

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.688 of 2009

Arising out of PS.Case No.-29 Year-1995 Thana-Raghopur District- VAISHALI (HAJIPUR)

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Dharmendra Singh, son of late Sona Lal Singh, resident of village-Fatehpur, P.S.-
Raghopur, District-Vaishali.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (DB) No. 721 of 2009

Arising out of PS.Case No.-29 Year-1995 Thana-Raghopur District- VAISHALI (HAJIPUR)

=====

Brij Nath Singh, Son of Chandra Mohan Singh, resident of village-Fatehpur, P.S.-
Raghopur, District- Vaishali.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (DB) No. 688 of 2009)

For the Appellant : Smt. Kanak Verma, Advocate
Shri Prabhat Kumar, Advocate

(In CR. APP (DB) No. 721 of 2009)

For the Appellant : Shri Rana Pratap Singh, Sr. Advocate
Shri Kamal Kishore Singh, Advocate
Shri Aaruni Singh, Advocate

For the State : Shri Dilip Kumar Sinha, APP
(in both appeals)

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 12-05-2015

These appeals are directed against judgment of conviction dated 05.06.2009 and the order of sentence dated 10.06.2009 passed by the learned Presiding Officer, Fast Track Court No. 2, Vaishali at Hajipur in Sessions Trial No. 204 of 1996/332 of 2001. By the impugned judgment the two appellants



were held guilty of committing offences under Sections 148, 302/149 of the Indian Penal Code as also Section 27 of the Arms Act. While passing the order of sentence, the learned trial Judge did not pass any sentence against the appellants for being convicted under Section 148 of the Indian Penal Code while he was directing each of the two appellants to suffer rigorous imprisonment for life as also to pay a fine of Rs. 1,00,000/- else to suffer rigorous imprisonment for further period of three years under Section 302/149 of the Indian Penal Code. As regards, the conviction of the two appellants under Section 27 of the Arms Act each of them was directed to suffer rigorous imprisonment for seven years as also to pay a fine of Rs. 5000/- else to suffer rigorous imprisonment for six months.

2. The two appeals arising out of the same judgment of conviction and order of sentence were heard together by us and are being disposed of by this common judgment.

3. P.W. 2, Bharat Prasad Singh, lodged the *fardbeyan* on 31.07.1995 at 7.15 P.M. at Primary Health Centre, Raghapur by stating to the Officer Incharge of Raghapur police station that on that very day in between 18.15 to 18.30 hours, i.e., 6.15 to 6.30 P.M. he was fixing a pole by the side of the road which passed in front of his *Darwaja*. P.W. 3 Shambhu Singh, the nephew of P.W.



2 was assisting him in fixing the pole when appellant Dharmendra Singh came there and objected to the fixing of the same by claiming that the land over which the pole was being fixed belonged to him. An altercation ensued between the informant and appellant Dharmendra Singh. The informant stated that his nephew Ramji Singh who was a Havildar posted in Aurangabad was at that time sitting on the *Chabutra* of the well situated by the side of the road and who had come on leave to his village.

4. It was stated that appellant Dharmendra Singh during the course of altercation stated that he would immediately teach the informant a lesson and after 15 minutes at about 8.30 P.M., he along with other appellant Brij Nath Singh both armed with regular rifles, with Amar Nath Singh, Badri Nath Singh, Satendra Singh, Gorakh Nath Singh and Bindeshwari Singh, who were also armed with one arms or the other came there and no sooner they had arrived at the place of occurrence than appellant Dharmendra Singh is said to have fired from his regular rifle at the elder brother of the informant, namely, Ramji Singh which shot hit the deceased in his left thigh. Appellant Brij Nath Singh is also said to have fired from his rifle and the shot fired by Brij Nath Singh is said to have hit the abdomen of the deceased as a result of which he fell down. It was alleged that other accused persons also

fired from their country made guns or pistols. The informant had perceived as if six rounds of shots had been fired by the accused persons.

5. The informant stated that accused Bindeshwari Singh had given a blow to him on his head with a *Dao* and he received a bleeding injury.

