

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.161 of 1993

With

Criminal Appeal (DB) No. 173 of 1993

With

Criminal Appeal (DB) No. 252 of 1993

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AGAINST THE JUDGMENT OF CONVICTION, DATED 02.04.1993, AND
THE ORDER OF SENTENCE, DATED, 03.04.1993 PASSED BY SHRI
MANOHAR PRASAD, 1ST ADDITIONAL SESSIONS JUDGE,
BHAGALPUR, IN SESSIONS TRIAL NO. 376 OF 1982, ARISING OUT OF
SANHAULA POLICE STATION CASE NO. 46 OF 1982.

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1. Sk. Newazuddin @ Sekh Khan @ Sk. Uddin, son of late Quamruddin
2. Sk. Makbul, S/o Sk. Newazuddin @ Sekh Khan
3. Sk. Nemani, S/o late Sk. Jalasi
4. Sk. Jahir, S/o late Sk. Jalasi
5. Sk. Rustam, S/o late Sk. Amin
6. Sk. Salamati, S/o late Quasmani
7. Sk. Manir, S/o late Fakhruddin

All residents of village Singhpur, P.S. Mahgama, Dist. Godda

.... Appellants (**In Criminal Appeal (DB) No. 161 of 1993**)

With

1. Sk. Sekhawat, S/o Sk. Saphru
2. Sk. Saphru, S/o Kamruddin
- Both residents of village Singhpur, P.S. Mahgama, Dist. Godda
3. Nathan Singh, S/o of Shri Chhedi Singh,
resident of village Gangarampur, P.S. Sanhaula, Dist. Bhagalpur
4. Deobrat Singh, S/o Shri Musahab Singh,
resident of village Dhuaway, P.S. Sanhaula, Dist. Bhagalpur

.... Appellants (**In Criminal Appeal (DB) No.173 of 1993**)

With

1. Jai Narain Singh, S/o Musaheb Singh
2. Umesh Singh, S/o Musaheb Singh
3. Sk. Manwa alias Sk. Jamiruddin, S/o Taj Ali,
Appellant Nos. 1 and 2 are residents of Dhowab,
P.S. Sonhaula, District Bhagalpur
Appellant No.3 is resident of village Seenpur,
P.S. Mahgama, Dist. Godda

.... Appellants (**In Criminal Appeal (DB) No. 252 of 1993**)

Versus

The State of Bihar

.... Respondent (**In all the appeals**)

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Appearance :

(In CR. APP (DB) No. 161 of 1993)

For the Appellants : Mr. Krishna Mohan, Advocate

(In CR. APP (DB) No. 173 of 1993)

For the Appellants : Mr. Rama Kant Sharma, Senior Advocate

(In CR. APP (DB) No. 252 of 1993)

For the Appellants : Mr. Rama Kant Sharma, Senior Advocate

For the Respondent: Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 18-05-2015

Under the judgment, dated 02.04.1993 passed, in Sessions Trial No. 376 of 1982, by learned 1st Additional Sessions Judge, Bhagalpur, the accused-appellants, Umesh Singh, Jai Narain Singh, Sk. Manwa @ Jamiruddin, stand convicted under Section 302 of the Indian Penal Code and Section 27 of the Arms Act, 1959, the accused-appellant, Deobrath Singh, stands convicted under Sections 148 and 302 read with Section 149 of the Indian Penal Code and Section 27 of the Arms Act, 1959, accused-appellant, Pinku Singh, stands convicted under Section 302 read with Section 149 of the Indian Penal Code and Section 27 of the Arms Act, 1959, accused-appellants, Jahir and Nathan, stand convicted under Section 302 read with Section 149 and 147 of the Indian Penal Code and accused-appellants, Sk. Newazuddin @ Sekh Khan @ Sk. Uddan, Sk. Makbul, Sk. Nemani, Sk. Jahir, Sk. Rustam, Sk. Salamat and Sk. Manir, stand convicted under Section 302 read with Section 149 of the Indian Penal Code. In consequence of their conviction under Section 302 of the Indian Penal Code, the



accused-appellants, Umesh Singh, Jai Narain Singh and Sk. Manwa @ Jamiruddin stand, under the order, dated 03.04.1993, sentenced to suffer imprisonment for life and to suffer imprisonment for seven years each for their conviction under Section 27 of the Arms Act, 1959. While the accused-appellant, Deobrat Singh, stands sentenced to suffer imprisonment for life for his conviction under Section 302 read with Section 149 of the Indian Penal Code, he is sentenced, for his conviction under Section 27 of the Arms Act, 1959, to suffer imprisonment for seven years and also to suffer, for his conviction under Section 148 of the Indian Penal Code, imprisonment for three years. For their conviction under Section 302 read with Section 149 of the Indian Penal Code and under Section 147 of the Indian Penal Code, the accused-appellants, Jahir and Nathan, stand sentenced to suffer imprisonment for life and to suffer imprisonment for two years respectively. For their conviction under Section 302 read with Section 149 of the Indian Penal Code, the accused-appellants, Makbul, Sk. Nemani, Sk. Shekhawat, Sk. Safru, Sk. Manir, Sk. Salamat, Sk. Rustam and Sk. Newajuddin @ Sk. Uddan, stand sentenced to suffer imprisonment for life. All the sentences have been directed to run concurrently.

