

Tunda and anr. Vs. State

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Court : Allahabad

Decided On : Dec-14-1988

Reported in : 1990CriLJ868

Judge : V.P. Mathur and ;M.M. Lal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302; Code of Criminal Procedure (CrPC) , 1974 - Sections 161, 174 and 313

Appeal No. : Criminal Appeal No. 1973 of 1978

Appellant : Tunda and anr.

Respondent : State

Advocate for Def. : Deputy Govt. Adv. and ;O.P. Dixit, Adv.

Advocate for Pet/Ap. : Prakash Chander, ;Tej Pal and ;A.B.L. Gaur, Adv.

Disposition : Appeal dismissed

Judgement :

V.P. Mathur, J.

1. Mr. O. P.Mehrotra, the then Sessions Judge, Mathura, vide his judgment and order dt. 4-7-1978, passed in Session Trial No. 208 of 1977, convicted the appellants under Section 302/34, I.P.C. and sentenced each one of them to

imprisonment for life. Now they have come up through this appeal against that order.

2. According to the prosecution case, Tunda and Bhagwan Singh are cousins. In their statements recorded under Section 313, Cr.P.C. Tunda denies this fact and Bhagwan Singh admits it and no cross-examination has been made to the witnesses who have spoken about this fact.

3. The occurrence took place at 6.30 p.m. on 14-3-1977 near Jhanda Chauraha, Kachchi Sarak Mathura in front of the shop of appellant Bhagwan Singh on the road at a distance of about 11/2 kilo-metres the first information report was lodged the same day at 7.30 p.m. by Ramesh Chandra (P.W. 1), who is real younger brother of deceased Radhey Shyam. The prosecution contends that Tunda and Bhagwan Singh armed with knives attacked Radhey Shyam and killed him on the spot.

4. Radhey Shyam and the first informant Ramesh Chandra (P.W. 1) were residents of Mohalla Maya Tila, Halan Ganj, Mathura. The house of the two appellants was also in their neighbourhood. The prosecution story is that Radhey Shyam somehow developed illicit relationship with Smt. Chando, the wife of appellant Tunda. There was some sort of Panchayat and as a result of all this Tunda shifted from his house in the neighbourhood of the deceased, and went to live in his shop at Vrindavan Gate. About two months prior to this occurrence, Tunda started raising constructions in his house at Maya Tila and in that connection both Tunda and his wife, at different times started visiting the site of the construction. It is also said that taking advantage of this situation Smt. Chando again started coming to the house of the deceased. Tunda and Bhagwan Singh started suspecting resumption of the illicit relationship. One day prior to this occurrence i.e. 14-3-77, they visited Radhey Shyam and entered into an altercation with him and they were told by Radhey Shyam that Tunda should stop his wife's coming to him because it was not Radhey Shyam who was going to his Ghar. Both the appellants left the place in a huff after threatening Radhey Shyam with death if he dared come to Tunda's shop.

5. There is an area known as Kachchi Sarak near the Jhanda crossing and there Bhagwan Singh has a shop. In the upper portion of that shop Bhagwan Singh has his residence. This occurrence took place in front of this shop. It is contended that neighbouring shops were open and electric bulbs were lighted. On that day Vrindavan Rath Fair was held and in that connection Narain Singh (P.W. 2), who is sister's husband of deceased Radhey Shyam and Ramesh Chandra had visited Vrindavan. This Narain Singh is original resident of village Solara, District Gurgaon, in the State of Haryana. After seeing the fair he came to Mathura to visit the house of his in-laws. At about 6.30 p.m. the deceased along with Narain Singh and Ramesh Chandra was proceeding towards the market. When they reached in front of the shop of Bhagwari Singh appellant, both the appellants, who were present on the shop of Bhagwari Singh, jumped down from the shop with open knives crying that now the result of the mischief will be apparent. They started giving knife blows to Radhey Shyam till such time that he fell down on the road. Besides Ramesh Chandra and Narain Singh, two other persons viz. Rajendra Prasad Sharma (P.W. 3) and Kanhaiya (P.W.4) and some other persons and the shop keepers also saw the occurrence. The shop keepers, however, did not come on the spot and they remained crying on their shops. Basant Singh, father of the deceased, who by chance was coming from the same road also came there and tried to catch the culprits but they escaped. Radhey Shyam died on the spot.

