

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.941 of 2013

Arising Out of PS. Case No.-16 Year-1986 Thana- ASANWA District- Siwan

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1. Vidya Sagar Mallah S/O Late Bikerma Mallah Resident Of Village - Singhpur, P.S. - Assaon, District - Siwan
 2. Harender Mallah S/o. Rameshwar Mallah Resident Of Village - Singhpur, P.S. - Assaon, District - Siwan

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

GOVT. APPEAL (DB) No. 6 of 2015

Arising Out of PS. Case No.-16 Year-1986 Thana- ASANWA District- Siwan

The State Of Bihar Through The District Magistrate Siwan

... .. Appellant/s

Versus

1. Sahdev Mallah Son of Late Bikarama Mallah R/o village - Singhpur, P.S. Assaon, District - Siwan
2. Bhojnath Mallah Son of Sarju Mallah R/o village - Singhpur, P.S. Assaon, District - Siwan
3. Yogendra Mallah @ Devi Mallah @ Devendra Mallah Son of Rameshwar Mallah R/o village - Singhpur, P.S. Assaon, District - Siwan
4. Phuleshwar Mallah Son of Sita Ram Mallah R/o village - Singhpur, P.S. Assaon, District - Siwan
5. Raj Kishore Panday Son of Rama Shankar Panday R/o village - Pachbenia, P.S. Assaon, District - Siwan
6. Ram Gopal Singh Son of Rameshwar Singh R/o village - Kashila, P.S. Assaon, District - Siwan
7. Vijay Singh Son of Hridya Singh R/o village - Kashila, P.S. Assaon, District - Siwan
8. Hridya Singh Son of Lokeshwar Singh R/o village - Kashila, P.S. Assaon, District - Siwan

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 941 of 2013)

For the Appellant	:	Mr. Ajay Mukherjee, Advocate Mr. Raghav Prasad, Advocate Mr. Neeraj Kr. Singh, Advocate
For the Informant	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Ram Binod Singh, Advocate
For the State	:	Mr. Abhimanyu Sharma, APP

(In GOVT. APPEAL (DB) No. 6 of 2015)

For the Appellant/s	:	Mr. Mukeshwar Dayal, APP
For the Respondent	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Ram Binod Singh, Advocate



CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 15-07-2024

Both the appeals have been taken up together as they arise out of the same Sessions Trial bearing S.T. No. 48 of 1988, arising out of Assaon P.S. Case No. 16 of 1986, corresponding to G.R. No. 1109 of 1986. Both the appeals have been preferred against the same impugned judgment.

2. The Criminal Appeal (DB) No. 941 of 2013 has been preferred against the impugned judgment of conviction and order of sentence dated 07.09.2013 and 09.09.2013, respectively passed by learned Additional District & Sessions Judge-III, Siwan, whereas the **Govt. Appeal (DB) No. 6 of 2015** has been preferred by the State against the judgment of acquittal by the same impugned judgment dated 07.09.2013 passed by learned Trial Court.

3. By the impugned judgment of conviction dated 07.09.2013, the appellants of Criminal Appeal (DB) No. 941 of 2013 have been convicted under Section 302 of the Indian Penal Code, 1860 and Section 27 of the Arms Act, whereas the respondents of Govt. Appeal (DB) No. 6 of 2015 have been acquitted of all charges. By the impugned order of sentence



dated 09.09.2013, the appellants of Criminal Appeal (DB) No. 941 of 2013 have been sentenced to undergo imprisonment for life and to pay a fine of Rs. 20,000/- each and in case of default to pay the fine, to undergo additional simple imprisonment for two years under Section 302 of the Indian Penal Code, 1860 and to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- and in case of default to pay the fine, to further undergo simple imprisonment of six months under Section 27 of the Arms Act. Both the sentences have been directed to run concurrently.

4. The Criminal Appeal (DB) No. 941 of 2013 was initially filed by the four appellants. However, during pendency of the appeal, two appellants/Maha Sagar Mallah and Shri Kishun Mallah died, whose cases have abated. The Govt. Appeal (DB) No. 6 of 2015 was initially filed against 13 respondents. However, during pendency of the appeal, four respondents/Rameshwar Mallah, Ramchandra Mallah, Indrasan Mallah and Shankar Singh died. Hence, their names have been deleted from the array of the respondents *vide* order dated 21.12.2023. The name of respondent/Anil Upadhaya @ Munna has also been deleted from the array of the respondents *vide* order dated 05.01.2016 on prayer of the appellant, because the



appellant could not find the address of this respondent.

