be a coward or to run away in the face of peril;  
2) the right of self defence is not to be exercised for causing more harm than necessary or for taking revenge. It is also to be considered that the right of self defence commences when necessity begins and ends when necessity ends.

33. After considering the testimony of PW-8 Mahender Singh, brother of the deceased, this Court considers it to be unreliable. The houses of the appellants and the deceased and the said witnesses are adjacent to each other in as much as there is only the disputed land between the two houses, still when Mahender Singh allegedly saw his brother being beaten up, he opted not to extricate or save his brother from the clutches of the appellants who only had lathis but opted to walk on foot to a distance of 1½ kms to a PCO Booth to call the police instead of going to his house adjacent to the house of the appellants where admittedly his elder brother and father were also residing and he must have also known other neighbours to call them to help him to save his brother. The said witness also deposed that he enquired the phone number of P.S.Samaipur Badli and intimated the said police station and that when he came back to the house of the appellants, the PCR van had already come and removed his

brother and the appellants to the hospital. The allegation that he had called the police from the PCO booth has not been established rather what has been established is that the mother of the appellants had called the police at number 100 pursuant to which information was sent to PCR van which was dispatched to the scene of occurrence and which had removed the deceased Rakesh Kumar and the appellants in the injured condition. The conduct of the brother is quite unnatural in the facts and circumstances. In AIR 2010 SC 3398, *Birappa & anr. v. State of Karnataka* where an alleged eye witness brother of the deceased had deposed though he had seen his brother being cut, had left him and had come after some time to enquire about him, it was disbelieved by the Apex Court and it was held that such a conduct of the brother raises a doubt in him being an eye witness. In this case relied on by the appellant the Supreme Court had not relied on the testimony of such a brother and no other witness had supported the prosecution and had therefore acquitted the accused. It was further held that where prosecution story rests on a single witness, the evidence of such a witness must inspire full confidence. Considering the entire testimony of PW-8 in the light of the other testimonies on the record, it is apparent that for the foregoing reasons it is unreliable and he appears to have been planted by the prosecution though he was not an eye witness. The

prosecution has also failed to explain as to how the cartridges were recovered and sent to Central Forensic Laboratory and how the deceased had suffered an injury in his back with a sharp edged weapon when no sharp edged weapon had been recovered from the appellants except two lathis. Taking all these factors into consideration on the basis of preponderance of probabilities, it can be inferred that the deceased with his accomplices Jai Kumar and Raj Kumar had trespassed on the property of the appellants and had attacked them. An injury with a sharp edged weapon and non recovery of jelly or a sharp edged weapon from the house or at the instance of the appellants is also indicative of the fact that the said injury at the back of the deceased was not caused by the lathis which was with the appellants which they used to save themselves from the attack on them.

34. This is no more res integra that where an individual citizen and his property is faced with danger and immediate aid from the state machinery is not readily available, the individual citizen is entitled to protect himself and his property and in the circumstances the individual citizen is entitled to use violence to defend himself and his property. In the case of the appellants it is to be inferred that the deceased with his accomplices Jai Kumar and Raj Kumar who were

later eliminated in police encounters on account of murdering a police inspector, attacked the appellants at their residence. It is not that there was no reason for the deceased to attack the appellants but it has been admitted and established that the land adjacent to their respective house was the bone of contention between the two. The incident took place at the residence of the appellant as is also indicated by the prosecution version that the blood samples were lifted from the room and the verandah of their house. The appellants tried to have the aid from the state by calling the police and as long as the police authorities did not reach them, if the appellants used lathis to protect themselves against the attack on them with the fire arms, jelly or such sharp edged weapon and lathis, the use of lathis by the appellants cannot be termed to be unduly disproportionate and cannot be termed to have exceeded their legitimate purpose. From the facts of the case it is also inevitable to infer that the right of the appellants to private defence was not vindictive or malicious.

35. On the cumulative reading of all the testimonies and the plea of the appellants, this Court is of the opinion that the judgement of the trial Court convicting and sentencing the appellants cannot be sustained. Accordingly this Court allows the appeal of the appellants

and sets aside the judgement of conviction dated 11<sup>th</sup> October, 2001 and order of sentence dated 12<sup>th</sup> October, 2001 of the appellants in Sessions Case no. 350 of 1996, titled as 'State v. Jai Singh & Another' arising from the FIR No.434 of 1992, under Sections 307/302/342/34 of the Indian Penal Code, PS S.P. Badli. The sentence of appellant no.2 was suspended and she was released on bail on her furnishing personal bond of Rs.10,000/- with two sureties of like amount pursuant to order dated 26<sup>th</sup> October, 2005 whereas the sentence of the appellant no.1 was suspended and he was released on bail on furnishing personal bond of Rs.10,000/- and one surety of like amount pursuant to order dated 6<sup>th</sup> November, 2006. Since their conviction and sentence have been set aside their bail bonds are cancelled and their sureties are discharged. The appellants shall be entitled to their freedom unless they are required in any other case. Ordered accordingly

**ANIL KUMAR J.**

**December 24, 2010**  
'k/rs'

**S.L.BHAYANA J.**