

ishwar Singh and ors. Vs. State of Rajasthan and ors.

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Court : Rajasthan

Decided On : Mar-14-1972

Reported in : 1973CriLJ811; 1972()WLN269

Judge : C.M. Lodha and; M.L. Joshi, JJ.

Appellant : ishwar Singh and ors.

Respondent : State of Rajasthan and ors.

Judgement :

C.M. Lodha, J.

1. Motti the above appeals are directed against the judgment of the Additional Sessions Judge. Merta dated 29.5.1971 by which the learned Judge convicted the accused Ishwar Singh. Kalyansingh. Prabhu. Arjun and Mewa Ram of the following offences and sentenced them to various terms of imprisonment as mentioned against each offence:

1. Under Section 302 read with 149. I.P.C. --- Sentenced to life imprisonment and a fine

of Rs. 100/-; in default of payment of fine

two months' rigorous imprisonment.

2. Under Section 325 read with- 149. I.P.C. -- Sentenced to three years' rigorous imprisonment

and a fine of Rs. 100/-; in default of payment

of fine two months' rigorous imprisonment.

3. Under Section 322 read with 149. I.P.C. --- Sentenced to one year's rigorous imprisonment.

4. Under Section 447. I.P.C. --- Sentenced to three months' rigorous imprisonment.

5. Under Section 147. I. P. C. --- Sentenced to two years' rigorous imprisonment.

All the substantive sentences have been ordered to run concurrently.

2. All the aforesaid five accused have filed a joint appeal to this Court from their conviction and sentences and the same has been registered as Criminal Appeal No. 530 of 1971.

3. Accused Ajeet Singh. Bhagirath Singh, and Smt. Mohni. wife of Mewaram were also jointly tried along with the aforesaid accused for the same offences, but they were acquitted. Consequently, the State has also filed an appeal to this Court from their acquittal and this appeal was registered as Criminal Appeal No. 22 of 1972, It may be stated here that at the stage of admission the appeal was dismissed against Smt. Mohni and we have now therefore to deal with the case against Ajeet Singh and Bhagirath Singh only.

4. The occurrence out of which this case arises took place on 15.10.1969 at about 12 noon in the field bearing Khasra Nos. 166 and 169 situated in the precincts of village Jakhli. Tehsil Parbatsar. The prosecution case as set out in the first information report is that the field where the occurrence took place was in the cultivator possession of P. W. 13 Ratna. but the accused wanted to take forcible possession from him. and with that object in view they formed an unlawful assembly and came armed with lathis and gave a severe beating to the deceased

Bhanwarsingh. and his sons P. W. 7 Guman Singh and P. W. 2 Motisingh. who along with a few others were cutting the crop of 'Baira' sown in the field by the complainant's party.

A first information report of the occurrence was lodged by P. W. 13 Ratna at 12 O'Clock in the noon on 16.10.1969 at Police Station. Parbatsar. On enquiry from the first informant the Station House Officer. Moolrai came to know that all the three injured, namely Bhanwar Singh. Gumansingh and Motisingh had been taken by Hanumansingh to the town of Sambhar for treatment but Bhanwar Singh had breathed his last at the Sambhar Railway Station, and consequently his corpse had been taken back to the Government Hospital at Makrana, but the other two injured Gumansingh and Motisingh were admitted in the Hospital at Sambhar. After making a note to this effect in the Police Diary the Station House Officer proceeded to the spot for necessary investigation. The accused Ishwar Sinah and Kalvan Singh were arrested on 17.10.1969 and since some injuries were found on their bodies also they along with Smt. Suwati wife of accused Prabhu were also medically examined by P. W. 1. Dr. Munnial. Medical Officer-in-Charge. Primary Health Centre. Degana on 16.10.1969. The autopsy on the body of deceased Bhanwar Singh was performed by P. W. 1 Dr. Ashok Kumar on 16.10.1969 at about 10.30 P. M. The other two injured P. W. 2 Motisinffh and P. W. 7 Gumansingh were also examined by Dr. Ashok Kumar the same day.