2. The case of the prosecution, as unfolded by the First Information Report, may, in brief, be described as under:



(i) About 45 bighas of land in village Kusahapur, which falls under Sanhaula Police Station, belonged to, and was owned by, accused Jai Narain Singh. Though the said land, popularly known as "*Kusahapur Nimiya Bandh Bahiyar*", was owned by accused Jai Narain Singh, it (i.e., the land) was used to be cultivated by the first informant, Sk. Sahabuddin, and his co-villagers, including Sk. Gambhir, Sk. Jamruddin, Hussaini Ansari and Sk. Manir (since deceased) and others, on the basis of sharing of crops raised thereon.

(ii) Those, who had been so cultivating the land, as indicated hereinabove, came to learn that accused Jai Narain Singh had sold the land to accused Sk. Newajuddin @ Sk. Uddan, Sarpanch of village Singhpur. While the seller was from village Dhoabe, the purchaser belonged to village Singhpur.

(iii) On 29.06.1982, accused Jai Narain Singh brought accused Sk. Newazuddin (since deceased) to the said land and, while showing the land, told the latter that the said land was the one, which had been sold to him (Sk. Newazuddin).

(iv) On the following day, i.e., on 30.06.1982, at about 10 A.M. , when the first informant, Sk. Sahabuddin, was making an outlet on the said land in order to drain out water from the field, accused persons, namely, Sk. Newazuddin, Sk. Amin, Sk. Nemani, Sk. Salamat, Sk. Fakruddin, Sk. Manir, Sk.

Munwa @ Jamiruddin, Sk. Mazhar, Sk. Shekhawat, Sk. Safari, Sk. Safru, Sk. Newazuddin @ Sk. Uddan along with 6-7 persons, came to the said field. While accused Jai Narain Singh, Deobrat Singh, Umesh Singh, Pinku Singh were armed with guns, accused Nathan Singh was carrying a bag, Sk. Jamaruddin was armed with 303 pistol and rest of the accused were carrying *lathis, spears and gadasas*.

(v) Having entered the land, Jai Narain Singh and the persons, accompanying him, started ploughing the land and when the informant, Sk. Sahabuddin (P.W.12), and other cultivators, tried to stop accused Jai Narain Singh and his associates from ploughing the field, pulling and pushing started between the two groups of persons; one group being of those, who had come with accused Jai Narain Singh, and other group being of those of people, who, along with the informant and others, had been cultivating the land on the basis of sharing of crops as stated hereinbefore.

(vi) When the two groups were so pushing and pulling each others as mentioned hereinabove, accused Umesh Singh fired on the informant, Sk. Shahabuddin, Sk. Safru and Sk. Hussaini causing injuries to them. Sk. Rasul and Sk. Hussain were also injured, but they were injured by the bullets fired by accused Jai Narain Singh. Pinku Singh fired from his gun on Sk. Gambhir and Sk. Jamurrudin. Accused Jai Narain Singh fired on



Sk. Manir for the second time and Sk. Manir died. Similarly, accused Umesh Singh fired at Sk. Hussaini for the second time and, on sustaining the second bullet injury so fired by accused Umesh Singh, Sk. Hussaini died at the spot. In the clash between the two groups, in all, four persons, namely, Sk. Jamruddin, Sk. Gambhir, Sk. Manir and Sk. Hussaini, happened to be killed, all the said four persons having sustained two bullet injuries each and it was not the first, but the second bullet fired at them, which made them breathe their last.

(vii) Leaving the said dead bodies at the place of occurrence, the assailants fled away and the first informant, Sk. Sahabuddin, along with others, including some injured persons, came to Sanhaura Police Station.

(viii) On arrival at the Police Station, Sk. Sahabuddin, orally, reported the occurrence to K. K. P. Singh (P.W.15), a Sub-Inspector of Police. The oral information, so given, was reduced into writing in the form of *fardbayan* and, treating the said *fardbayan* as the First Information Report, Sanhaura P.S. Case No. 46 of 1982, under Sections 147/148/149/307/302/324 of the Indian Penal Code and Section 27 of the Arms Act, 1959, was registered.

(ix) During investigation, police visited the place of occurrence and found dead body of Sk. Jamiurrdin lying at the land of accused Jai Narain Singh, which was, as mentioned



hereinbefore, popularly known as "*Kusahapur Nimiya Bandh Bahiyar*". The remaining dead bodies had already been carried to their respective houses. The police also found a plough at *Kusahapur Nimiya Bandh Bahiyar*, i.e., the land of accused Jai Narain Singh. Inquests were held over the said dead bodies, which were also subjected to *post mortem* examination. The injured, too, were medically treated and, on completion of investigation, a *charge sheet* was laid, under Sections 147/148/149/307/302/ 324 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against the accused persons aforementioned.

3. At the trial, charges, under Section 302 read with Section 149 of the Indian Penal Code, were framed against all the accused. Substantive charge, under Section 302 of the Indian Penal Code, was also framed against accused Umesh Singh, Jai Narain Singh, Pinku Singh and Jamiruddin. Apart from the fact that a charge under Section 324 of the Indian Penal Code was framed against accused Umesh Singh, Deobrat, Jai Narain Singh and Pinku Singh, a charge, under Section 27 of the Arms Act, 1959, was also framed against accused Umesh Singh, Jai Narain Singh, Pinku Singh, Deobrat and Jamiruddin. To the charges so framed, accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 16 (sixteen) witnesses. The accused were, then,



examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being, in brief, that the land, in question, belonged to accused Jai Narain Singh, who not only possessed the land, but also cultivated the land. The first informant and others had never been in possession of the land, in question, nor had they ever cultivated the land and it was, therefore, falsely asserted, as contended by the prosecution, that the first informant and his other co-villagers used to cultivate the said land. It is also the case of the defence that the first informant and his co-villagers resented the fact that the said land had been sold by accused Jai Narain Singh to an outsider, namely, Sk. Newazuddin, who belonged to village Singhpur, and accused Jai Narain Singh wanted to give possession of the land to the purchaser, namely, Sk. Newazuddin. The informant and his co-villagers, therefore, according to the defence, decided that they would not allow accused Jai Narain Singh to hand over the possession of the land, in question, to accused Newazuddin and when accused Jai Narain Singh went to hand over possession of the land aforementioned to the purchaser (i.e., accused Sk. Newazuddin), the informant and his co-villagers, who were present around the land, came to resist the handing over of the



possession of the land by the seller to the purchaser. It is the further case of the defence that many of the co-villagers of the informant stated coming towards the land, in question, armed with various weapons and as the situation had not only become tense, but also dangerous to lives of accused Jai Narain Singh and others, firing was resorted to from the end of the accused in order to protect their lives and properties and it was in such a situation that *death* of as many as four persons had taken place.

5. The defence, too, adduced evidence by examining five witnesses. As far as accused Sk. Nemani and Md. Makbul are concerned, they took the plea of *alibi*.

6. Having, however, found the accused guilty of the offences, which they stood charged with, learned trial Court convicted them accordingly and passed sentences against them as mentioned above.

7. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, as convict, have preferred these appeals.

8. We have heard Mr. Rama Kant Sharma, learned Senior Counsel, appearing for the appellants and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. While considering the present appeals, it may be pointed, at the very outset, that according to the evidence of Dr.

Haider Imam Ansari (P.W.13), who had, on 02.07.1982, at about 12.45 P.M., admittedly, conducted *post mortem* examination on the dead body of Sk. Manir, which stood decomposed with maggots present thereon, the examination revealed as follows:

"(1) Multiple small fire arm wounds of entry nearly circular and shape & black in colour. The size of the wounds was about $\frac{1}{4}$ cm x $\frac{1}{2}$ cm in diameter. The injuries were found spread right upper part of chest, lower part of chest, right side abdomen, right forearm and right thigh. They were eight in number.

On dissection:

The interior costal spaces, in right side, was infiltrated with blood clots. Fire arm wounds were found in upper lobe of right lung and right vertical. Chest cavity in right side has blood clot about 50 c.c. Two small metallic pellets deformed in shape were found lodged in the right lung and right vertical. One pellet was found also in right iliac farsa."

10. In the opinion of the doctor (PW 13), all the injuries were *ante mortem* in nature and caused by fire-arm and were sufficient to cause *death* in the ordinary course of nature, time elapsed since *death* being within 48 to 60 hours.

11. On the same day, i.e., on 02.07.1982, at about 2.15 P.M., the doctor (PW 13) conducted *post mortem*

examination on the dead body of Sk. Gambhir, which, too, was in decomposed condition and the examination revealed as under:

"(1) Firearm wound of entry with black & lacerated margin on left side of face, forehead, left eye & frontal bone. All the injuries had caused a big hole 4" x 3" on left side of face.

On dissection:

left side facial bone including zygomatic nasal bone, frontal bone and the left maxillary bone were found broken into several small pieces. Two pellets were found in the cranial cavity which contained same liquefied brain substance."

12. In the opinion of the doctor (PW 13), the injuries, which were *ante mortem* in nature,, cause by fire-arm and were sufficient to cause *death* in the ordinary course of nature, time elapsed since *death* being within 48 to 60 hours.

13. On 02.07.1982 itself, at 1.45 P.M. the doctor (PW 13) performed *post mortem* examination on the dead body of Sk. Zamruddin and found as follows;

"(i) Firearm wound of entry with lacerated black margin 4" x 3" x Brain deep on right side of face (Cheek). The right maxilla , nasal bone & other facial bone found broken into multiple small pieces forming a big hole in

the right side of face.

On dissection:

The wad and four pellets were recovered from the big hole above said and from the liquifying brain substance. On dissection of skull, the skull was found broken into multiple small pieces in occipital, frontal, right parietal regions."

14. In the opinion of the doctor (PW 13), the injuries were *ante mortem* in nature, the same, having been caused by fire-arm and were sufficient to cause *death* in the ordinary course of nature, time elapsed since *death* being within 48 to 60 hours.

15. The doctor (PW 13) has further conducted the *post mortem* examination, on 02.07.1982, at about 01:15 PM, on the dead body of Sk. Hussaini Ansari and found as follows:

" (i) *firearm wound of entry 1 ½" x 1" x Bone deep on chin.*

(ii) *Firearm wound of entry on upper part of neck in front size ¾" x ¾" x ½".*

(iii) *On dissection of neck and the track, the skin, soft tissues including muscles, B.V., nerves Trachea, esophagus & hyoid bone was found lacerated and infiltrated with blood clots. The 6th & 7th cervical vertebra was found punctured. One deformed metallic ball of diameter ¾" x ½" was found lodged in the body of the seventh cervical vertebra."*

16. In the opinion of the doctor (PW 13), the injuries were *ante mortem* in nature, the said injuries were caused by fire-arm and were sufficient to cause *death* in the ordinary course of nature, time elapsed since *death* being within 48 to 60 hours.

17. The findings of the doctor with regard to cause of *deaths* of the said deceased and/or his opinion with regard to the nature of weapons, which might have been used, for causing the *death* of the said four deceased were not seriously disputed. We, too, do not find anything inherently incorrect or improbable in the evidence given by the doctor (PW 13).