5. The FIR bearing Assaon P.S. case No. 16 of 1986, was registered on 09.05.1986 at 17:00 O'clock on the *fardebayan* of the informant/Nagnarayan Rai against twenty one named accused persons, including the appellants of Criminal Appeal (DB) No. 941 of 2013 and the respondents of Govt. Appeal (DB) No. 6 of 2015 and some unknown persons for the offence punishable under Sections 147, 148, 149, 324, & 302 of the Indian Penal Code, 1860 and Section 27 of the Arms Act.

6. The prosecution case as emerging from the *fardebayan* of the informant/Nagnarayan Rai is that on 09.05.1986 at 10:00 am, he along with Mukhiya, Pradosh Nath Rai, Gorakhnath Rai and Parikshan Kumhar was cutting maize crops of Mukhiya Ji. One Brahma Singh came and gave information to Mukhiya Ji that Mallah people along with some outsiders were fishing in Pachbenia pond. They were also carrying arms. On this information, the informant and others who were cutting the maize crops went along with Mukhiya Ji to the Pachbenia pond and saw that Uma Mallah, Ram Prawesh Mallah, Ram Aghan Mallah, Dev Mallah, Ramjit Mallah, Mangru Mallah, Indrasan Mallah, Vidya Sagar Mallah, Mahasagar Mallah, Nihora Mallah, Harendra Mallah, all



resident of village Singhpur police station in Assaon were carrying country made pistols and guns. Ramashray Kohar, resident of Trikalpur P.S. Assaon, Shri Kishun Mallah, resident of Toka, Rajkishore Pandey, resident of Pachbenia, Shamsher Ojha resident of village Khardara and Hridaya Singh were carrying gun in their hands. Munna Upadhyay, resident of Pachbenia, Vijay Singh, Shankar Singh and Ramgovind Singh were carrying country made pistols. Mukhiya/Pradosh Nath Rai told them that the pond is attached and asked why they were fishing in the pond. They should do fishing after Court's order. Upon this, Mahanth Rajendra Giri, resident of Pachbenia, who was standing there, exhorted them to kill Mukhiya/Pradosh Nath Rai, because due to him they were not able to fish in the pond and they were getting harassed. Whereupon, the aforesaid all the accused persons started firing indiscriminately. Hriday Singh and Shri Kishun Mallah fired at the Mukhiya, Pradosh/Nath Rai, leading to his death. Gorakh Nath Rai died due to firing by Ramashray Kumhar and Vidya Sagar Mallah. Shailendra Rai died due to firing by Harendra Mallah and Mahasagar. While Parikshan Kohar was taking away the dead body of Mukhiya ji, he was shot at by Ram Gopal Singh and Shankar Singh and subsequently he died. The informant/Nag Narayan Rai, Vijay



Singh, Bindeshwar Bhagat and Dilip Kumar Singh also received injury on account of firing by other co-accused. Hearing the sound of firing, Chandra Mohan Chaudhary, Basant Singh, resident of Kasila, reached the place of occurrence and witnessed the occurrence. Besides them, other people of village Assaon and Pachbenia also witnessed the occurrence. The occurrence took place at 11:00 am on 09.05.1986. The informant is not aware of the names of other accused. As per the Informant, Section 144 Cr.PC. was promulgated at the pond.

7. After registration of the FIR, the investigation started and after completion of the investigation, charge-sheet bearing No. 15 of 1986 dated 04.08.1986 was submitted against 32 accused persons under Sections 147, 148, 149, 324, 307 & 302 of the Indian Penal Code, 1860 and Section 27 of the Arms Act, dropping the proceedings against ten accused persons. Subsequently, cognizance was taken of the offence against 32 accused persons. However, case of only 17 accused persons were committed to the Court of Sessions as rest accused persons had died. Charges were framed against the accused persons facing the Trial under Section 302 of the Indian Penal Code, 1860 and Section 27 of the Arms Act. The accused persons pleaded not guilty and claimed to be tried.