5-11. After stating the injuries found on the person of accused and the prosecution witnesses his Lordship proceeded.

12. The case of the accused Arjun is that the fields Khasra Nos. 166 and 169 'belonged to Kastura father of the accused Prabhu, Ariun and Mewa Ram and a Bapi Patta had also been issued in his name. It is further stated by him that P. W. 13 Ratna was married to the sister of the accused Prabhu. Arjun and Mewa Ram. and Prabhu had orally mortgaged the field in question with Ratna in Samwat 2003 in lieu of a debt of Rupees 740/-. His case is that the possession of the field was delivered back to Prabhu and others in Samwat 2023 after Ratna had enjoyed the usufruct of the same for about 20 years, and thereby the mortgage debt had stood discharged. In nut shell his case is that the accused Prabhu, Arjun and Mewa Ram

were in actual physical possession of the field in question and on the day of occurrence the accused Ariun. his brother's wife Smt. Suwati and 10 to 15 labourers employed by Ariun were cutting the crop whereupon the deceased Bhanwar Singh alone with his sons Gumansingh. Motisingh and Gegsingh came in a arty of about 10 to 20 persons and started removing their crop and thereby wanted to take forcible possession of the field.

The case of the accused further is that Arjun and Smt. Suwati tried to stop Bhanwar Singh and others from taking away their crop, but the latter started beating them. On hearing their hue and cry, according to the defence, the accused Ishwar Singh and Kalyan Singh, who were working in the fields nearby came to the spot to intervene but they too were beaten. The accused Prabhu. Mewaram. Ajeet Singh. Bhagirath Singh and Smt. Mohni pleaded alibi, and while asserting Prabhu and his brother's ownership and possession over the field in question they denied their presence at the time of occurrence.

13. After recording the evidence produced by the prosecution as well as by the, defence the learned Sessions Judie found that Bhanwar Singh died on account of the injuries inflicted on him by the accused Ishwar Singh. Kalyan Singh, Prabhu. Ariun and Mewa Ram on 15.10.1969 about 12 noon in the field bearing Khasra No. 166 and 169. He also found that the accused Ishwar Singh, Kalyan Singh, Prabhu. Mewa Ram and Arjun were the persons responsible for causing injuries to Bhanwar Singh. Guman Singh and Motisingh. Another important finding of the learned Sessions Judge is that the accused committed a criminal trespass as members of an unlawful assembly over the field which was in possession of the complainants' party. He repelled the defence contention regarding private defence of person and property. However, when coming to the question of convicting the accused he grave benefit of doubt to the accused Ajeet Singh. Bhagirath Singh and Smt. Mohni mainly on the ground that these accused were found to have no injuries on their person, and further that they had not been mentioned as assailants of the prosecution witnesses in their statements recorded by the Police, and that is how these three accused came to be acquitted.

14. We propose to dispose of both these appeals by a single judgment.

15. Learned Counsel for the convicts Ishwar Singih and 4 others has urged that the prosecution has failed to prove that the field in question was in possession of Ratna or any other man of the complainants' party on the date of occurrence. and that the accused had formed an unlawful assembly with the object of dispossessing the complainants from the field by force and to cause murder and grievous hurt to the complainants' party in ^prosecution of that object He has also argued that whatever injuries were caused by the accused to the complainants' party, they were all caused in exercise of the right of private defence of person and property. In this connection it has also been submitted that none of the accused is proved to have exceeded the right of private defence.

16. We may state at once that there is no doubt that Bhanwar Singh deceased, Gumansingh (P. W. 7) and Motisingh (P. W. 2) on the complainants' side were injured in the field in question in the course of the occurrence at the hands of some or all of the accused. Similarly we have also no doubt that in the course of the same incident the accused Ishwar Singh and Kalyan Singh also received injuries (vide the injury reports Ex. D. 25 and Ex. D. 23 respectively), and in fact the learned Counsel for the parties have not disputed this fact. The points of decision, therefore, may be summed up as follows:

(1) Which party was in the cultivatory possession of the field in dispute on the date of occurrence?