18. In the face of the findings of the doctor (PW 13) and his opinion with regard to the nature of weapons used and nature of injuries, which have been sustained by the said deceased, we have no hesitation in concluding that all the abovementioned deceased had met *homicidal death*.

19. The question, which, however, remains is: whether the accused-appellants or any of them had committed the offences, which they stood charge with?

20. Our quest to the question, posed above, brings us to the evidence of the informant, Sk. Shahabuddin (PW 12), whose evidence is that on 30.06.1982, at 9:00 - 10:00 A.M., he was present at the agricultural field, popularly known as



“Kusahapur Nimiya Bandh Bahiyar”, and, at that time, about 20-25 men from village Kusahapur also arrived there, but before the arrival of the informant and his co-villagers there, some *haserhi* (members of the unlawful assembly) came to cultivate the said paddy field, which belonged to accused Jai Narain Singh, and, on arriving at the field, the *haserhi* started ploughing the field. It is also in the evidence of P.W.12 that his co-villagers came and asked those, who were so ploughing, not to plough the field. It is the further evidence of P.W.12 that even a co-villager told those persons, who were ploughing the field, that the said field, which belonged to accused Jai Narain Singh, was being cultivated by P.W.12 and his associates and, on the resistance so offered, quarrel took place and, at that point of time, firing was started.

21. P.W.12 has deposed that because of firing, Sk. Shafique, Sk. Kalim, Sk. Gambhir, Sk. Zamiruddin, Sk. Manir, Hussaini Ansari, etc., suffered injuries. P.W.12 has clarified, in his evidence, that when first firing took place, no one died and that he (PW 12) fled away. It is the evidence of P.W.12 that even after he started running, he heard the sound of firing and, in the said firing, four persons, namely, Sk. Gambhir, Sk. Zamiruddin, Sk. Manir, Hussaini Ansari died and that he (P.W.12) and others carried the said dead bodies to Sanhaura Police Station, where his statement was recorded, but the same

was signed after the Superintendent of Police arrived there. It is the clear evidence of P.W.12 that he did not recognize any of the assailants.

22. Though P.W.12 was declared hostile by the prosecution and cross-examined, the prosecution could not elicit anything except putting the previous statement said to have been made by this witness (PW 12), under Section 161 of the Code of Criminal Procedure, to the Investigating Officer, which is, admittedly, not substantive evidence.

23. In his cross-examination by the defence, P.W.12 has, however, admitted that the land of accused Jai Narain Singh was being cultivated by accused Jai Narain Singh himself and, at the arrival of those, who had come to cultivate the land of Jai Narain Singh, his co-villagers came running with lathis, etc., to the said field and when they all reached near the group of people, who were cultivating the land, the firing started and when he (PW 12) suffered injuries, he (PW 12) fled away and did not see as to what had happened.

24. From the evidence of the informant (P.W.12), what becomes abundantly clear is that the land, in question, had been in occupation and use of accused Jai Narain Singh inasmuch as it was accused Jai Narain Singh, who used to himself cultivate the land meaning thereby that the said land had not been in occupation of anyone other than accused Jai

Narain Singh. There was no re-examination of P.W.12 by the prosecution and the evidence, so given by P.W.12, remained undisputed and unchallenged.

25. What also becomes clear from the evidence of P.W.12 is that some persons had come to the land, in question, and tried to plough the land and this act of ploughing was resisted by the informant's co-villagers, who came running, armed with *lathis* and when they reached near the group of people, who were trying to cultivate the land, the firing took place. .

26. In view of the fact that the informant (PW 12) himself has admitted that the land, in question, had not only been in possession of accused Jai Narain Singh, but also in accused Jai Narain Singh's use and that it was accused Jain Narain Singh, who had been cultivating the land himself, it logically means that the said land had been, and remained, at the relevant point of time, in the possession and use of accused Jai Narain Singh, who had been cultivating the land, and no one from village Kusahapur had been cultivating the land on crop sharing basis.

27. Bearing in mind what have been pointed out above, when we come to the evidence of PW 2 (Sk. Hussaini), we notice that according to his evidence, one day before the occurrence took place, accused Jai Narain Singh, accused



Newazuddin and some other people had come to the land, popularly known as "*Kusahapur Nimiya Bandh Bahiyar*", and accused Jai Narain Singh showed the said land to accused Newazuddin and, on the next day, which was a Wednesday, when he (PW2), at about 9-10 AM, was near the said land, about 40-45 persons came there armed with various weapons, such as, guns, pistols, *lathis*, *bhala*, *gada* and sword and after accused Jai Narain Singh and his associates so reached the land aforementioned, Sk. Jamaruddin, Sk. Gambhir, Sk. Manir, Hussaini Ansari, Sk. Shahabuddin, Sk. Safir, Sk. Rasool, Sk. Nazamuddin, Sk. Kalim, Sk. Qutubuddin, Sk. Manir, along with some other inhabitants of the village, arrived there.

28. According to the evidence of PW 2, the accused aforementioned were variously armed with guns, country-made pistol, *bhalas*, *garasa*, sword and *lathis*.

29. It is the evidence of PW 2 that the accused wanted to plough the field, but he (PW 2) and his co-villagers asked the accused persons not to cultivate the land and this led to exchange of words between the parties concerned and, then, accused persons rushed forward to chase PW 2 and his co-villagers, whereupon PW 2 and his co-villagers ran from the said field and came to the field of P.W.11 (Fakhruddin), but insisted upon the accused persons not to plough the field and the resistance, so offered, led to exchange of abuses between the

parties and indiscriminate firing was resorted to by the accused persons.