6. Ramesh Chandra went to his house to inform the other family members and there he prepared a written report Ext.Ka. 1 and with it went to Police Station Kotwali, Mathura, where he lodged it at 7.30 p.m. and a case was duly registered.

7. Mr. Chandramani (P.W. 6), Sub-Inspector who was present in the Thana at the time of lodging of the first information report, took up the investigation and the same day at 8.00 p.m. he reached the spot. Intimation of the lodging of the first information report was communicated by telephone to police outpost Vrindavan within whose area the place of occurrence lay. Mr. Chandramani took the dead body into custody, prepared Pancha-yatnama and then sent the dead body for autopsy.

8. Dr. Shailendra Kumar (P.W. 7) conducted the postmortem examination on the dead body of the deceased on 15-3-77 at 4 p.m. He found the deceased to be about 28 years of age and of average built and he was of the opinion that the death had taken place about a day back and it was possible for the deceased to have received injuries and succumbed to them at about 6.30 p.m. on 14-3-77. The following ante mortem injuries were found on the dead body :

1. Three punctured wounds, each lying 1' apart on epigastrium transversely in an area 5' x 2' each punctured wound measuring 1 1/4 x 3/4 x abdominal cavity deep on Epigastrium-Direction backwards.
 2. Stab wound 3/4' x 1/2' x muscle deep on outer side, right buttock upper part direction medially.
 3. Stab wound 1' x 1/2' x chest cavity on left side chest 3' x above left nipple direction backward.
 4. Incised wound 2' x 1/2' x bone deep on right side front of skull 2' above right eyebrow, middle part.
 5. Incised wound 1 1/2' x 1/2' x bone on occipital protuberance.
 6. Incised wound 1 1/2' x 1/2' x bone deep on back of head left side 4' back of left ear.
 7. Stab wound 3/4' x 1/4' x chest cavity deep on left side chest back near middle of chest (near mid-line).
 8. Abrasion 1' x 1/2' on top of left shoulder.
 9. Stab wound 1 1/2' x 1/2' x abdominal cavity deep near anterior superior Iliac spine direction medially.
 10. Incised wound 1' x 1/4' x muscle deep on outer side right thigh lower third.
9. The internal examination showed a cut mark on the bone of the skull under injury No. 5, out of the second left rib under injury No. 3 in mid clavicular line,

pleura was punctured under injuries Nos. 3 and 7, puncture of left lung at two places under injuries 3 and 7, and peritoneum was perforated under injuries Nos. 1 and 9. Stomach was punctured at two places through and through and so also large intestine at several places. Under injury No. 1 the spleen was punctured. The death was due to syncope as a result of haemorrhage and shock, which had resulted from the injuries sustained.

10. The two accused appellants of this case were not available on search and they surrendered in Court on 25-3-77.

11. Seven witnesses in all were examined in support of the prosecution case. Four of them were cited as eye-witnesses, namely Ramesh Chandra (P.W.1), Narain Singh (P.W. 2), Rajendra Prasad Sharma (P.W. 3) and Kanhaiya (P. W. 4). Out of them Rajendra Prasad Sharma and Kanhaiya went back upon their statements recorded under Section 161, Cr.P.C. and came up with the story that they did not see the actual incident. One of them said that he saw the dead body lying on the road at about 8.30 p.m. All other witnesses including the Investigating Officer and Dr. Shailendra Kumar are formal witnesses.

12. Ramesh Chandra (P. W. 1) is younger brother of the deceased and informant of this case and Narain Singh (P.W. 2) is sister's husband of the deceased and Ramesh Chandra. Both of them are, therefore, interested and related witnesses but that will not be the only criterion to judge the worth of their testimony. The only effect of this will be that their statements will have to be read with greater care and caution. A very great emphasis has been laid by the learned counsel for the defence on the fact that Narain Singh has his residence about 60-70 miles away from Mathura in village Solara in the State of Haryana and he could not have been present on the spot at the time of the incident. Narain Singh's testimony is that he had started from his village early in the morning at 7.00 a.m. and arrived at Palwal at about 8 or 8.30 a.m. At about 8.45 in the morning he caught a bus at Palwal which was crossing from Delhi. He purchased a ticket for Vrindavan on payment of Rs. 5.75. It was a Haryana Roadways Bus and by it he reached Vrindavan near about 10.45 a.m. Then he saw the Rath fair and remained in the Mela up to 2.00 p.m. and after visiting some other places there, he came to Mathura and reached

the place of his in-laws at about 3.30 p.m.