8. During trial, the following ten witnesses were examined on behalf of the prosecution:

- (1) **P.W.-1** – Mundrika Bhagat
- (2) **P.W.-2** – Dilip Kumar Singh
- (3) **P.W.-3** – Veer Bahadur Singh
- (4) **P.W.-4** – Shiv Kumar Rai
- (5) **P.W.-5** – Syed Fakrul Ebad
- (6) **P.W.-6** – Raj Bahadur Singh
- (7) **P.W. 7** – Vijay Kumar Singh
- (8) **P.W. 8** – Bela Prasad
- (9) **P.W. 9** – Chandra Mohan Chaudhary
- (10) **P.W. 10** – Shahnawaz Khan (I.O.)

9. The prosecution also brought on record the following documentary evidences:

- (i) **Ext. 1 to Ext. 1/1** - Signature of Shiv Kumar Rai and Ajit Singh on the Seizure List.
- (ii) **Ext. 2 to Ext. 2/3** - Identification of signatures of Dr. H.B. Sahay on the postmortem reports of deceased persons by Syed Fakrul Ebad (PW-5).
- (iii) **Ext. 3** – Formal FIR.
- (iv) **Ext. 4 to Ext. 4/3** - Injury reports of Nagnarayan Rai, Bindeshwar Bhagat, Vijay Singh and Mundrika Bhagat respectively.
- (v) **Ext.5 to Ext. 5/1**- Signatures of Basant Singh and Chandra Mohan Singh on the inquest report.
- (vi) **Ext. 6**- Fardbeyan.
- (vii) **Ext. 7 to Ext. 7/2**- Signature of Shahnawaz Hussain on the injury reports
- (viii) **Ext. 8 to 8/3**- Inquest reports with objection as the inquest reports are photostat copies.
- (ix) **Ext. 9 to 9/1** – Seizure lists

10. After closure of the prosecution evidence, the accused persons were examined under Section 313 Cr.PC confronting them with incriminating circumstances which came in the prosecution evidence, so as to afford them



opportunity to explain those circumstances. During this examination, they stated that they had heard the evidence of the prosecution, but they did not explain those circumstances, but claimed to be innocent.

11. The accused persons, however, did not examine any witnesses in their defence. But they have brought the following documents on record with no objection of the prosecution.

(i) **Ext. A** – FIR of Assaon P.S. Case No. 17 of 1986 and fardbayan.

(ii) **Ext. B** – Chargesheet no. 17 of 1986 dated 04.08.1986 of Assaon P.S. Case No. 17 of 1986.

(iii) **Ext. C** – Judgment in Sessions Trial No. 231 of 1989 arising out of Assaon P.S. Case No. 17 of 1986

(iv) **Ext. D to D/5** – Injury reports of Rameshwar, Phuleshwar, Sahadev, Ganesh Mallah, Nand Ji Mallah and Bhojnath Mallah respectively.

(v) **Ext. E** – Lease agreement dated 28.07.1984.

12. Learned Trial Court after appreciating the evidence on record and considering the submissions of the parties found that the occurrence had taken place in regard to fishing in Pachbenia pond. There was firing from both sides causing deaths on the prosecution side and injuries on the accused side by fire-arms. However, it could not be proved which side started firing first. It was a free fight. Application of Section 149 of the Indian Penal Code, 1860 does not get attracted in the facts and circumstances of the case.



13. Learned Trial Court also found that the Pachbenia pond was settled in favour of the accused side for fishing and fishing by the accused side in Pachbenia pond cannot be held to be illegal. The prosecution side had gone to the pond without any legal right. It has been also found that the accused side fired in response to firing by Pradosh Nath Rai for defence leading to death of four persons of the prosecution side.

14. Learned Trial Court further found that the accused side had right to private defence in regard to their property. But they exceeded their right to private defence, causing death of four persons.

15. However, learned Trial Court found the accused Vidya Sagar Mallah and Harendra Mallah (appellants of Criminal Appeal (DB) No. 941 of 2013) and Shri Kishun Mallah and Mahasagar Mallah guilty under Section 302 of the India Penal Code, 1860 and Section 27 of the Arms Act for causing death of Gorakh Nath Rai, Pradosh Nath Rai, Shailendra Rai and Parikshan Kumhar by fire arm. The rest accused who are respondents herein in Govt. Appeal (DB) No. 6 of 2015 were acquitted of their charges.