(2) Whether the accused had a right of private defence of property and person in exercise of which they caused injuries to Bhanwar Singh. Gumansingh and Motisingh? and

(3) If so, whether the accused had exceeded the right of private defence?

17. The prosecution case as mentioned above is that the field in question was in the Khatedari of P. W. 13 Ratna. who held exclusive possession of the same. In the course of evidence. P. W. 13 Ratna has stated that the field bearing Khasra No. 166 was recorded in the name of Kastura (father of the accused Prabhu. Ariun and Mewa Ram) in the revenue record, and that after the death of Kastura the mutation in respect of the field in question was made in favour of his father Bhura

Ram. In this connection he has also produced copy of Khewat Khatoni Ex. P. 29, copies of Khasra Girdawari Exhibit P. 30 and Ex. P. 31. copy of order sheet of Munsiff, Parbatsar dated 5.5.1953 Ex. P. 32. an order under Section 107. Criminal P.C. dated 6.5.1970 Ex. P. 34 and a copy of an order of injunction dated 22.9.1967 Ex. P. 33. He has further stated that during the year in which the occurrence took place he had cultivated both the Khasra numbers jointly with Hanumansingh and Bhanwar Sinsh. and that on the day of occurrence he had gone along with Gumansingh. Bhanwarsingh. Motisingh. Hanumansingh and Laxmansingh to cut the Bajra crop.

In the course of cross-examination this witness has stated that he did not know. whether the mutation proceedings had been effected in favour of Arjun, Prabhu, Bhinwa and Mewa. sons of Kastura vide Ex. D. 12. and that he also did not know whether this field had been entered in the name of Ariun, Bhinwa. Prabhu and Mewaram. sons of Kastura in the Jama Bandi of Sections 2024 to 2027 (vide Ex. D. 13). On being further cross-examined, the witness expressed complete ignorance as to the fact that this field had been mentioned in the name of Kastura in the 'Dhal Bach (Dues Demand Register) of Samwat 2025 and 2026 (vide Ex. D. 14 and Ex. D. 15). The witness further admitted that he had not paid land revenue for this field for the Samwat years 2023 and onwards and that he does not know whether Ariun and Mewa Ram had paid the land revenue amounting to Rs. 52.06 on 15.1.1971 vide receipt Ex. D. 16. The witness has further stated that he is ignorant of the fact whether the field had been entered in the name of Kastura in the Khatoni of Section 2000, a copy of which is Ex. D. 22. He has also expressed his ignorance as to whether in the Khasra Girdawari of Sections 2024 to Section 2027 (Ex. D. 17) the names of Kastura and his sons Prabhu. Mewa, Bhinwa and Arjun were entered.

The witness has also admitted that there is a field of Dalaram (D. W. 3) on the east of the field in question and adjacent to it. Towards the end of his cross-examination the witness has taken the stand that the field was lying fallow and uncultivated about 25 years ago and that his father had started cultivating the same and that thereafter the Government had allotted the field in question to him and the Girdawari was also prepared in his name. He has however, admitted that

there is no written order of the Government by which this field was allotted to him.

18. We may state at once that we are not at all impressed by the testimony of the witness Ratna regarding his alleged ownership and possession over the field in dispute. In a suit for injunction filed by Prabhu and others against Ratna, this witness admittedly filed written statement (marked Ex. D. 8) in which he has clearly admitted that the Bapidar of the field in dispute was Kastura father of Prabhu and others and that in Samwat 2003 Prabhu and his brothers Arjun and Mewala had mortgaged the field in dispute with the defendants, that is, Ratna and his father Bhura in lieu of a debt of Rs. 740/- and that it was agreed between the mortgagors and the mortgagees that the field would continue to remain in possession of the mortgagors who would pay up the mortgage debt and in case the mortgagors failed to make timely repayments the mortgagees would be entitled to cultivate the field themselves. In face of the aforesaid admission by Ratna in Ex. D. 8 we are clearly of the opinion that Ratna's assertion in his statement as P. W. 13 that the field was lying fallow and uncultivated and that the Government had allotted the field to him is palpably false.