13. D.Ws. 2 to 5 have been examined by the defence to show that no Haryana Roadways Bus runs between Delhi and Vrindavan and that there is no regular stop of such bus at Vrindavan and hence the presence of Narain Singh witness on that day at Vrindavan and consequently in Mathura thereafter is highly improbable and impossible. The defence witness D.W. 2 is Sri Amir Chandra, Inspector, Haryana Roadways Bus Stand at Delhi. In the last line of his cross-examination he admits that from Delhi or Palwal tickets are not issued by Haryana Roadways for Vrindavan road but it is always possible for a passenger to obtain a ticket for Mathura and request the Conductor to have the bus stopped unscheduled at Vrindavan road which is known as Chhatikara and get down there.

14. Similarly, D.W. 3, Sri Shyam Lal, Duty Clerk, Haryana Roadways, Gurgaon in para No. 3 of his cross-examination says that from Gurgaon Buses run for Mathura at 7.15, 8.15, and 9.30 a.m. and those Buses pass through Palwal. He also gives out that Buses which run from Palwal to Mathura and Agra have to pass through Mathura Delhi Road.

15. D.W. 4, Mr. Har Saran Singh, Traffic Manager, Haryana Roadways, Gurgaon, admits during his cross-examination that while coming from Palwal to Mathura Vrindavan Road is not a regular Bus stop of Haryana Roadways, nor a stop at request, nor any tickets are issued for Vrindavan or Vrindavan Road, but it is always possible to obtain a ticket for Mathura and with the permission of the Conductor to get down any where in between.

16. Lastly D.W. 5 Sri Ramnath Mishra, Station in charge, U. P. Roadways Vrindavan admits that from Agra Road, Vrindavan Bus stand is 8 kilo metres away. During Rath Fair thousands of people visit Vrindavan and hundreds of them get down at Vrindavan Road and reach Vrindavan. In between Vrindavan Road and Vrindavan, by the side of the road, there are many famous places, worth being seen.

17. From the testimony of these witnesses it is quite clear that from Palwal if one purchases ticket for Mathura and if he pleases the Conductor he can get down at

Vrindavan Road and reach Vrindavan without any difficulty. No cross-examination was made with Narain Singh in this respect and the whole argument against possibility of his presence is based upon his testimony that he took ticket for Vrindavan and got down at Vrindavan. It is a matter of common knowledge that when people go to the Booking window asking for the ticket of their destination, they are clearly told that the conveyance does not stop where they want to go and yet if they may purchase ticket for a longer distance, they may go by the Bus. Hence if this witness obtained ticket for Mathura under the impression that he was going in for a ticket for Vrindavan and after requesting the Conductor got the bus stopped at Vrindavan Road and got down there and then reached the fair, there would be nothing unusual, unnatural or impossible for him. This witness does not belong to Mathura or Vrindavan. He is resident of a village in Haryana which is 60-70 miles away from Mathura. He is not alleged to be a regular or frequent visitor to Mathura or Vrindavan. Under these circumstances it would be too much to expect that he would differentiate between Vrindavan Road and Vrindavan.

18. A perusal of the first information report would show that the name of Narain Singh is mentioned in it and actually the contention is that it was only to show the market to this guest of the family that the two brothers took him towards the Bazar. The Investigating Officer reached the spot without losing much time at about 8 or 8.30 p.m. and interrogated this witness after about 11 p.m. the same day. Hence undoubtedly the witness was present in Mathura at the house of the deceased where he was interrogated the same night. There is nothing on record to suggest that after the occurrence any action was taken to summon him from Haryana in order to be a witness in this case. The allegation that the first information report has been ante-timed is also not established. Our attention was, however, drawn to a Division Bench decision of this Court in the matter of *Shyama Charan v. State of U.P.*, (1985 All Cri C (Summary of Cases) S. No. 11 at pp. 12 and 13) (and also Summary of Case No. 55 at p. 57) where discrepancy in the distance given in two documents, i.e. the first information report and the inquest memo, was allegedly taken to give rise to the inference that the first information report came into existence later on. The Court in that case found three things which were intriguing and on that basis this opinion was expressed. The first was that the distance in the first information report did not tally with that in the inquest memo. The second was