6. The informant as per his story put his brother Ramji Singh on a cot and with the help of Harendra Singh (not examined), Sarvjeet Singh (not examined) and Ravindra Singh (not examined) brought him to the Primary Health Centre, Raghapur. His brother was unconscious and was not in a position to speak and, as such, the informant had given his *fardbeyan* who had himself seen the occurrence. The informant stated that the doctor was not available there and he was being pressed to shift his brother to Patna Medical College Hospital and the compounder who was available in the primary health centre also advised him to take his brother to Patna Medical College Hospital.

7. As appears from the evidence of P.W.5 S.I. Kamrul Hoda Khan, he had picked up information on 31.07.1995 at about 7.45 P.M. about the incident and he entered that information in the station diary dated 31.07.1995 and started for the hospital with A.S.I. J. Ram, A.S.I. Ram Ganesh Yadav and A.S.I. R. Sharma. He

reached Raghopur Primary Health Centre and he found Ramji Singh injured there and he recorded the *fardbeyan* of another injured Bharat Singh and sent the same for registration of the case through A.S.I. Jagarnath Ram. On the basis of the *fardbeyan* of P.W.2 Bharat Singh, Raghopur P.S. Case No. 29 of 1995 was drawn up. The First Information Report was marked Ext.3. The *fardbeyan* of P.W.2 Bharat Singh was marked Ext.3/1.

P.W.5 took up the investigation himself and recorded the further statement of the informant and also the compounder of the Primary Health Centre besides recording the statement of P.W.3 Shambhu Singh. P.W.5, thereafter, came to the place of occurrence to inspect it.

It was a brick and tile built house of the informant facing east. At the end of its *Sahan* was running the road and to further west of which was the well of Satpal Singh. At the western extremity of the *Darwaja* from south, the Investigation Officer found two poles fixed at a distance of about 1½ ft. as per his evidence. Those were the poles which were the bone of contention between the parties and the pole had been fixed permanently by putting some concrete cement material there. The road which was running in front of the *Darwaja* and to its west was going from north to south and was 7 ft. in width. To the west of the said road



was a *Pucca Kuan* which had a plastered *Chabutra* and the diameter of the well was of 5 ft. P.W.5 found blood stains in the north and south of the well which had dried up and as may appear from paragraph-2 of his evidence, the blood stains were seized by him by preparing seizure memo Ext.5. He had found two cartridge cases made of brass material and those were also seized by preparing the seizure memo. He received the post-mortem examination report of deceased Ramji Singh and after examining further witnesses to close the investigation, he submitted charge sheet for the trial of the accused persons.

8. As appears from the record five persons were put on trial out of whom Gorakh Nath Singh absconded with Badri Nath Singh and Amar Nath Singh. Bindeshwari Singh died during the trial and only three accused persons, namely, two appellants and one Shailendra Singh were left at the trial which ultimately ended in the impugned judgment of conviction in respect of the appellants which was also a judgment of acquittal in respect of Shailendra Singh.

9. The defence of the appellants was of non-participation and false implication.

10. Shri Rana Pratap Singh, the learned senior counsel appearing on behalf of the appellant Brij Nath Singh took us



through the evidence of the witnesses and submitted that P.W.1 Usha Devi, the wife of the deceased, was not named in the First Information Report and her evidence as such, should not be considered by us. Shri Singh was pressing upon us to discard the evidence of P.W.2 Bharat Prasad Singh also who had been examined in-chief on 04.02.2004, but could not be cross-examined. As regards P.W.3 Shambhu Singh, Shri Singh was asking us to discard his evidence also because he did not appear to be eye witness to the occurrence. It was contended by Shri Singh that three persons who were named in the First Information Report as witness, namely, Harendra Singh, Sarvajeet Singh and Ravindra Singh were not examined by the prosecution who were real independent eye witnesses and no plausible explanation has been furnished by it for their non-examination. Submission was that the prosecution appears withholding independent witnesses and real facts of the case and, as such, the appellant should be acquitted.