16. We have heard learned counsel for both sides.

17. Learned counsel for the appellants of Criminal



Appeal (DB) No. 941 of 2013 submit that the occurrence has taken place in regard to fishing right in the Pachbeniya pond which was settled by the government authority in favour of the appellant/accused side, whereas the prosecution side had no right or authority for fishing in the pond. They had come to the pond as unlawful assembly with intent to compel the accused side by means of criminal force not to do fishing in the pond. The firing was also started by the prosecution side causing fire arm injury to the accused side and seeing the imminent danger to their life, the accused side did fire to protect their life and property. Hence, it is the prosecution side who were aggressor and the accused side only exercised their right to private defence. No offence has been committed by the accused side. The impugned judgment whereby the appellants of Criminal Appeal (DB) 941 of 2013 have been convicted is not sustainable in the eye of law. However, the respondents of Govt. Appeal (DB) No. 6 of 2015 have been rightly acquitted..

18. *Per contra*, learned APP for the State vehemently submits that the appellants of Criminal Appeal (DB) No. 941 of 2013 have been rightly convicted and appropriately sentenced, whereas the respondents in Govt. Appeal (DB) No. 06 of 2015 have been wrongly acquitted of their charges. He further



submits that the accused persons who are appellants in Criminal Appeal (DB) No. 941 of 2013 and respondents in Govt. Appeal (DB) No. 06 of 2015 had formed unlawful assembly and caused death of four persons on the prosecution side by their fire arms. Hence all the accused including the appellants of Criminal Appeal (DB) No. 941 of 2013 and all the respondents in Govt. Appeal (DB) No. 06 of 2015 being members of the unlawful assembly are equally guilty under Section 302 IPC and Section 27 of the Arms Act. Hence, the respondents in Govt. Appeal (DB) No. 06 of 2015 have been wrongly acquitted.

19. We have perused the relevant materials on record and given thoughtful consideration to the submissions advanced by both the parties.

20. The question which arises for our consideration is whether learned Trial Court has rightly convicted the appellants of Criminal Appeal (DB) No. 941 of 2013 and respondents in Govt. Appeal (DB) No. 06 of 2015 by the impugned judgment dated 07.09.2013. To consider the question, we are required to examine the evidence on record.

21. Coming to the prosecution evidence, we find that **PW-1** is Mundrika Bhagat. Supporting the prosecution case, in his **examination in chief**, he has deposed that the occurrence



had taken place at 11:00 am on 09.05.1986. He was at his door. Hearing the *hulla*, he went to the pond situated to the west of the village, Pachbenia. Pradosh Nath Rai, Gorakh Nath Rai, Shailendra Rai and Parikshan Kumhar had got fire arm injury and they were fallen on the ground. They had already become dead. Shamsheer Ojha, Vidya Sagar Mallah, Mahasagar Mallah and Harendra Mallah were doing firing by gun. He had got injured by firing by Shamsheer Ojha. In his **cross-examination**, he has deposed that Raj Kishor Pandey had fired at him. In his cross-examination, he had denied that before the police he had said that it is Raj Kishore Pandey who had fired at him. He has further deposed that when he had reached the P.O, there were hundreds of people present there. Except about few people, he cannot say who were carrying which type of arms. He himself was treated at government hospital. He had no enmity with the Mukhiya. He does not know whom the pond belongs to, but Uma and Mukhiya were litigating in regard to the pond. To Court, he deposed that it is the Mukhiya who had possession over the pond. He further deposed that prior to the occurrence the Mukhiya/Pradosh Nath Rai had contested election.