There is further the statement of Ratna (Ex. D. 8) recorded in that suit wherein also Ratna had admitted that he had money dealings with Prabhu and his brothers and that he had been put in possession of the field by Prabhu and others, who had handed over the Patta of the field standing in their names to him. From the documents filed by Ratna it does appear to us that Ratna continued in possession of the field in question as mortgagee upto Samwat 2023. But thereafter the Bapidars of the field, namely Prabhu and others got back the possession of the same from Ratna and others. We are persuaded to take this view, for the following reasons:

(i) Ratna has not produced any document relating to the period subsequent to Samwat 2023 to show his possession over the field.

(ii) The accused Prabhu. Arjun and Mewaram have produced a number of documents, pertaining to the period subsequent to Samwat 2023. which go to show that they had come into possession of the field; to mention a few of them - Ex. D. 13 Jamabandi (Khewat Khatauni of village Jakali) of the period Samwat

2024 to Samwat 2027, Ex. D. 14 and Ex. D. 15 'Dhalbach' of village Jakali of Samwat 2025 and Samwat 2026. Ex. D. 16 land revenue receipt pertaining to the field in question for Rs. 52.06 paise in respect of Samwat year 2026 dated 15.1.1971. Ex. D. 17 Khasra Girdawari of village Jakali for the period Samwat 2024 to Samwat 2027. In all these documents either Kastura, father of the accused Prabhu, Arjun and Mewaram or the accused Prabhu, Arjun and Mewaram are themselves entered as tenants in actual cultivatory possession of the field.

(iii) The corroborative statement of D. W. 2 Vali Mohammad, who was a Patwari in the Patwar Circle, Jakali and has proved the entries Ex. D. 13, Ex. D. 15, Ex. D. 16, and Ex. D. 17, further lends support to the defence in this connection. Vali Mohammad has stated that he realized the land revenue for the Samwat years 2026 and 2027 from one Hira on behalf of Mewa, Arjun and Bhinwa and that the mutation in respect of the field in question was effected in favour of Arjun, Mewa, Prabhu and Bhinwa by the order of the Gram Panchayat, Jakali dated 28.3.1970. The witness has also stated that on 14th and 15th October, 1969 he went to the spot at about 8 a.m. and found Arjun, the accused, present on the field in question along with 4 or 5 ladies and in support of this statement he has also exhibited an entry in his daily diary marked Ex. D. 21.

(iv) The defence has also examined one of the immediate neighbours of the field in question, namely, D. W. 3 Dalla Ram. That P. W. 3 Dallaram's field is situated contiguous to the field in dispute on the eastern side is not a matter of dispute, Dallaram has stated in unambiguous terms that on the west of his field there is the field of Arjun, Prabhu, Mewa and Bhinwa sons of Kastura and that in Samwat 2023-24 the field was redeemed by the accused Prabhu and others from Ratna and since then they had been continuously cultivating the same. The witness has further stated that during the year of this occurrence Arjun and his brothers had cultivated the field. The evidence of this witness has not been shaken even during a lengthy cross-examination.

(v) In his statement recorded in the committing Court (Ex. D. 6) Ratna admitted that he had instituted a criminal case under Section 452, I.P.C. against Gumansingh, Gagsingh, Anop Singh, Hanumansingh and Richpalsingh but had

compromised the same on the assurance given by the said accused that they would get the possession of the field in question delivered to him. When confronted with this portion of the statement, all that Ratna has stated is that he is not sure whether he had given such a statement. In the circumstances, therefore, we must hold that in his unguarded moments truth escaped from the lips of Ratna and he admitted that he was out of possession of the field in question in 1967 when he compromised the criminal case with Gumansingh and others as stated above.