30. It is also the evidence of PW 2 that the bullet fired by accused Jai Narain Singh hit him on his hand, leg, rib, etc. and that Sk. Jamiruddin and others were also injured in the said firing and, on being so injured, they went to some distance and saw that four persons, namely, Sk. Jamiruddin, Sk. Maneer, Sk. Gambhir and Hussaini Ansari had fallen at some distance. It is the further evidence of PW 2 that accused Jai Narain Singh shot at Sk. Manir again, whereupon Sk. Manir fell down and died. Sk. Gambhir and Jamruddin had also died on receiving gun-shots injuries. P.W 2 managed to reach his house and, then, he (PW 2), along with six other injured persons, were taken to Sanhaura Police Station, where PW 12 (Sk. Shahabuddin) gave his statement and, thereafter, the injured were sent to hospital by the police.

31. As correctly noted by the learned trial Court, broadly in tune the evidence of PW 2 is the evidences of PW 3, PW 4, PW 5, PW 6 and PW 7, who have claimed to have been injured on the day of occurrence and PW 16, whose evidence is the same as PW 2, has reported that he was not injured.

32. What is, however, important to note, while considering the evidence of PW 12, coupled with the evidence of PWs. 2, 3, 4, 5, 6 and 7, is that despite the claim that the

injured were sent to hospital by the police, as indicated above, no doctor has been examined to prove that the witnesses aforementioned had suffered injuries.

33. Moreover, the consistent evidence of not only PW 12, but also of PWs. 2, 3, 4, 5, 6, 7 and 16 is to the effect that while PW 12 and his co-villagers were fleeing away from the agricultural field of accused Jai Narain Singh, four of them, namely, Sk. Jamruddin, Sk. Gambhir, Sk. Manir and Sk. Hussaini, were shot at and died. However, the *post mortem* examinations did not reveal that any of the said four deceased persons had been shot at their back. More importantly, though the consistent evidence, adduced by the prosecution, is that the said four deceased persons were shot by bullet twice and it was the second bullet injury sustained by them, which resulted into their *deaths*, the *post mortem* report revealed only one bullet injury being received by the said four deceased persons.

34. Clearly, therefore, the evidence of the prosecution witnesses, describing the occurrence that the informant and his co-villagers were chased and fired at their back and the said four deceased persons sustained two bullet injuries each and it was the second bullet injury, sustained by them, which caused their *death*, is false or, at any rate, these witnesses have presented before the Court a distorted and colourised version of the occurrence and not the truth, far less

the complete truth.

35. The above inference gets reinforced from the fact that though it is common evidence of P.Ws. 2, 3, 4, 5, 6, 7 and 16 that the land, in question, belonging to accused Jai Narain Singh, was being cultivated, at the relevant point of time, by the residents of village Kusahapur, the evidence of P.W.12 belies this assertion of P.W. 2, 3, 4, 5, 6, 7 and 16 inasmuch as the first informant (PW 12) has deposed, in no uncertain words, that the land, in question, has all along been in the occupation and use of accused Jai Narain Singh and it was accused Jai Narain Singh, who used to cultivate the said land.

36. Coupled with the above, what cannot be ignored and must not be ignored is that it transpires from the cross-examination of P.W.2 that proceedings, under Sections 144 and 145 of the Code of Criminal Procedure, had been drawn up in respect of the said land and that in both the said cases as well as cases related thereto, P.W. 2 and his associates had lost up to the High Court and, thereafter, no civil suit had been filed.

37. It needs to be pointed out that a proceeding, under Section 145 of the Code of Criminal Procedure, is for the purpose of making declaration of possession of land and water and since the proceedings aforementioned ended in favour of accused Jai Narain Singh, the interference would be, in the face of the admission of none other than P.W.2, coupled with the



evidence of PW 12, that the land, in question, had not only been in the possession of accused Jai Narain Singh, but accused Jai Narain Singh used to cultivate the said land himself, there can be no escape from the conclusion, on the basis of the evidence adduced, that until the time the occurrence took place, the said land had been in occupation and use of accused Jai Narain Singh and not in the occupation and use of the residents of village Kusahapur and that the residents of the said village had no right to resist the act of handing over of the possession of the land by accused Jai Narain Singh to accused Newazuddin.

38. Since the case of the defence boils down to taking the plea of *private defence*, it may be noted that Section 100 of the Indian Penal Code provides, *inter alia*, that the right of *private defence* of the body extends, under the restrictions mentioned in Section 99 of the Indian Penal Code, to the voluntary causing of *death* if the offence, which occasions the exercise of such right, be an assault as may reasonably cause the apprehension that *death* or *grievous hurt* will, otherwise, be the consequence of such assault. In other words, when the person, claiming the right of *private defence*, has to face assailants, who can be reasonably apprehended to cause *death* or *grievous hurt*, it would be open to such a person to defend himself by causing *death* of the assailant.

39. For the kind of situation as depicted above, it



needs to be borne in mind that it is generally assumed, in a well-ordered civilized society, points out the Supreme Court in **Jai Devi v. State of Punjab (AIR 1963 SC 612)**, that the State would take care of the persons and properties of individual citizens and that normally, it is the function of the State to afford protection to such persons and their properties, but it does not mean that a person, suddenly called upon to face an assault, must run away; rather, such a person is entitled to resist the attack and defend himself. No different is the position if such a person has to meet an attack on his property. Where, therefore, a person or his property faces danger and immediate aid from the State machinery is not readily available, such a person is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of *private defence* that the violence, which the citizen defending himself or his property is entitled to use, must not be unduly disproportionate to the injury, which is to be averted or which is reasonably apprehended. The exercise of the right of *private defence* must not, therefore, be vindictive or malicious.