22. PW.-2 is Dilip Kumar Singh, Son of late Pradosh Nath Rai. Supporting the prosecution case, in his **examination-**



in-chief, he deposed as stated by the informant in his fardbeyan regarding fishing in the pond. When he reached at the pond, he saw that fishing was going on in the pond. Uma Mallah, Ramjit Mallah, Shri Kishun Mallah, Nihora Mallah, Ram Agahan Mallah, Vidya Sagar Mallah, Ram Prawesh Mallah, Mahasagar Mallah, Harendra Mallah, Ramashray Kohar, Hridaya Singh, Vijay Singh, Raj Kishore Pandey, Munna Upadhayay, Shamsher Ojha, Shankar Singh, Ram Gopal Singh, Dev Mallah and other were present there. Some of them were fishing and others were standing. He has further deposed that Shri. Kishun Mallah, Raj Kishore Pandey, Ramashray Kohar, Dev Mallah, Mahasagar Mallah, Vidya Sagar Mallah, were carrying guns. Others were carrying *lathi*, *Bhala* and country made pistol. He has further deposed that when his father asked them why they were fishing, one Mahant Rajendra Giri exhorted them to kill him. Consequently, all the accused persons started doing firing indiscriminately. His father succumbed to the firing done by Kishun Mallah and fell down. Gorakh Nath Rai died due to firing by Ramashray Kohar and Vidya Sagar Mallah. Shailendra Rai got fire arm injury from the firing done by Harendra Mallah and Maha Sagar Mallah. Consequently, he also died there. Parikshan Kohar. also got fire arm injury and died there. Nag



Narayan Rai, Vijay Bahadur Singh, Bindeshwar Bhagat also received fire arm injury. All the dead and injured persons were taken to Siwan. In his **cross-examination**, he has deposed that a counter case has also been lodged by Kaushal Mallah. He further deposed that the deceased, Pradosh Nath Rai was his father and the deceased Gorakh Nath Rai was his uncle and Shailendra was his cousin. He has further deposed that near the pond he has no land. He is also not aware of the outcome of the litigation going on before the Sub-Divisional Magistrate under Section 144 Cr.PC in regard to the pond. He has further deposed that about 10-12 persons including himself had reached the pond at 10:45 A.M. Pradosh Nath Rai, Gorakh Nath Rai, Shailendra Rai, Parikshan Kohar, Nag Narayan Rai, Dilip Kumar Rai, Basant Singh, Veer Bahadur Singh, Vijay Bahadur Singh were also among them. They were empty handed. There were about 50-60 people present at the pond. The firing started after five minutes after reaching the P.O. This firing continued for about 15-20 minutes. Within ten minutes, four persons had died due to firing. The accused persons had not received any injury. He had denied the suggestion that he is concealing the injury of the accused persons.

23. P.W.3 is Veer Bahadur Singh, son of Gorakh Nath



Singh. Supporting the prosecution case, in his **examination-in-chief**, he has deposed that he had gone to the pond along with his father, uncle and brother/Shailendra Singh, Parikshan Kohar, Naga Singh, Dilip Singh, Raj Bahadur Singh, Mundrika Bhagat, Chandra Mohan Chaudhary and other people. When they reached at the pond, the accused side were fishing in the pond. Ramashray Kohar, Harendra Mallah, Vidya Sagar Mallah, Uma Mallah, Shri Kishun Mallah, Shamsheer Ojha, Raj Kishore Pandey, Maha Sagar Mallah and Kaushal Mallah were carrying gun. Upon questioning by his father why they were fishing in the pond, the accused persons started firing on them on exhortation of Rajendra Giri. They were firing indiscriminately. Gorakh Nath was shot at by Ramashray Kohar and Vidya Sagar. Shri Kishun Mallah shot at Pradosh Nath Rai, Harendra Mallah and Maha Sagar Mallah shot at Shailendra. Prikshan also received fire arm injury. Naga Singh, Vijay Singh and Bindeshwar Bhagat also received fire arm injury. The dead persons were taken to Siwan. In his **cross-examination**, he has deposed that when they reached at the pond, stampede and firing started. Nobody was earlier injured there.

24. P.W.-4 is Sheo Kumar Rai. Supporting the prosecution case, he has deposed in his **examination-in-chief**



that he has a cowshed to the west of the pond at a distance of 50 yard. At the time of occurrence, he was at his cowshed. Mallah people were fishing in the pond. Mukhiya Pradosh Nath Rai, Gorakh Nath Rai, Shailendra Rai, Parishan Kohar, Basant Singh, Dilip Rai and others came to the pond and Mukhiya Ji asked them not fish in the pond. Thereupon, Rajendra Giri exhorted the accused persons to kill. Shri Kishun Mallah shot at Pradosh Nath Rai, Mukhiya. Consequently, he fell down on the ground. When Gorakh went to lift him, Ramashray Kohar and Vidya Sagar shot at him. When Shailendra, son of Gorakh Nath Rai went to lift him he was shot at by Maha Sagar Mallah and Harendra Mallah. Parikshan Kohar also received fire arm injury. Shri Kishun Mallah and Mat Mallah and other accused persons were also present. He does not remember the name of other accused persons present there. Pradosh Nath Rai, Gorakh Nath Rai, and Shailendra Rai died on the spot. In his **cross-examination**, he has deposed that during *jamindari*, he had fished in the pond. The owner of the pond was Chandeshwar Babu, but since 1956, he has never fished in the pond. He is not aware whether the accused persons have taken the pond in auction. On the date of occurrence, the pond was in the possession of the Mukhiya Ji. But, he cannot say since when he



was in possession of the pond and how did he come into its possession. He is not aware in whose favour, the pond was settled at the time of occurrence.