19. Learned Counsel for the State, however, placed strong reliance on the statements of P. W. 2 Motisingh. P. W. 3 Hanumansingh P. W. 5 Salu Ram, P. W. 7 Gumansingh P. W. 11 Laxman-singh and P. W. 13 Ratna and submitted that the possession of Ratna over the field in dispute on the date of occurrence was established by the testimony of these witnesses. We have gone through the statements of these witnesses carefully and are of opinion that they cannot be relied upon, on account of the fact that they are interested witnesses and besides that, their evidence runs counter to the documentary evidence referred to above. Moreover, the circumstances speak against their version. We find it difficult to comprehend that Ratna and his alleged co-sharers, namely. Bhanwar-singh and Hanumansing peacefully cultivated the land in question during the year in which the occurrence had taken place also succeeded in reaping the fruits of their cultivation by removing the crop from the field for three days before the occurrence and on the day of occurrence the accused should have suddenly taken it into their 'heads to have come armed and to have taken away the crop which had been cut by Ratna and others.

20. We may also here Point, out that two women namely Smt. Mohni, wife of Mewaram and Smt. Suwati. wife of Prabhu were also present at the spot, and it does not stand to reason that if the accused had come determined to take possession of the field by force, they should have brought their womenfolk with them.

21. From what we have stated above it appears to us that the accused Prabhu, Arjun and Mewaram were in actual possession of the field in question on the day

of occurrence, and the prosecution has failed to establish that all the accused or any of them had come there after forming an unlawful assembly to take forcible possession of the field in question from Ratna and his co-sharers and to achieve that object they had also made up their minds to commit murder or cause grievous injuries to the party of the complainants. Thus the point No. 1 as framed above stands answered in favour of the accused.

22. This brings us to the consideration of the second question pertaining to exercise of right of private defence. From our finding on point No. 1 it is abundantly clear that the accused Prabhu. Arjun and Mewaram being in cultivatory possession of the field in dispute had a right to defend the same against theft or criminal trespass by any party. In this view of the matter we have no difficulty in coming to the conclusion that Ratna Bhanwarsingh deceased, P. W. 7 Guman Singh and P. W. 2 Moti-singh both injured) had no right to come on the field in dispute. As we have already stated above, on the side of the accused also Ishwar singh and Kalyan-singh received a large number of injuries both by talent weapon as well as by sharp weapon. It, therefore, logically follows that the complainants' party including the deceased, and the injured were also armed both by blunt weapons such as lathis and also by at least one share weapon. There is also no doubt, in our minds, that the accused or at least some of them were armed with sticks, which were certainly used by them against Bhanwar Singh, Guman Singh and Mortising.

The witnesses produced on behalf of the prosecution have no doubt given a consistent version that all the accused came there crying 'beat beat', and then began dealing blows with sticks to Bhanwar Singh. Motisingh and Guman-singh. But the other persons in the complainants' party namely P. W. 3 Hanumansingh. P. W. 11 Laxmansingh and P. W. 13 Ratna remained concealed in a bush, and consequently could not be beaten. On the other hand, the version given by the accused is that the complainants' party came on the field and started beating Ariun and his womenfolk namely Mst. Suwati and Mst. Mphni and hearing their cries Ishwarsingh and Kalyansingh went to the spot from their fields situated nearby to intervene and to save Ariun and the two women.

The defence very conveniently omits to give any explanation as to how, Bhanwarsingh, Gumansingh and Motisingh received injuries, and so also the prosecution has made no endeavour to explain the injuries found on the person of Ishwarsingh. Kalyansingh and Smt. Suwati. We are, therefore, left to conjecture as to who beat whom but regard being had to the ordinary course of events it would not be unreasonable to presume that since Prabhu and Arjun were in possession of the field and the complainants' party had come to take possession of the same, the initiation in the matter of 'marpeet' must have been taken by the complainants' party and if that is so. as we think it is accused Prabhu, Ariun and Mewa Ram as well as the neighbours Ishwar Singh and Kalyansingh or for the matter of that Ajeet Singh and Bhagirath Singh, who happened to come there on their attention having been attracted by the hue and cry raised in the field were justified in using reasonable force necessary to protect their possession over the field and also to protect their person. We are, therefore, of opinion that the accused had the right to defend their person and property against the complainants. This is our answer to point No. 2.