Smt. Kanak Verma, learned counsel appearing on behalf of the appellant Dharmendra Singh was submitting that the individual act of the said appellant pertains to firing a shot which hit the deceased into his left thigh and that shows lack of intention on his part. It was further contended that at any rate it appears a case of grave and sudden provocation and, as such, the Court



should take a view that it was not a case of murder. Further, citing the decisions of the Supreme Court in the cases of *Tholan Vs. State of Tamil Nadu* reported in (1984) 2 SCC 133, *V. Sreedharan Vs. State of Kerala* 1992 CRI.L.J. 701 and *Bawa Singh Vs. State of Punjab* 1993 CRI.L.J. 49, it was contended that in any view of the evidence the appellant Dharmendra Singh could never be convicted for an offence under Section 302 of the Indian Penal Code and even taking the worst view of the evidence, he could be held up only under Section 304 Part II of the Indian Penal Code.

11. Shri Dilip Kumar Sinha, the learned Additional Public Prosecutor was responding to the above submissions with all vehemence and was pointing out that P.W.1 was a real, natural witness being the house wife of the house who could be attracted to the scene of occurrence out of curiosity on account of having picked up the altercation between the informant and the accused persons and there is no real reasons to discard her evidence. Merely because she happens to be the wife of the deceased, Shri Sinha was submitting, the defence did not have any right to challenge the credibility of the evidence of P.W.2 Bharat Prasad Singh because it lost the opportunity of cross examining the witness which was offered to him by the trial Court and when the appellants had attempted to get the witness recalled before the learned trial



Judge by filing a petition to that effect, the same was rejected by the learned trial Judge by an order passed on 13.04.2007. While passing that order the learned trial Judge had extracted the relevant part of the order passed by this Court in Cr. Misc. No. 3350 of 2007 on 05.02.2007 when the Court had refused to direct the recall of P.W.2 for further cross examination. Shri Sinha was submitting that it is quite late in the day for the defence to submit that this Court should outright leave aside from its consideration the evidence of P.W.2. Shri Sinha was submitting that P.W.2 was fully corroborated by P.W.1 and both the witnesses were corroborated in all material parts by the evidence of P.W. 4 Dr. Amarnath Jha who held post-mortem examination on the dead body and had prepared the post-mortem examination report Ext.4. Submission was that it was a concerted act of the accused persons committed in prosecution of their common object of killing the deceased and there was no grave and sudden provocation and as such, the laws which were cited by learned counsel for the appellant Dharmendra Singh were not applicable to the facts of the case.

12. Before we take up the evidence of witnesses for scrutiny in the light of the criticisms which have been levelled against it, we want to point out that the substratum or the genesis of the prosecution case was the attempt of the informant or the action



of the informant in fixing two poles at the edge of the *sahan* of his *Darwaja* which was also the eastern edge of the road. The act of fixing the poles was protested by appellant Dharmendra Singh claiming that the land belonged to him. The continuity of the *sahan* which was found by P.W.5 during the inspection of the place of occurrence as appears from the evidence of P.W.5 the investigating officer, does not indicate that there was any scope to even imagine that there could be any body's land which could have been amalgamated with the *sahan* land of the deceased. P.W.5 had found the *Darwaja* on the eastern side of the *sahan* which faced west and it had continues un-intervened *sahan* which went in the east to meet the road which passed in front of it from north to south. Thus, there is a fundamental fallacy in the claim of the defence or in the claim which was set up at the very point of fixing the poles by appellant Dharmendra Singh that he held some interest in the land over which the two poles were being fixed by the informant. P.W.5 found the two poles fixed. There was no other pole there in the vicinity or anywhere around it. Thus, what appears to us is that the prosecution claim that the incident had generated on account of the fixing of the poles by the informant Bharat Prasad Singh as per his case appears established satisfactorily. At the same time, after considering the evidence of P.W.5 S.I. Kamrul Hoda Khan, we are



very much firm in holding that the interference by appellant Dharmendra Singh does not appear justifiable from any angle. We have just recorded the reasons as to how his claim over the land could not be acceptable even on the prima facie basis of evaluation of the claim and the situation of the land. At the cost of repetition we want again to point out that there was continuity of the *sahan* right from the edge of the *Darwaja* to the eastern edge of the road and western edge of the *sahan* and no marks or signs were found by P.W.5 anywhere in the continuous area which could create a doubt that someone could also be holding some interest in the property.