25. P.W.-5 is Syed Fakrul Ebad. He is a formal witness deposing that the postmortem reports of Parikshan Kumar, Shailendra Kumar Singh, Pradosh Nath Singh and Gorakh Rai were prepared by Dr. H.B. Sahay. He identified the signatures of Dr. H.B. Sahay on the postmortem reports of the deceased persons and the signatures of Dr. H.B. Sahay were exhibited as Ext 2 to Ext 2/3. However, Dr. H.B. Sahay has not been examined and the postmortem reports of the deceased were not exhibited.

26. P.W.-6 is Raj Bahadur Singh. Supporting the prosecution case, in his **examination-in-chief**, he has reiterated the statements as made in the fardbeyan of the informant. In his **cross-examination**, he has deposed that he is not aware which party has won in the litigation in regard to pond. He has also deposed that he has not made any statement before the Police Inspector.

27. P.W.-7 is Vijay Kumar Singh, son of Pradosh Nath Rai. He has also supported the prosecution case. In his **examination-in-chief**, he has also reiterated the statements as



made in the *fardebayan*. In his **cross-examination**, he has deposed that near about 150 rounds of firings were done. He has further deposed that the pond did not belong to anybody and occurrence took place in regard to the pond. He has further deposed that from the prosecution side, near about 20-25 persons reached the pond and thereafter, there was talk between both the sides and after some talk the firing started. accused persons have also lodged counter case. He cannot say who fired how many rounds. He has denied the suggestion that due to political enmity and with intention to grab the government pond, this false case has been lodged. He has also denied the suggestion that they got encountered with unknown criminals of Balia District and in that encounter they got killed.

28. P.W.-8 is Banka Prasad, son of Ram Lal Prasad. He is a formal witness. He has identified the signature of Dr. B.P. Verma on the injury report of Mundrika Bhagat, Bindeshwar Bhagat and Nag Narayan and the injury report is exhibited.

29. P.W.-9 is Chandra Mohan Chaudhary. He has identified his signature on the inquest reports of Gorakh Nath Rai, Shailendra Kumar Singh, Parikshan Kohar and Pradosh Nath Rai.



30. P.W.-10 is Shahnawaz Khan. He is Investigating Officer of the case. In his **examination-in-chief**, he has deposed that on 09.05.1986 he was officer-in charge of the Assaon Police Station. At 11:15 A.M., he got information that there was an altercation between Mallah people and Pradosh Nath Rai, Mukhiya, in regard to fishing in the pachbeniya pond. Upon this information, he reached the village Kasila. Then he came to know that the injured have been taken to Siwan hospital. Hence, he reached Sadar Hospital Siwan at 1:00 P.M and recorded the *fardebayan* of the injured Nag Narayan Rai and lodged Assaon P.S. Case No. 16 of 1986 and started investigation in the case himself. He also identified the injury reports of the injured persons. He also prepared inquest reports of Gorakh Nath Rai, Parikshan Kohar, Shailendra Kumar Singh and Pradosh Nath Rai. He also inspected the P.O. at 17:40 O 'clock in the evening. As per him, the P.O. is situated to the west of pachbeniya pond near the agricultural plot of Satyanarayan Rai bearing plot No. 3333. The crop of wheat was recently harvested from the plot. Soil stained with blood was also seized from the P.O. Seizure list in the presence of Shiv Kumar Rai and Ajit Singh was also prepared. Fish net and *konch* were also recovered from Mahasagar Mallah and seizure list of the same was also