40. In ascertaining if a person had the right of *private defence* in a given case, it needs to be borne in mind that when a person proves that he had a right of *private defence*, allowance has necessarily to be made for his feelings at the relevant time, when he is faced with an assault, which causes a



reasonable apprehension of *death* or *grievous hurt* and creates, inevitably, in his mind some excitement and confusion and, at such a moment, the uppermost feeling, in his mind, would be to ward off the danger and to save himself or his property and he would, naturally, be anxious, in such a case, to strike a decisive blow in exercise of his right of *private defence*. It is, no doubt, true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary; but in dealing with the question as to whether more force was used than was necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity at a distant point of time in the cool atmosphere of a Court-room. No wonder, therefore, that it is commonly observed by Courts that the means, which a threatened person adopts, or the force, which such a person uses, should not be weighed in golden scales.

41. A person, exercising his right of *private defence*, must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right of *private defence*, he can use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as the threat lasts and the right of *private defence* can be legitimately

exercised, it would not be fair to require that he should modulate his defence step by step and according to the attack before there is reason to believe that the attack is over. [**See Jai Devi v. State of Punjab (AIR 1963 SC 612). See also Puran Singh V. State Of Punjab (AIR 1975 SC 1674)]**

42. The answer to the question as to whether a person was entitled to exercise his right of *private defence* or has exceeded the right of *private defence* would depend on the facts and circumstances as may transpire from the evidence adduced in a given case.

43. Bearing in mind the scope of *private defence*, let us, now, revert to the case at hand and determine if the accused-appellants can be held to have acted in exercise of their rights of *private defence*.

44. As the land, in question, was owned by accused Jai Narain Singh, who, in turn, sold the land to accused Newazuddin, who was from village Singhpur, the informant, Shahabuddin (PW 12) and his co-villagers were annoyed with the sale of the land to Newazuddin. No wonder, therefore, that even P.W.2, when questioned by the defence, has candidly admitted that the sale of the land by accused Jai Narain Singh to accused Newazuddin annoyed the residents of Kusahapur and, in this regard, a *panchayati*, i.e., sitting of the villagers, took place, wherein it was decided by the residents of village

Kusahapur that whatever might be the consequences, Newazuddin would not be allowed to take possession of the land, in question.

45. The admission, which P.W.2 has made, makes it amply clear that the residents of village Kusahapur were determined not to let Newazuddin come into possession of the said land and, in order to stop Newazuddin from coming into possession of the land, they were determined to do anything and to go to any length. It is in this context that one has to consider the evidence of P.W.3, whose evidence is that there are 35-36 houses in their village and, at the time, when the occurrence took place, apart from 20-25 persons, who were present at the land, some people were coming from their village variously armed, and the evidence of PW 4 is that some persons came from east, some from west and other persons from north as well as from south, meaning thereby that those, who wanted to stop from ploughing accused Jai Narain Singh and accused Newazuddin (since deceased), came from all directions.

46. With regard to the above, we may point out that the evidence, given by P.W. 2, describing the occurrence, clearly shows that though the land, in question, belonged to accused Jai Narain Singh and had been in possession and use of accused Jai Narain Singh, the residents of village Kusahapur, who had apparently not been in possession of the land, wanted to stop



accused Newazuddin from taking possession of the land and, for this purpose, while some persons had already assembled at the said land, many were coming armed with various weapons to resist accused Newazuddin from taking over the possession of the land and/or accused Jai Narain Singh from handing over the possession of the land to accused Newazuddin.

47. In the circumstances indicated above, it cannot be held that the accused had no apprehension that they would be assaulted, injured and might even die inasmuch as the villagers of Kusahapur, as a whole, were larger in number than the accused persons; more so, when we notice that despite the fact that the accused were allegedly armed with various weapons including fire-arms, yet the residents of village Kusahapur were rejoining each other in order to forcibly stop Newazuddin from taking possession of the land.

48. We have already pointed out that the prosecution witnesses have presented a coloured version of the occurrence inasmuch as an altercation, according to the evidence of PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 16, took place between the parties concerned on the land, in question, the accused allegedly chased the residents of Kusahapur from the said land and, in order to save their lives, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7, and PW 16 came to the land of Fakhruddin (PW 11) by jumping over a *nala* (i.e., drain) and it was at the field of



Fakhruddin (PW 11) that Sk. Jamruddin, Sk. Gambhir, Sk. Manir and Sk. Hussaini, have been allegedly shot for the second time and died there. However, in this regard, the evidence of Fakhruddin (PW 11) is that accused Jai Narain Singh used to grow crops on his land and that there had been proceedings, under Sections 144 and 145 of the Code of Criminal Procedure, between accused Jai Narain Singh and the residents of Kusahapur, but the said disputes were decided in favour of accused Jai Narain Singh. Fakhruddin was not examined by the prosecution. He was merely tendered as a witness and, therefore, cross-examined by the defence.