P.W.1, the wife of the deceased stated that the partition had been affected long back and the agnatic relatives or coparceners who had the properties joint with them in the past, had occupied their shares in the allotted properties and there was no dispute ever raised by anyone as regards the possession of any of the partners to the partition. Dharmendra Singh, the appellant was one of the coparceners of the deceased as appears stated by P.W.1, the wife of the deceased Usha Devi in paragraph-4 of her evidence. As per her evidence, appellant Dharmendra Singh was the son of the cousin brother of her husband and it further appeared from the same paragraph-4 of P.W.1 that the partition had been effected much prior to the lady was married to the deceased.



13. It was very strenuously submitted before us by Shri Rana Pratap Singh, that this Court should discard from its consideration the evidence of P.W.1. The reason which was assigned by Shri Singh was the lady Usha Devi, firstly, was the wife of the deceased and, as such, held some interest in the prosecution and further that she had not been named in the First Information Report as a witness. Shri Singh was highlighting that if she was ever present on or around the place of occurrence, there was no reason for P.W.2 not to name her in the report. P.W.1, Usha Devi had claimed herself to be an eye witness. She had stated that at the time of the occurrence she was very much present at the *Darwaja* when Bharat Prasad Singh and Shambhu Singh were fixing the poles at the end of the *sahan* when appellant Dharmendra Singh came to object to it. An altercation had ensued and thereafter appellant Dharmendra Singh went away threatening to teach the informant and Shambhu Singh a lesson to reappear again after 15 minutes with other accused persons with arms. Being not named in the First Information Report as a witness may be a circumstance for considering the desirability of holding the witness trustworthy or otherwise. But that is never the solitary criteria to reject the evidence of such a witness. If a witness claims to be an eye witness, then it is the primary duty of the Court to consider the



claim of the witness and examine, by scrutinizing, the evidence of such a witness on the probably presence of the witness at the place of occurrence. While P.W. 1 Usha Devi is not named in the First Information Report, the other circumstances which appear in support of her presence is that she was cited as a witness in the chargesheet at serial-9 and that goes to inform us that she had been questioned by the police and was found to be an eye witness and she was cited as such. She claimed, as noted above, her presence at the *Darwaja*. The *Darwaja* was facing west. We have already noted that it was at the end of the *sahan* that the altercation had taken place. It was rightly contended by Shri Sinha, the learned Additional Public Prosecutor that the situations which are presented at such instance are generally of a commotion between the parties who claim and counter claim between themselves their right to any parcel of land and in such a situation of a commotion the louder voices of the parties must have caused a curiosity in the lady who could have been inside the house to come out as to what was happening there. This appears a natural reaction of the wife of the deceased who could have been alarmed after picking up the words of the contending parties, like, the informant and appellant Dharmendra Singh as to what had really triggered the altercation between them and it was not unnatural that she had come out. The



place of occurrence was almost the very place where her *Darwaja* was situated. Her presence, as such, appears natural there. She had seen the occurrence and while perusing the cross examination part of her evidence, we could not come across a single line even of suggestion to her that she had not made those statements before the police which she made in Court indicating that she had indeed seen the occurrence taking place. While cross examining the witness it was not even suggested that she was not present at the scene of occurrence. Suggestions were given to her in paragraph-12 somewhere at page 15 in the middle and lastly in paragraph-14 and nowhere in these paragraphs the witness was suggested that her claim of remaining present at the place of occurrence as was false and that she had never seen the occurrence and because, she was the wife of the deceased she had come into the witness box to support the charges. These are some of the circumstances which we find missing from of the evidence of P.W.1, and others satisfy our enquiries which were raised on account of the contention of Shri Sinha putting a stiff challenge to the criticism of the merit of the evidence of P.W.1. We are satisfied that P.W.1 was the most natural and competent witness.