prepared. He also received postmortem reports from Siwan hospital. In his **cross-examination**, he has deposed that the P.O. is situated in plot no. 4212 and 4213. Both the plots are government land. The same was settled in the name of Shri Kishun Mallah by Fishery Department, Siwan on 21.02.1984. Thereafter, A.D.M., Siwan again settled for ten years. Proceeding under Section 144 Cr.PC had also started in regard to the pond but that proceeding also terminated in favour of Shri Kishun Mallah. He has also deposed that in paragraph no. He also deposed that the occurrence had taken place in regard to fishing in the pond. He has further deposed that the witness Dilip Singh has not stated to him which accused has killed whom. He has also not taken the name of Vijay Singh, Shankar Singh and Ram Gopal. He has further deposed that the witness Veer Bahadur Singh has not stated to him which accused killed whom. Vijay Kumar Singh has also not stated to him that Kaushal Mallah and Vijay Singh has shot at his chest.

31. Coming to the evidence of the defence, we find that no witness has been examined by the accused persons in their defence, but they have brought on record **Ext. A, Ext. B, Ext. C, Ext. D to D/5 and Ext. E** under Section 294 Cr.PC without any objection from the prosecution side.



32. Ext. A is **FIR** of Assaon P.S. Case No. 17 of 1986 and the **fardbayan**. The FIR was registered on 09.05.1986 under Sections 147, 148, 159, 324, 326 and 307 of the Indian Penal Code, 1860 and Section 27 of the Arms Act against five accused persons viz., Pradosh Nath Rai, Gorakh Rai, Dilip Rai and Shailendra Rai, all residents of village Sinhpur and Shiv Nath Pandey, resident of Pachbenia, P.S. Assaon. **As per the fardebayan** of the informant Kaushal Mallah, on 09.05.1986 Pradosh Nath Rai, Gorakh Nath Rai, Dilip Rai, Shailendra Rai of Kasila village and Shiv Nath Pandey along with other persons were fishing in pachbeniya pond. When the informant along with Shri Kishun Mallah, Phuleshwar Mallah, Kaushal Mallah, Gathosh Mallah, Bhojnath Mallah, Sahdev Mallah, Ram Dev Mallah and Rameshwar Mallah reached the pachbeniya pond, Pradosh Nath Mukhiya started firing with his licensee gun and his men started firing by their country made pistols. Consequently, the informant side received firearm injuries. Thereafter, the informant side also fired at them leading to injuries to them.

33. Ext. B is Charge-sheet no. 17 of 1986 dated 04.08.1986 which was submitted after completion of the investigation of Assaon P.S. Case No. 17 of 1986, against nine



accused persons viz., Dilip Kumar Rai, Basant Rai, Baikhunt Rai, Rajnath Rai, Shiv Kumar Rai, Chandramohan Chaudhary, Shivrath Pandey, Ramji Rai and Naga Rai @ Nagnarayan Rai for offence punishable under sections 307 and other sections of IPC and Section 27 of the Arms Act.

34. Ext. C is Judgment in Sessions Trial No. 231 of 1989 arising out of Assaon P.S. Case No. 17 of 1986. As per the judgment, the prosecution did not produce the prosecution witnesses, except one formal witness. Hence, all the accused persons facing trial were acquitted. However, it transpires that the Trial Court had not taken any coercive measure to ensure the attendance of the prosecution witnesses. Hence, the prosecution case of the informant could not be tested by examining the witnesses as named in the charge-sheet.

35. Ext. D to D/5 are injury reports of Rameshwar, Phuleshwar, Sahadev, Ganesh Mallah, Nand Ji Mallah and Bhojnath Mallah respectively. As per the injury reports, the injured persons had got fire arm injuries.

36. Ext. E is Lease agreement dated 28.07.1984. As per it, piscicultural and fishing in Pachbenia of Siwan district has been settled in favour of Sri Kishun Mallah, Devnath Mallah and Dukhi Mallah.



37. From perusal of the evidence on record, we find that the occurrence had taken place in regard to fishing right in the Pachbeniya pond and there have been two versions regarding the occurrence. As per the informant of the present case, the accused side were fishing in the pond and when they were asked by the Prosecution side why they were fishing, the accused side started firing at them, resulting into four deaths on the Prosecution side. However, as per the counter version as emerging from the Assaon P.S. Case No. 17 of 1986, the accused side of the present case were fishing in the Pachbeniya pond and when the prosecution side of the case reached there, they (prosecution side) started firing at the accused side by gun and country-made pistols causing firearm injuries to six persons of the accused side.