49. We may pause here to point out if the evidences of PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 16 were true, all the said four deceased were shot at and died at the field of Fakhruddin (PW 11) and, therefore, their dead bodies would have been found at the field of Fakhruddin, whereas the Investigating Officer (PW 15) has, admittedly, found the dead body of Sk. Jamruddin at the land of accused Jai Narain Singh and the rest of the dead bodies had been taken to the respective houses of the deceased persons. The finding of the dead body of Sk. Jamruddin, at the field of accused Jai Narain Singh along with the plough, which was found lying there, eloquently speaks that the occurrence had taken place at the land which belong to accused Jai Narain Singh.



50. Above facts, in turn, eloquently speak that the prosecution witnesses have falsely tried to shift the place of occurrence from the land of accused Jai Narain Singh to the land of Fakhruddin (PW 11). In this regard, it is also noteworthy and cannot be overlooked that according to the F.I.R., the occurrence took place at the land of accused Jai Narain Singh. Consequently, the assertions of PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 16, that it was at the land of Fakhruddin (PW 11) that the said persons were shot at, are wholly untrue and false.

51. In the backdrop of the evidence discussed above and the inferences drawn therefrom, we find ourselves left with no option, but to conclude, and we do conclude, that having become victorious in all the proceedings, drawn under the law, with regard to the dispute in respect of the land, in question, as indicated above, and when no further suit or proceeding was pending in any Court of law with regard to the land, in question, between the parties concerned, accused Jai Narain Singh, as the evidence on record indicate, had the right to continue to possess the land and sell the same to anyone of his choice unless prohibited by law and that is what transpires from the evidence to have happened inasmuch as accused Jai Narain Singh sold the land in favour of accused Newazuddin (since deceased), but before accused Jai Narain Singh came along with accused Newazuddin and others to the land, in question, to hand over

possession of the land to the purchaser, namely, accused Newazuddin, the residents of village Kusahapur had already made up their mind and decided not to let, at any cost, accused Newazuddin, who belonged to village Singhpur, to take possession of the land.

52. In the situation indicated above, when some residents of village Kusahapur physically tried to stop the act of ploughing of the land by accused Newazuddin, not only abusive language was used, but also a sort of scuffle took place between the parties and it was in this kind of scenario that a large number of residents of village Kusahapur were seen approaching the land, armed with various weapons, and many others of their co-villagers were on the way to the land. Apprehending that they might not only be harmed physically, but might even die, firing from the end of the accused was resorted to and though it is alleged that each firearm was used more than once and that, too, when the residents of village Kusahapur were running away, it is clear from the evidence on record that the firing took place, when the residents of village Kusahapur, including the said four deceased persons, were moving forward to resist the ploughing of the land by the accused aforementioned. When the concern and apprehension of risk to the lives were real, the accused were within the ambit of their rights to defend their persons and also their property.



53. When visualized the scene of the occurrence, as we have done above, there remains no room for doubt that the accused aforementioned acted in exercise of their right to *private defence*, when they took recourse to firing. Sadly enough, four lives were lost. Because of the fact that four lives were lost, those, who were aggressors and impelled the accused to resort to firing, cannot be rewarded for their act of aggression if the accused were not shown, far less proved, to have exceeded their right to *private defence*. The accused-appellants are, therefore, required to be held, and we do hold, to have acted in exercise of their rights of *private defence* and they ought to be also held to have not exceeded their right to *private defence*, when apprehension of the accused-appellants that their lives and property were in danger cannot be really ignored or brushed aside, particularly, when the evidence on record, as depicted above, make it transparent that the residents of village Kusahapur far outnumbered accused Jai Narain Singh, accused Newazuddin (since deceased) and their associates and there is not even a particle of evidence to show that the accused did not have the requisite licences to carry the said fire-arms to the land, in question.

54. While, thus, confronting apprehension of *death* at the hands of the aggressors, neither the accused-appellant, Jai Narain Singh, nor accused Newazuddin (since deceased), could

have been expected to run away in order to save their lives and not stand at the land, in question, resolutely to protect the encroachment on the land, in question, which had become the property of the purchaser, namely, accused Newazuddin (since deceased).

55. Situated thus, we are clearly of the view that in the facts and attending circumstances of the present case, the accused-appellants deserve to be accorded, at least, benefit of doubt.

56. In the result and for the foregoing reasons, we allow these appeals. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offences, which they stood convicted of, and they are hereby acquitted of the same under benefit of doubt.

57. Since all the accused-appellants are on bail, their bail bonds are hereby cancelled and their sureties shall stand discharged.

58. Before parting with these appeals, we cannot help but observe that because of the fact that in the present case, a number of witnesses have been *tendered* by the prosecution at the trial without examining them, *in examination-in-chief*, by prosecution, we consider it appropriate to point out

the position of law in this regard so that the practice of tendering of witnesses, at the trial, is hereafter stopped inasmuch as we are clearly of the view that when the provisions embodied in the Code of Criminal Procedure, 1973, are considered in the light of the Evidence Act, 1872, the practice of *tendering* of a witness, at the trial, is wholly illegal and needs to be eschewed by the Courts.

59. The order of examination of witnesses is prescribed by Section 138 of the Indian Evidence Act, 1872.

60. Under the scheme of examination of witnesses, as embodied in Section 138, *witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

61. It would, thus be seen, as observed by the Supreme Court, in **Sukhwant Singh V. State of Punjab (AIR 1995 SC 1601)**, that Section 138 envisages that a witness would, first, be *examined-in-chief* and, then, subjected to *cross-examination* and, for seeking any clarification, the witness may be *re-examined* by the prosecution and there is, therefore, no meaning in *tendering* a witness for cross-examination only. The Supreme Court has held, in **Sukhwant singh** (supra), that tendering of a witness for cross-examination, in fact, amounts to giving up of the witness by the prosecution inasmuch as the prosecution, in such a case, chooses not to examine him-in-

chief.