that the inquest report's examination as a whole showed some discrepancy in the writing and the signatures of the Panches, which suggested that the impressions of the Panches were obtained earlier and the writing portion was executed later on. Thirdly, it was found as a matter of fact that additions had been made subsequently as regards the various sections of the IPC which could be applicable to the case. Considering all these facts and other circumstances of the case, the Court came to the conclusion that the first information report did not come into existence at the time at which it purports to have been lodged. This ruling does not lay down that in each and every case in which there is a discrepancy in the mention of the distance between the first information report and the inquest memo the natural and normal inference will be that the first information report was ante-timed.

19. We may like to mention in this context an old case of *Podda Narayana v. State of Andhra Pradesh*, decided by a Division Bench of the Supreme Court and reported in AIR 1975 SC 1252. There is the inquest memo details of the weapons used, the names of the assailants, and the circumstances in which the assault was made were not given and the Sessions Judge was of the view that these indicated that the first information report was not in existence or the case was suspicious. The Supreme Court held that:--

'The object of the proceedings under Section 174 Cr.P.C. is merely to ascertain whether a person has died under suspicious circumstances or unnatural death and if so what is apparently the cause of death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, appear to us to be foreign to the ambit and scope of the proceedings under Section 174. Under these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report.'

20. The situation before us is not much different. The inquest memo is on a prescribed form and in column No. 1 the time of occurrence and the time when the inquest is started, have to be mentioned. Usually the time of the occurrence is to be taken from the first information report itself in which for the first time it is

mentioned. The Officer carrying out the inquest has no personal knowledge about it, but in the whole of the form there is nothing to show that everything had to be taken down or copied from the first information report. After all the officer who conducts the inquest is also a human being and an intelligent one for the matter of that, who is expected to be conversant with the preparation of these documents. When he travels the distance from the Thana to the place where the inquest is to be done, he has his own impressions about the distance. Under no provision of the law and even as a matter of practice is he required to note, down in the relevant columns the distance from the Thana by copying it out from the first information report, although at times it may be different from what his own impression about it is. He is not called upon to copy out this fact from the first information report. Therefore in our view, the mere fact that there is a discrepancy in the distance as given in the first information report and the inquest memo will not by itself be sufficient to claim that the first information report should be discarded as ante-timed. Even the case of Shyama Charan (*supra*) does not lay down that law. We are of the view that in most of the cases the officer conducting the inquest reports has his own impression about the distance. In some cases he may note down the distance as given in the first information report, but in no case his action in this respect can result in the conclusion that either the inquest memo is fake or the first information report is ante-timed, unless there are other circumstances to justify such a conclusion.

21. The Investigating Officer came into the witness-box and he stated on oath that the first information report was taken down in his presence in the Thana. This report clearly shows the time of the incident as 6.30 p.m. and the time of the lodging of the first information report as 7.30 p.m. No cross-examination with the Investigating Officer was made to elicit that he was actually not present in the Thana or that the first information report was not lodged in his presence or that there was any action by the police as a result of which the time of lodging of the first information report was falsely written. The Head Constable who scribed the report has entered into the witness box as PW 5 and his statement on oath is very clear and unambiguous and we are clearly of the view that the first information report was lodged at the time at which it purports to have been lodged.

22. Considering all these aspects of the case and in view of the sworn testimony of Ramesh Chandra and Narain Singh, we are of the opinion that these witnesses were present at the spot when this occurrence took place.

