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KULWANT SINGH AND ORS.

v.

STATE OF PUNJAB

JANUARY 23, 2004

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[DORAISWAMY RAJU AND S.B. SINHA, JJ.]

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*Penal Code, 1860—Sections 96, 148, 149, 302 & 323—Evidence Act, 1872—Section 32—Murder of two persons and injuring two witnesses by accused with sharp weapons—One of the deceased making a statement five days before death—Whether dying declaration—Plea of right of private defence by accused—Admissibility of—Held, the said statement is a dying declaration and hence admissible in evidence—On facts, the accused were not able to establish that the offence was committed in the exercise of their right of private defence.*

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Appellants, numbering three, with their father (accused no.1) and brother (accused no.3) attacked P and K and two sons of K (PWs. 5 and 6) over a dispute relating to the boundaries of agricultural lands. K died on way to hospital. PWs. 5 and 6 received injuries. P was seriously injured and was admitted in a hospital. The statement of P was recorded after 5 days of the incident when he was fit. P died thereafter. Appellant no. 3 and accused no.1 also received injuries purportedly inflicted by PWs. 5 and 6 in self defence. All the five accused were charged for offences under sections 148, 302, 323 & 149 IPC. The trial court acquitted all the accused holding that the offences were committed by the accused in exercise of the right of private defence. In appeal by the State, High Court convicted all the accused and sentenced them to life imprisonment and also sentenced them for various offences.

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In appeal to this Court, the appellants contended that the statement of P cannot be treated as a dying declaration under section 32 of the Indian Evidence Act, 1872 and was made under section 161 Cr. PC and the same is not reliable since P died thereafter; that P and PWs. 5 and 6 were the aggressors and the offences were committed by the appellants while exercising the right of private defence which is proved by the nature of injuries suffered by them; that the injuries suffered by PWs. 5 and 6 were

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self-inflicted; and that there is no material on record to show that they were present and participated in the crime. A

The State contended that the appellants failed to prove that the informant party were the aggressors and they exercised their right of private defence; that no explanation has been offered by the appellants as to why K was done to death; and that from the materials on record, K was subjected to assault despite falling down on the field. B

Dismissing the appeal, the Court

HELD: 1. Section 32 of the Indian Evidence Act, 1872 nowhere states that the dying declaration must be recorded in the presence of a Magistrate or in other words no statement, which has not been recorded before the Magistrate, cannot be treated to be a dying declaration. The fact that the investigating officer from the beginning intended to take the statement of P is not in dispute. The endorsement made by the doctor would clearly show that he had not been found fit to make such statement. Only on the fifth day, the statement of P could be recorded. Section 32 of the Indian Evidence Act also does not state that a dying declaration should be made only in expectation of death and in that view of the matter the fact that P died after a period of one week is of no consequence. Explanation-I appended to Section 32 specifies that when the statement is made by a person as to the cause of his death, or any of the circumstances of the transaction which resulted in his death where cause of death of that person's death comes into question would be a relevant factor. The investigating officer has proved the statement of P. He deposed that he was fully conscious when he made the statement which were read over to him. Hence, the statement of P would be admissible under Section 32 of the Indian Evidence Act. [1031-F-H; 1032-A-B] C D E F

*Ramawati Devi v. State of Bihar*, AIR (1983) SC 164 and *Tahal Singh and Ors. v. State of Punjab*, AIR (1979) SC 1347, relied on.

2. The statement of P stands corroborated by the evidence of PWs. 5 and 6. PW 5 categorically stated that when they were working in the field, their mother K had come with food and when they just finished taking the same, the accused came with weapons and inflicted blows on P, K, PW 5 and PW 6. The sufferance of minor injuries by PWs. 5 and 6 at the hands of the accused appears to be more probable as by the time G H

A they realised their position and went to the actual place of occurrence upon collecting their weapons and assaulting the accused therewith, the accused might have realized that they had already inflicted fatal blows on K and P and in the meanwhile they had also suffered injuries at the hands of the informant party. The allegations made in the first information report and the statements by PWs. 5 and 6 as also the dying declaration of P

B clearly indicate the manner in which the offence had been committed and injuries had been inflicted upon the deceased. The statement made by PW 5 as regard nature of injuries suffered by K also stands corroborated by medical evidence. The presence of PWs. 5 and 6 at the place of occurrence cannot be disbelieved only on the ground that the injuries found on their

C persons were found to be simple in nature. They might have suffered simple injuries because they might have collected their arms so as to make counter attacks after seeing unarmed K and P having been seriously injured. [1034-C-G]

D 3.1. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger which is not his own creation. The necessity must be present, real or apparent. It is preventive and not retributive. The question, whenever a right of private defence is claimed, must be judged from the nature of occurrence, the circumstances in which it had occurred and whether the person claiming such right has acted legitimately. Attending circumstances would also be relevant for judging the same. The burden to prove the same is on the person who raises such a plea. For the purpose of proving the same, the accused may rely upon the materials on record brought by the prosecution in addition to examining the witnesses and adducing positive evidences, if any. A person has a right of private defence of body under

E Section 97 IPC and in the event it is found that he was entitled to exercise the same, he necessarily must be held to have a right to cause death in terms of Section 100 IPC, if there was a reasonable apprehension that death or grievous hurt would be caused. [1034-H; 1035-A-D]

G *Laxman Sahu v. State of Orissa*, AIR (1988) SC 83, referred to.