23. Now it remains to consider the most important aspect of the case, namely, whether the accused had exceeded the right of private defence. Section 99 provides that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Learned Counsel for the accused has vehemently urged that the complainants' party had committed an offence of robbery and theft of the Bajra crop under such circumstances as may reasonably cause the apprehension that death or grievous hurt would be the consequence, if the right of private defence even extending to the voluntary causing of death was not exercised. In support of this contention he has placed reliance on Section 103, Indian Penal Code. He has further argued that the assault made by the complainants reasonably caused an apprehension in the minds of the accused that death or grievous hurt would be the consequence of such assault if the right of private defence of the body was not exercised to the fullest extent of voluntarily causing of death or of any other harm to the assailant and to lend support to his argument learned Counsel has further referred to Section 100. I.P.C.

24. We may observe straightway that the proposition of law as submitted by the learned Counsel admits of no doubt and the question is only one of its application to the facts and circumstances of each case. It is true that there are as many as 12 injuries on the person of Ishwar Singh and six injuries on that of Kalyan Singh. But at the same time a survey of the injuries found on the bodies of Bhanwar Singh. Gumansingh and Motisingh leave no manner of doubt that they were very severely beaten and so far as Bhanwar Singh is concerned his body was almost reduced to pulp. There were nine lacerated wounds on the body of Bhanwarsingh, out of which 7 were on the head. Similarly in the case of Moti Singh there were 5 lacerated wounds on the head and in the case of Gumansingh out of 9 lacerated wounds caused to him 7 were on the head. It is in the evidence of the prosecution witnesses P. W. 2 Motisingh. P. W. 3 Hanuman Singh and P. W 13 Ratna that a number of blows were inflicted to Bhanwar Singh even when he had fallen to the ground. The witnesses have nowhere said as to which out of the three Bhanwar Singh, Gumansingh and Motisingh. was armed with a sharp weapon. We are, therefore, of opinion that the accused did exceed the right of private defence in the circumstances of the case. In this view of the matter learned Counsel for the State pressed upon us that they are all liable to be convicted for exceeding the right of private defence, and thereby causing the death of Bhanwar Singh under Section 304 read with Section 34, I.P.C.

25. In view of our findings on points Nos. 1 and 2 at this stage we may point out that the charges under Sections 147 and 149. Indian Penal Code must fail as there was no question of forming an unlawful assembly with any illegal object. The accused also cannot be punished for criminal trespass under Section 447, I.P.C. and the only question that calls for determination is whether they are liable to be punished under Sections 304, 325 and 323 read with Section 34, I.P.C. The answer to this question is furnished by the judgment of their Lordships in State of Bihar v. Natihu : 1970 CriLJ5 wherein their Lordships have reproduced the following passage from the judgment of Ramaswami, J., in Kishori Prasad v. State of Bihar Cr. Appeal No. 191 of 1966. decided on 5.12.1968 (SC) and we too are tempted to reproduce that passage here:

In a case where the accused Person could invoke the right of private defence it is manifest that no charge of rioting under Section 147 or Section 148, Indian Penal Code can be established for the common object to commit an offence attributed in the charge under Section 147 or Section 148. Indian Penal Code, is not made out. If any accused person had exceeded the right of private defence in causing the death of Chitanu Rai or in injuring Gorakh Prasad it is open to the prosecution to prove the individual assault and the particular accused person concerned may be convicted for the individual assault either under Section 304, Indian Penal Code, or of the lesser offence under Section 326, Indian Penal Code. The difficulty in the present case is that the High Court has not analyzed the evidence given by the parties and given a finding whether any or which of the appellants are guilty of causing the death of Chitanu Rai or of assaulting Gorakh Prasad. As we have already said none of the appellants can be convicted of the charge of rioting under Section 148 or of the constructive offence under Sections 326/149, Indian Penal Code.