23. In the first information report there is mention of the facts which may constitute a motive for this offence. According to the defence version also, there is a story in view of which it is said that the prosecution party was ill disposed against Tunda and Bhagwan Singh. So far as prosecution version is concerned, it is contended that Tunda's house is adjacent to the house of Ramesh Chandra and Radhey Shyam and Tunda's wife Smt. Chanda was having illicit relations with the deceased. When this fact became public, there was some sort of a Panchayat and Tunda shifted to reside on his shop. It is contended again that Tunda started raising constructions in his house and in that connection he and his wife again started visiting the site of those constructions and whenever opportunity was available Smt. Chanda was visiting Radhey Shyam at his house. One day prior to this occurrence Tunda and Bhagwan Singh went to the house of the deceased, where in the presence of the father of the deceased they complained about the matter and they were promptly told that it was not Radhey Shyam who was going to visit Smt. Chanda but Chanda was visiting Radhey Shyam and Tunda should stop her from doing so. It is contended that Tunda and Bhagwan Singh left the place after threatening with death if Radhey Shyam dared come near their shop.

24. In this respect the evidence consists of the statement of Ramesh Chandra only. There is nothing on record. Further, Narain Singh could have no information about this matter. Ramesh Chandra's father has not been examined in this case. On behalf of the accused persons all these facts are denied. As against this, the defence version is that some Parnalas from the house of Ramesh Chandra and Radhey Shyam opened into the house of Tunda and in respect of the same there was a written agreement whereby Radhey Shyam's father had agreed to close those Parnalas as and when buildings were raised in the land of Tunda and he was asked to close the Parnalas. It is in evidence that Tunda started raising some building but there is nothing on record to show that he called upon Basant Singh, father of Ramesh Chandra to close the Parnalas. Obviously, even on this score there can be no enmity between the parties. In this view of the matter, so far as

the existence of enmity is concerned, there is no apparent cause for the same unless the prosecution version is accepted. But it is now well settled that in cases in which there is direct testimony, motive loses much of its importance and the court has to decide the case on the basis of the evidence of direct witnesses.

25. It is contended that between Tunda and Bhagwan Singh there was litigation. No documents have been placed about the same on record but from the statement of the accused-appellants the learned court below has taken note of the fact that this litigation was with respect to partition of the property. We do not know as to what was the defence in this case on behalf of Bhagwan Singh. Partition does not necessarily create enmity or animosity. There is a very important document on record of the case and it is Ext. Kha.1. The circumstance in which it was placed on the record may be narrated. We have already referred to an agreement entered into between Tunda and Basant Singh with respect to the Parnalas. This document was shown to Ramesh Chandra and he accepted the signature of Basant Singh on this document and taking it to be the agreement with respect to Parnalas, it was placed on the record and got exhibited as Kha 1 but it is not the document which it purports to be or which it was intended to be. It is another agreement between Tunda and Bhagwan Singh on one hand and Jai Narain and Laxmi Narain on the other with respect to the sale of a land belonging to Tunda and Bhagwan Singh. It is dt. 18-9-76. It shows two things. Firstly, it clearly shows that at least up to 18-9-76 Tunda and Bhagwan Singh had no enmity inter se. They were selling joint, property by a common deed of agreement. It also shows that Basant Singh who had no concern with this property simply signed as a witness, which means that there was no enmity between Tunda and Bhagwan Singh on one hand and Basant Singh on the other. Therefore, the argument that because there was a partition between Tunda and Bhagwan Singh and hence they were inirrnically disposed and could not join hands to commit this offence is far fetched and cannot be accepted as a ground to hold that the occurrence could not have taken place in the manner in which it is alleged by the prosecution.

26. It is contended that both Ramesh Chandra and Narain Singh are related and are partisan witnesses, but they have apparently no enmity. Unless the prosecution version of the same is accepted, then the motive will be against Tunda

and Bhagwan Singh and in favour of the prosecution. Even otherwise also, if the story regarding the Parnalas is accepted as a basis for enmity, then the grouse will be with Bhagwan Singh and Tunda and not Ramesh Chandra and Radhey Shyam. It is contended that independent witnesses have not been examined in this case. This is a wrong contention. Rajendra Prasad Sharma and Kanhaiya were duly examined. The name of Rajendra Prasad Sharma finds mention in the first information report also. Both these witnesses were interrogated by the Investigating Officer on the very night of this occurrence. In their depositions in court they have gone back upon their statements recorded under Section 161, Cr.P.C. and have taken shelter behind the plea that they were not present and they did not see anything. It is easy to say so and to deny having made any statement before the Investigating Officer and to get out of the situation. But the prosecution has done its duty by placing these two persons into the witness box and it cannot be blamed of having withheld independent witnesses.