14. So far as the evidence of P.W.2 Bharat Prasad Singh is concerned, before we go to say anything on its merits, we



want to put on record some of the events which had occurred in the Court below. P.W.2 Bharat Prasad Singh was produced for his evidence on 4th of February, 2004. His evidence in cross examination was recorded and at that time the counsel appearing for the appellants was also present. After the recording of the evidence the examination-in-chief of P.W.2 was completed, the Court requested the learned counsel appearing for the appellants to cross examine the witness who outrightly refused to do so and pressed on to the Court for adjourning the hearing of the witness. The Court drew up a detailed order on 04.02.2004 pointing out that on the earlier occasion when P.W.1 Usha Devi was in attendance one of the accused Gorakh Nath Singh had absconded forcing the Court to separate his trial and to proceed with hearing of the evidence of P.W.1 and when the evidence of the lady P.W. 1 was recorded in cross-examination, the same tactics of cross-examination of the witness was adopted which forced the Court to discharge P.W.1 Usha Devi also. The Court recorded that during his stay at Vaishali at Hajipur, he had found that similar tactics were adopted in contested matters by the counsel not to proceed to cross-examine the witness thus forcing the Court to adjourn the hearing of the witness and such witnesses were not allowed to come again into the witness box. The Court, as such, had refused to



adjourn the case when P.W.2 Bharat Prasad Singh had been produced for evidence. What appears further is that two important petitions were filed before this Court by the accused Brij Nath Singh and Badri Nath Singh vide Cr. Misc. Nos. 12449 of 2003 and 3350 of 2007. While Usha Devi was directed to be recalled for cross-examination considering the facts of the case, the Court had refused to issue a similar direction in respect of the prayer of Badri Nath Singh in Cr. Misc. No. 3350 of 2007 to recall P.W.2 Bharat Prasad Singh for his cross-examination. In spite of having failed before this Court in their attempt to get P.W.2 recalled for their cross-examination, the appellants appeared filing petition for recalling the witness before the Court below on 24.03.2007 and that petition was heard at length and was disposed of by a reasoned order passed on 13.04.2007 after referring to the refusal by this Court to direct the recall of P.W.2 Bharat Prasad Singh in Cr. Misc. No. 3350 of 2007.

15. Our system of administration of criminal justice recognizes the right of an accused to a fair trial and that pertains to the right of an accused to cross-examine a witness. The procedures have been as elaborate as to extent that Section 273 of the Cr. P.C. directs the evidence of the witnesses to be recorded in presence of the accused and in case the accused is represented then in presence



of his counsel. The Court after recording the examination-in-chief evidence of P.W.2 had offered the witness for cross-examination to the defence as appears recorded in the order dated 04.02.2004 as also in the deposition-sheet in paragraph-2 and in spite of that offer given by the Court, the learned counsel appearing on behalf of the appellants in the trial Court refused to cross-examine the witness. Shri Singh, the learned senior counsel appearing on behalf of the appellant Brij Nath Singh was ardently requesting us to consider the principles of fair trial and the sufferance of the cause of justice as the evidence of P.W.2 remains somewhat like an ex parte evidence against the appellants. We have already noted that an accused has a right to fair trial and that right to fair trial partakes of the right to cross-examine a witness. That right is as much untrammelled as it does not allow interference by any party to the proceedings unless the Court out of its own motion had put certain questions in exercise of its powers under Section 165 of the Evidence Act. The trial Court, as appears noted in its order dated 04.02.2004 as also in the deposition-sheet of P.W.2, appears very anxious to ensure that the defence had cross-examined the witness, but the learned counsel who was appearing in the trial Court was probably more concerned to stall the trial proceedings than to allow the process of law to take its due course. The reason as to why the