62. We may point out that since the enactment of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "old Code"), the practice of *tendering* witnesses for *cross-examination*, in session trials, had been frequently resorted to, the reason behind taking recourse to such a practice was that under the old Code, as the same stood prior to its amendment by the Act 26 of 1955, envisaged a full-fledged *magisterial enquiry* in a case, which was triable *exclusively* by the Court of Session or the High Court in accordance with the procedure laid down in Chapter XVIII thereof, and, in such an enquiry, prosecution was required to examine all its witnesses and under Section 288 of the old Code (prior to its amendment by the Act 26 of 1955), the evidence of the witnesses, so recorded by the Committing Magistrate, could be treated, at the discretion of the Sessions Judge, as *substantive evidence* at the trial.

63. Thus, taking advantage of the above provisions embodied in the old Code (as the same stood prior to its amendment by the Act 26 of 1955), the prosecution, as pointed out by the Supreme Court, in **Sukhwant Singh** (supra), more often than not used to ask for and obtain leave of the Sessions Court to treat the depositions of the witnesses, recorded in the *committal enquiry*, whom the prosecution did not intend to examine afresh, as its evidence at the trial and, then, *tender*

them for cross-examination.

64. To put it a little differently, under the old Code (as the same stood prior to its amendment by the Act 26 of 1955), prosecution used to bring on the record of the trial Court, and relied upon, the testimonies of some of the witnesses recorded, at its instance, in the *committal proceedings* held before Magistrate, as its evidence during trial and, then, *tendered* them for cross-examination by the defence. By the Act 26 of 1955, which amended the Code of 1898, the Legislature restricted the examination of prosecution witnesses, in the *committal enquiry*, in respect of cases instituted on police report only to those, who were to give an ocular version of the incident only.

65. What is, however, of immense importance to note is that notwithstanding the provisions of Section 288 of the old Code (as it stood prior to its amendment by the Act 26 of 1955), many of the High Courts, such as, Bombay, Calcutta, Madras and Punjab, had consistently taken the view that there was no provision in the Code of Criminal Procedure, 1898, whereby the prosecution was permitted to *tender* a witness for *cross-examination* only without there being any *examination-in-chief* in relation to which, such a witness can be *cross-examined*.

66. The practice of *tendering* a witness for *cross-examination* had, therefore, been consistently discouraged and

even deprecated by the High Courts aforementioned as contrary to not only the old Code, but also Section 138 of the Evidence Act.

67. In the opinion of the Supreme Court, as expressed in **Sukhwant Singh** (supra), the High Courts correctly discouraged and deprecated the practice of *tendering* of witnesses for cross-examination only inasmuch as such a procedure was foreign to the procedure embodied in the Code of Criminal Procedure, 1898, even prior to its amendment by Act 26 of 1955.

68. Referring to the observations of the Supreme Court, in **State of UP and another V. Jaggo @ Jagdish and others (AIR 1971 SC 1586)**, that "*a witness could have been produced for cross-examination by the accused and that the accused were entitled to test his evidence*" does not support the view that a material witness can be *tendered* for cross-examination only and, therefore, the observations, made in **Jaggo's** case (supra), cannot, according to the Supreme Court, in **Sukhwant Singh** (supra), be read in isolation and divorced from the context in which the observations were made. The Supreme Court has also clarified, in **Sukhwant Singh** (supra), that it is improper for any Court to take out a sentence from a judgment of the Supreme Court divorced from the context in which the sentence was stated and treat such an isolated

sentence as the complete enunciation of law by the Supreme Court.

69. Makes it clear the Supreme Court, in **Sukhwant Singh** (supra), referring to **Jaggo's** case (supra), that the observations, made in **Jaggo's** case (supra), cannot be interpreted as a sanction from the Supreme Court to the prosecution to adopt the practice of *tendering* a witness for cross-examination only without there being any *examination-in-chief* in relation to which the witness has to be *cross-examined*.

70. However, after the coming into force of the Criminal Procedure Code, 1973, which replaced the Code of 1898 and which is hereinafter referred to as the "new Code", since recording of evidence in *committal proceedings* has been totally dispensed with and Section 288 of old Code has been omitted, the course, suggested by some of the High Courts in the earlier judgments regarding *tendering* of a witness for cross-examination, who had been examined in the *committal proceedings*, is no more relevant or available.

71. The Supreme Court has, therefore, pointed out, in **Sukhwant Singh** (supra), that **Jaggo's** case (supra), was decided, when the Code of 1898 was operating in the field and, upon coming into force of the Code of Criminal Procedure, 1973, the decision in **Jaggo's** case (supra), cannot be pressed into service as a sanction from the Supreme Court that a witness

may be *tendered* for *cross-examination* only.

72. In no uncertain words, the Supreme Court has pointed out, in **Sukhwant Singh** (supra), that when a witness is material and is required for unfolding the truth of the prosecution’s case, he ought to be *examined-in-chief*. The Supreme Court has also made it clear, in **Sukhwant Singh** (supra), that the effect of a *witness* being *tendered* only for *cross-examination* amounts to the failure of the prosecution to examine the *witness* at the trial and non-examination of such a witness will seriously affect the credibility of the prosecution’s case and detract materially from its reliability.

73. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J)

(Vikash Jain, J)

B.T./AI/A.F.R.

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