(The underlining is ours)

26. Reference may also be made to the following passage occurring in the judgment of Mullick. J., (?) in *Kunia Bhuiya v. Emperor* (1912) ILR 39 Cal 896:

Once an attack was made on persons in the lawful exercise of their right over the property in question, they were undoubtedly entitled to the right of private defence, and the only question which can arise after that is whether any members of the party individually exceeded that right. People who were in the exercise of lawful rights cannot be held to have been members of an unlawful assembly, nor can that assembly, become unlawful by reason of their repelling the attack made upon them by persons who had no right to obstruct them, nor by reason of their exceeding the lawful use of the right they had. We have laid down before, and we desire to lay down again, that the fact of exceeding the right of private defence which a man has cannot make him a member of an unlawful assembly, and he can only be convicted and punished for the individual act which he himself had done in excess of the right of private defence....

27. In the present case since we have held that the accused Prabhu. Mewaram and Arjun could invoke the right of private defence and so also Ishwar Singh, Kalyan Singh. Ajeet Singh, and Bhagirath Singh, who had come to intervene and rescue Arjun and others, it is manifest that no charge under Section 147, I.P.C. or under any section read with Section 149, I.P.C. can be established for the common object to commit an offence attributed in those charges is not made out nor is it possible to convict them under any offence read with Section 34, I.P.C. as all that the accused wanted was to prevent the complainants' party from taking forcible and unlawful possession of the field in question. We are clearly of opinion that a common intention of all of them to murder Bihanwar Singh or to cause grievous injury to Guman Singh is not established. As to the question of exceeding the right, of private defence in causing the death of Bhanwar Singh or injuring Guman Singh and Motisingh those, who killed Bhanwar Singh by exceeding the right of private defence may be individually held responsible for causing the death of Bhanwar Singh, but it cannot be said that the murder was committed in prosecution of the common object of an unlawful assembly or in furtherance of the common intention of all the accused. In that view of the matter we find it difficult to convict the accused by pressing into service Section 34 of the Indian Penal Code. As regards the liability for individual acts all the accused were charged under Section 302. as well as under Sections 307, 325 and 323. Indian P.C.

We may mention here that they were also charged of these sections read with Section 34, I.P.C. But the learned Sessions Judge did not convict them either under Sections 302, 307. 325 or 323 I.P.C. or under these sections read with Section 34, I.P.C. Therefore, they would be deemed to have been acquitted under the aforesaid charges. If that is so. as we are inclined to think that it is, it is not open to us. in the first instance to set aside the acquittal of the accused under the aforesaid charges in their appeal from conviction and convict them of the charges of which they have been impliedly acquitted by the trial court without any appeal by the State. In this connection reference may be made to *Lakhan Mahto v. State of Bihar* : 1966 CriLJ1349 in which their Lordships of the Supreme Court were pleased to hold that the High Court acted without jurisdiction in altering the finding of acquittal of 'L' on the charge under Section 302. I.P.C. and convicting him on the charge under Section 326, I.P.C. It was further observed that in exercising the

powers conferred by Section 423(1)(b). Criminal P.C. which is clearly confined to appeals against convictions the High Court could not in the absence of appeal by the State against the acquittal convert the order of acquittal into one of conviction.

Their Lordships further observed that there is a legal distinction between a charge under Section 302, I.P.C. and a charge of constructive liability under Sections 302/149, I.P.C. i.e., being a member of an unlawful assembly, the common object of which was to kill the deceased. In this view of the matter we are unable to convict the accused of any specific and distinct offence. But apart from that we cannot fail to point out that the prosecution has failed to establish as to which of the accused can individually be held responsible for exceeding the right of private defence.

28. The result is that we allow appeal No. 530 of 1971 by the convicts, set aside their convictions and sentences passed by the court below and hereby acquit them. They shall be released forthwith, if not required in connection with any other case.

29. As a necessary corollary Appeal No. 22 of 1972 by the State must fail and is hereby dismissed.

30. Learned Counsel for the State prays for leave to appeal to Supreme Court under Article 134(1)(c) of the Constitution. However, we do not consider it a fit case for grant of leave. The prayer is disallowed.