learned counsel had adopted such a difficult and unlawful position, appears recorded by the learned trial Judge in his order dated 04.02.2004 especially on circumstance that such practices were prevalent in the judgeship of Vaishali at Hajipur so as to scuttling out the contested trial in a criminal case. If this could be the attitude of the bar to put spanners in a fair trial, then this Court shall be very very slow to legitimize such attempts which will be more infectiously adopted by the other counsel making it impossible for the trial Judges to conclude the trial or to conclude a trial fairly and lawfully. It was the most disturbing approach of a counsel and it was something sort of a stubborn attitude of the counsel who was probably living under a belief that if he was not ready to cross-examine the witness, he was likely to stall the trial and was again to force the Judge to dance at his tune. We deprecate and disapprove of such attempts and as appears recorded by us, the circumstances which were created there in the trial Court do not convince us that any unfair trial was given to the appellants. The appellants of their own misbehaviour and volition had lost the chance of cross-examine the witness and this Court in the Cr. Misc. petition had rightly refused to recall P.W.2 Bharat Prasad Singh for cross-examination.

16. However, while scrutinizing the evidence of



P.W.3 what we found was that in spite of the witness being named in the First Information Report and in spite of the fact that it was claimed by the informant in his *fardbeyan* that P.W.3 was assisting him in fixing the poles, we have some reservations in accepting his evidence as that of a truthful evidence. He has supported the story of the prosecution, but while so doing he stated a couple of facts which distracted our faith in him as a trustworthy witness. The witness stated that the partition among the parties had been affected on the very day of the incident. This statement of P.W.3 in our opinion is not acceptable because the very prosecution case that the informant was fixing the poles when appellant Dharmendra Singh came there to oppose the act of the informant claiming that the land belonged to him itself suggested as if there was some partition which had been affected quite prior to the incident. The other fact which was stated by the witness was that when the accused persons came there armed with rifles etc., he hid himself into a *Bhuskar* (the fodder store) while Ravindra Singh, Harendra Singh and Sarvajeet Singh, the three witnesses named in the First Information Report and who were not examined in the trial went into a *Palani*. If a witness had concealed into a *Bhuskar* so as to purchasing safety for him then it has to be assumed that he had concealed himself not to be seen by others and neither to see outside the *Bhuskar*. If this was

the situation, which appears coming from P.W.3 in paragraph-14 then it is not safe at all to accept the claim of the witness that he was an eye witness to the occurrence.

17. While addressing arguments to us, Shri Rana Pratap Singh, the learned senior counsel was submitting that the non examination of three independent persons, like, Ravindra Singh, Harendra Singh and Sarvjeet Singh was a serious defect in the prosecution case as they were the only independent witnesses named in the First Information Report who had seen the occurrence. It is true that the three witnesses are named in the First Information Report and it has very clearly been stated in the *fardbeyan* by P.W.2 that the three who had carried the injured brother of the informant to the Primary Health Centre had seen the occurrence, but when we were considering the evidence of P.W.2 in paragraph-11, we found that the presence of the witness at the scene of occurrence so as to seeing some part of the occurrence could not be said to be for the whole length of the occurrence. P.W.1 stated that when the accused persons were coming to the scene of occurrence carrying arms and ammunitions, persons who were sitting at the well, went inside a *Marai* to hide themselves. P.W. 1, thereafter, elaborated upon as to who were present during that course. She had named the three persons, i.e., Ravindra Singh,



Harendra Singh and Sarvjeet Singh with one Baban Singh who had gone inside the *Marai* to conceal themselves and thereafter the incident of firing shots had taken place. While drawing our attention to the evidence of P.W.3 in paragraph-15 Shri Singh attempted to convince us that in spite of having gone into a *Marai* the witnesses could be competent witnesses who had clearly and properly seen the occurrence as the evidence of P.W.3 in paragraph-15 indicated as if they were standing in a *Palani* which was facing the *Bhuskar* in which P.W.3 had hid himself. It is very difficult for us to take a view on the evidence of P.W.3, firstly, because we have not placed reliance on his evidence and secondly, because the defence did not elaborate upon by putting more questions to the witness as to what was the complete structure of that *Palani*. Assuming something will be hazardous for us and we are not going tread into that conjecture so as to speak something which may not be available through the evidence. P.W.1 Usha Devi had definitely stated that the three persons named as witnesses in the First Information Report who as stated by her were also sitting at the well, had hidden themselves in a place which could be safe enough to protect a human being. If they had concealed themselves so as to securing safety as appears the case from the evidence of P.W.1 then the very evidence in itself is sufficient explanation as to why the

prosecution had not chosen to examine the three persons as they were not eye witnesses to the occurrence.