27. The occurrence took place on the road in front of the shop of Bhagwan Singh appellant. The place of occurrence is not disputed. Obviously the other shops were open and those shop keepers would have witnessed the occurrence. They have not, however, supported the prosecution version and the Investigating Officer says that they denied having seen the occurrence and at least one refused to be a witness. Whatever may be the truth, but it is evident that the persons of the neighbourhood of the shop of Bhagwan Singh would be extremely reluctant to come into the witness box to support the prosecution case in which Bhagwan Singh was being accused of murder.

28. Our attention was drawn to the fact that although the first Parcha of the case diary is alleged to have been sent from the police station on 16-3-77 it was signed by the Circle Officer on 22-3-77. It is in evidence that Parliamentary elections were held on 18-3-77 and 20-3-77. Judicial notice can be taken of the fact that during election period Police Officers and officials remain extremely busy with arrangements for holding the elections. There is nothing on record to show as to why the Circle Officer could not get time to peruse the Parcha before 22-3-77. The Investigating Officer could have been examined on this aspect of the matter. The reasons is, however, obvious that the Circle Officer must have been busy and in

any view of the matter if the Parcha has been promptly sent but was not looked into by the Circle Officer for a long time that will have no effect on the merit of the prosecution case now will it raise a doubt on the mere ground that it was seen by the Circle Officer on 22-3-77 and it cannot raise any presumption of the fact that it had not been sent from the police station on the date and at the time when it purports to have been sent.

29. In view of what we have discussed above, we are convinced that both Ramesh Chandra and Narain Singh are telling truth about how the occurrence took place. Tunda and Bhagwan Singh armed with knives suddenly came out of the shop of Bhagwan Singh. It is, of course, apparently a coincidence that although Tunda has his own shop some distance away, he was at that time at the shop of Bhagwan Singh. There is no evidence to that effect on the record but the possibility that Tunda might have seen Ramesh Chandra, Narain Singh and Radhey Shyam going out of their house towards the market and might have suddenly come to the shop of Bhagwan Singh cannot be ruled out. The fact remains that both these accused persons came out of the shop of Bhagwan Singh armed with knives and attacked Radhey Shyam just when he was in the company of Ramesh Chandra and Narain Singh and they gave him persistent blows with knives as a result of which he fell down on the road and died. In our opinion, the case against the accused appellants is satisfactorily made out and they have rightly been convicted on the charge under Section 302/34 I.P.C The imprisonment for life awarded to them by way of sentence is just and proper and does not call for any interference.

30. DW 1 Bhajan Lal is a worthless witness and has been rightly ignored by the learned Sessions Judge. He says that at about 8 or 8.30 p.m. the murder of Radhey Shyam took place in front of the shop of Bhagwan Singh. He claims that his own shop is 3 or 4 shops away from the place of incident on the Jhanda Wala Chauraha and on hearing the noise he came out and saw Radhey Shyam lying on the road and 4 and 5 persons running away. He also says that there was no electric light at that time and, therefore, he could not recognize those persons. During cross-examination he had to admit that he has no shop of his own. He claimed to be a partner with one Tribhuvan Dixit. There is nothing on record further to show that there is even a shop of Tribhuvan Dixit any where near the scene of

occurrence. The story of partnership has not been established. He is unable even to name the servants who were working on the shop. He claims to have had an agreement of partnership, which has not been placed on record. At the time of his deposition he was living in Jaith. He says that after seeing the dead body he went straightway to his home and did not talk to anybody. He had to admit that in those days the shops used to close at 5.30 p.m. but claims that the shop of Tribhuvan Dixit used to remain open up to 10 or 11 p.m. Such a witness can always be procured and no reliance can be placed upon his testimony and in any view of the matter his evidence can only show that about 8 or 8.30 p.m. when he reached the spot he found the deceased lying on the road in front of the shop of Bhagwan Singh. This much is not against the prosecution version.

31. In the result, the appeal is hereby dismissed. The conviction of the appellants under Section 302/34 I.P.C. and the sentence of imprisonment for life awarded to them by the learned Sessions Judge, Mathura on 4-7-1978 are upheld and confirmed. The two appellants are on bail. They shall surrender and be taken into custody to serve out their sentences and their surety deeds and personal bonds shall stand cancelled.