38. We also find that on the date of alleged occurrence, the fishing right in the Pachbeniya pond was settled by the Government Authority in favor of Shri Kishun Mallah i.e the accused side, as emerges from the evidence of the Investigating Officer of this case and exhibit 'E' as adduced on behalf of the accused. Even Section 144 Cr.PC proceeding had already got terminated in regard to aforesaid Pachbeniya pond.

39. We also find that 20-25 persons of the prosecution



side had visited the Pachbeniya pond, as per P.W.-7 himself and they were trying to prevent the accused side from fishing in the pond, though the accused side had legal right to do fishing in the pond. We also find that the accused side had received firearm injury, which shows that the prosecution side were also carrying firearms and they had also resorted to firing at the accused side.

40. In such situation, question arises whether the prosecution side were aggressors and there existed the right of private defence to the accused side.

41. We have already held that the Prosecution side had no right or authority for fishing in the pond. They had come to the pond to compel the accused side by means of criminal force not to do fishing in the pond. As such, in terms of Section 141 of the IPC, the Assembly of the prosecution side was unlawful and they were aggressors against the accused side who were fishing in the pond as per their right. In such situation, there existed the right to private defence to the accused side to protect their life and property.

42. It would be felicitous to refer to **Dharam and others Vs. State of Haryana, (2007) 15 SCC 241**, wherein **Hon'ble Supreme Court** has held that the basic principle underlying the doctrine of the right of private defence is that



when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is 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 sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. However, it may be hastened to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

43. In the celebrated judgment of **Darshan Singh vs. State of Punjab, (2010) 2 SCC 333**, Hon'ble Apex Court after



referring to its various decisions with regard to right to private defence under Section 96 to 106 of the Indian Penal Code laid down ten principles which are as follows:

“58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his



assailant either when the assault is attempted or directly threatened.”

(Emphasis supplied)

44. In **Genda Singh and Ors. Vs. State of U.P., (2008) 11 SCC 791, Hon’ble Apex Court** has also held that burden of establishing the plea of self defence is on the accused but burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

45. In paragraph 9 of **Salim Zia Vs. State of U.P., (1979) 2 SCC 648, Hon’ble Apex Court** has also expressed similar view holding that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.

46. In **Buta Singh Vs. Sttate of Punjab, (1991) 2 SCC 612, Hon’ble Apex Court** has held 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



assailant who were armed with lethal weapons.

47. It has also been held by **Hon'ble Supreme Court** in **James Martin Vs. State of Kerala** that a person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

48. It would be also pertinent to note that as per **Section 96 of IPC**, nothing is an offence which is done in the exercise of the right of private defence.

49. Coming back to the case on hand, we find that the prosecution side were aggressor, armed with fire arms i.e. lethal weapons and they were at a very short distance from the accused side at the pond. They had also resorted to firing causing fire arm injuries to the accused side. In such facts and circumstances, no one can deny that the accused side had apprehension of imminent danger to their life and property from the aggressor/the prosecution side. In such situations, if the accused side exercised their right to private defence resulting into deaths on the aggressor side, we can not hold that the accused side exceeded their right to private defence.

50. Hence, we find that no offence was committed by



the accused persons, some of whom are appellants in Criminal Appeal (DB) No. 941 of 2013 and some of them are respondents in Govt. Appeal (DB) No. 6 of 2015. Learned Trial court has rightly acquitted the respondents of Govt. Appeal (DB) No. 6 of 2015, but wrongly convicted the appellants of Criminal Appeal (DB) No. 941 of 2013.

51. Accordingly, the Criminal Appeal (DB) No. 941 of 2013 is allowed acquitting the appellants, setting aside the impugned judgment of conviction and order of sentence and Govt. Appeal (DB) No. 6 of 2015 is dismissed upholding the acquittal of the respondents.

52. The appellants of Criminal Appeal (DB) No. 941 of 2013, who are in custody, are directed to be released forthwith, if not required in any other case.

(Jitendra Kumar, J.)

I agree.

(Ashutosh Kumar, J.)

Chandan/
Ravishankar/S.Ali/
Shoaib

AFR/NAFR	NAFR
CAV DATE	03.07.2024
Uploading Date	15.07.2024
Transmission Date	15.07.2024