The learned counsel appearing for the appellant, Brij Nath Singh, had taken up the issue from another angle by submitting that still they were competent witnesses to the part of the occurrence as regards the arrival of the appellants at the scene of occurrence with arms and ammunitions. It may be a fact and that fact appears stated by P.W.1 in ample details. But, as regards the material facts of the case, in our opinion, it were those facts which related to the manner of occurrence, i.e., the firing of shots by the two appellants or others upon the deceased or others. The three persons Ravindra Singh, Harendra Singh and Sarvjeet Singh in the light of the evidence available do not appear the witnesses to those facts and merely because they had been named in the First Information Report as eye witnesses, we cannot hold that the prosecution had some duty to the Court and to the defence to produce them for their evidence.

18. The evidence of P.W.1 Usha Devi and that of P.W.2 Bharat Prasad Singh clearly corroborates the charges that after the informant had persisted with fixing the poles in spite of the opposition from appellant Dharmendra Singh, the appellant went back home threatening to teach the informant a lesson and then

came with other accused persons having armed himself and others with rifles and thus it was appellant Dharmendra Singh who had fired the shot which hit at the left thigh of the deceased and the deceased was again targeted by appellants Brij Nath Singh who shot him in his abdomen. P.W.2 had stated that he was also given a blow with gun by Bindeshwari Singh but Bindeshwari Singh had died during trial and that charge appears not considered by the trial Court and, thus, the trial Court does not appear considering the evidence in that behalf. The evidence of P.W. 4 Dr. Amarnath Jha points out that he had found two ante mortem injuries-wounds of entry on the dead body in the form of lacerations. The first lacerated wound with inverted and blackened margin measuring 3/4" x 1/2" x abdominal cavity deep, was found on the right side of the middle part of the abdomen while the other lacerated wound with inverted and blackened margin measuring 3/4" x 1/2" communicating with injury no. 3 was found on the interior surface of left thigh. The third injury the wound of exit corresponding to injury no. 2 was found on the left thigh of the deceased. P.W.4 further stated that the heart was found empty and the mesentery was lacerated with rupture of mesenteric vessels. A bullet was found lodged in the abdominal cavity near the lumbar vertebra. Death had occurred within 24 hours of the holding of post-mortem

examination, on account of hemorrhage and shock resulting from the above injuries which, in his opinion, were sufficient to cause death. The manner of occurrence which was stated to by P.W.1 and P.W.2 gets full support from the evidence of P.W.4 and we do not find any aberration or conflict between the oral and medical testimony.

19. Smt. Kanak Verma appearing on behalf of appellant Dharmendra Singh was, however, submitting that the appellant had received grave and sudden provocation from the informant and had committed acts under such grave and sudden provocation and, as such, the offence established by the facts of the case was 304 Part-II of the Indian Penal Code. In support of the contention Smt. Kanak Verma had cited before us the three decisions of the Supreme Court reported in *Tholan* (supra), *V. Sreedharan* (supra) and *Bawa Singh* (supra). In *Tholan* (supra), it was a case of single blow given by Chura and the facts of the case established that the blow was given on the spur of the moment. As such the Supreme Court found that the above facts brought down the offence from Section 302 to 304 Part-II of the Indian Penal Code. In *V. Sreedharan* (supra), the fact of the case indicated as if the occurrence had ensued on provocation and it was a sudden fight during which a death had occurred. The Supreme Court



considering these aspects of the case had held that the offence established would be that under Section 304 Part-I. As regards the third judgment reported in *Bawa Singh* (supra), the facts of the case indicated as if entry injury attributed to the appellant was not individually sufficient to cause death and the medical evidence also indicated that the cause of death was due to shock and hemorrhage resulting from two injuries one attributed to the appellant and the other to the other accused and further, that the injuries were not sufficient to cause death in the opinion of the doctor. Here in the present case it is true that one gun shot has been attributed to appellant Dharmendra Singh which hit the deceased in his left thigh and there is no definite opinion about the nature of that injury but the injury which was caused in prosecution of the common object by appellant Brij Nath Singh was definitely a gun shot injury which had hit the deceased in his abdomen to cause lacerations to mesenteries and other internal organs and in the opinion of P.W.4 Dr. Amarnath Jha the injury was sufficient to cause death in the ordinary course of nature. Thus, the facts of this case appear quite different from that of *Bawa Singh* (supra).

20. So far as the submission of Smt. Verma that the appellants had been gravely and suddenly provoked into firing the shots is concerned, we again find the arguments falling sort of the



available factual details. The very initial story had been established, as we have noted, that while fixing two poles appellant Dharmendra Singh had opposed the act of fixing the poles and in the midst of an altercation which had ensued, he had gone back to his house to reappear with six other accused persons who had armed themselves with rifles, guns, etc. If there could have been any provocation at the spur of the moment inviting retaliary action from Dharmendra Singh and if it had appeared at the time the altercation which had ensued between him on the one hand and the informant and others on the other then the Court would have found merit in the argument. The very fact that he went back to his house to reappear with six other accused persons and that too as dangerously armed as to carry rifles and guns, itself indicated that it was never a case of grave and sudden provocation as the accused persons had appeared at the scene of occurrence after 15 minutes. In *K.M. Nanavati v. State of Maharashtra* reported in *A.I.R. 1962 SC 605*, the appellant had gone to the house of the deceased Prem Ahuja to request him to marry his wife Sylvia. The deceased Prem Ahuja had uttered some insulting words. Nanavati did not do any act there and in fact returned back to his ship, got the revolver issued to him and then went back to the house of Prem Ahuja to shoot him dead. It was held by the Supreme Court in *K.M. Nanavati* (supra) that at the



very moment when Prem Ahuja was using abusive words for his wife and was insulting him, he was provoking the appellant and if he had fired the shot at that moment he could have got the benefit of provisions regarding the act having been done in sudden heat of passion or on account of sudden provocation. But, because he did not do any act and rather come back to the ship so as to getting the revolver issued to him and then to reappear at the house of Prem Ahuja to shoot him, the act was premeditated intentional murder. We find some similarity as regards the circumstances appearing from the facts of *K.M. Nanavati* (supra) with those appearing in the evidence of the present case. Dharmendra Singh, might have some reasons to submit that he had some provocation at the time there was an altercation between the informant and himself when he was resisting the very fixing of the poles, but as soon as he came back to his house and reappeared at the scene of the occurrence after 15 minutes by carrying rifles, etc. he was determined in his mind to commit murder and thus, the very act committed by him or by Brij Nath Singh in prosecution of the common object of the unlawful assembly formed by the accused persons proves that it was an intentional pre-determined murder. The contention of Smt. Verma that the facts could constitute an offence under Section 304 and not that under Section 302 of the Indian Penal Code in our opinion does

not merit consideration and is fit to be rejected.

21. In our opinion and under the facts available to us, the two appellants had acted in prosecution of the common object of the unlawful assembly, they had been the members of and both the appellants had done one act or the other in prosecution of that common object of the unlawful assembly. We are, as such, of the view that the conviction of the appellants under Sections 148 and 302/149 of the Indian Penal Code was appropriately recorded and the same must not be disturbed by us. Likewise, the conviction of the appellants under Section 27 of the Arms Act also appears justified under the facts of the case needing no interference from this Court.

22. In the result, the two appeals fail and the same are dismissed.

(Dharnidhar Jha, J.)

(Ahsanuddin Amanullah, J.)

P. Kumar/Sanjay/A.F.R.

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