H 3.2. The place of occurrence is the agricultural field of the informant. It will, therefore, be safe to presume that the accused persons trespassed into the property of the informant. The fact that at least two of the accused persons were armed with sharp-edged weapons is not disputed. If they had trespassed into the agricultural field of the informant with deadly weapons,

it is difficult to presume, in absence of any material on record, that the initiation of the assault was from the side of the informant. There is also no reason to disbelieve the statements of PWs. 5 and 6 as also the dying declaration of P that their mother had brought food for them and they had taken the food and the incident took place immediately thereafter. The injuries inflicted on deceased K is not disputed. She was not and could not have been armed with any weapon. She did not take any part. She did not incite her sons to assault the accused persons. If the informant party was the aggressor, there was no reason as to why she would run towards the place where the fight was taking place, resulting in causing of injuries on the person of P. She apparently tried to intervene seeing her sons being assaulted with sharp cutting weapons. She had been inflicted with as many as five sharp-cut injuries, three on the leg and two on the wrist. There does not appear to be any reason as to why an aged lady was done to death. Injury no.2 of the five injuries was sufficient to cause death in ordinary course of nature. It defies common sense, if the prosecution story is accepted that PWs. 5 and PW. 6 were not present at the place of occurrence, that the deceased P alone would single handedly attack the accused persons who were five in number and variously armed.

[1035-F-H; 1036-A-C]

3.3. There were five male members on the side of the accused whereas three were there on the side of the informant. The nature of the weapons used in the commission of offence also suggests that they are not ordinarily required to be carried on their persons, even on religious ground. One of the accused has suffered five injuries out of nine injuries on both palms because he might have tried to ward off the assault of the blows which were inflicted on him by themselves, cannot be conclusive that he was attacked first. Another factor is that after the occurrence at 10.30 a.m, PW-5 went back to the village to inform his cousin, brought a tractor and took the injured K and P to the hospital. On the way, K died and P was examined at 12.30 p.m. It is not in dispute that they were brought to the hospital by PW-5 and in that view of the matter his presence at the place of occurrence appears more probable. On the other hand, the injured accused were brought to the hospital by another accused at least one hour thereafter. Presence of the injured accused also, thus, appears to be probable. Despite suffering such injuries why they were not rushed to hospital has not been explained. If the informant and his brothers were the aggressors, it was expected, that the injured accused would have made such statements before the police officer giving details as to the mode and

**A** manner in which the incident had happened and as to how the two of the accused suffered such grievous injuries. The accused persons have not been able to discharge their onus of proof that they had killed the deceased in exercise of their right of private defence. [1036-E-H; 1037-A-D]

**B** CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 947 of 1997.

From the Judgment and Order dated 14.5.97 of the Punjab and Haryana High Court in CrI.A.No.402 DBA/89 and CrI.R.No.104 of 1989.

**C** U.U. Lalit and Ms. Indra Sawhney for the Appellants.

O.K. Khullar, R.C. Kohil, Arun Kr. Sinha and Rakesh Singh for Bimal Roy Jad for the Respondent.

The Judgment of the Court was delivered by

**D** **S.B. SINHA, J.** The appellants who are three in number with their father, Virsa Singh (Accused No.1) and brother Tara Singh (Accused No.3) [since deceased] were charged for commission of an offence under Sections 148/302/323/149 of the Indian Penal Code.

**E** The incident took place at about 10.30 a.m. on 13.6.1987. Admittedly, the family of the deceased and the appellants belong to the same village. They have agricultural lands. The parties had disputes both as regard boundaries of their agricultural land as also as regard irrigation of their respective field. On the day of the incident, Kartar Kaur (deceased) brought food for her sons Avtar Singh and Balkar Singh (PW 5 and PW 6) who were working in their agricultural field. When they finished taking their meals, **F** Virsa Singh (Accused No.1) armed with 'Takwa', Kulwant Singh (Appellant No.1) and Tara Singh (Accused No.3) armed with 'Kirpan' each, Sahiba Singh (Appellant No.2) armed with 'Barchha' and Darbara Singh (Appellant No.3) armed with 'Kappa' came near the informant and the deceased from the side of their tubewell. Virsa Singh, allegedly, exhorted the complainant and the deceased to be ready as they had come to teach them a lesson for **G** scrapping the boundaries of the fields; whereupon the first informant Partap Singh, since deceased, and Balkar Singh along with their mother got up. It is contended that Sahiba Singh gave one Barchha blow to Partap Singh in his abdomen and another blow just below his right shoulder in the chest, whereas **H** Virsa Singh assaulted Partap Singh with Takwa on the back of his right hand.

Kartar Kaur, mother of the informant, who had tucked her salwar as she waded through the water, came forward and she was given a blow with Kirpan by Kulwant Singh on the back of her left leg, whereupon she fell down. Even thereafter Tara Singh is said to have given Kirpan blow on her left thigh and Virsa Singh gave two Takwa blows on her both wrists. A

Avtar Singh and Balkar Singh who examined themselves as PW 5 and PW 6 respectively came forward to rescue their mother and brother whereupon Sahiba Singh is said to have given Barchha blow in the abdomen of Avtar Singh (PW 5) and another blow on his left thigh. Accused No.1 allegedly gave blunt side Takwa blow on Balkar Singh (PW 6) on the back of his right hand. B

It stand admitted that in the aforementioned incident, Darbara Singh and Virsa Singh also suffered injuries which are said to have been inflicted on them by the complainant and his brother purported to be in their self-defence. C

The accused persons thereafter ran away with their respective weapons whereafter Avtar Singh (PW 5) went to the village and informed his cousin Hardip Singh about the occurrence. A tractor was brought from the village in which Partap Singh and Kartar Kaur were brought to the hospital at Ferozepur. The lady breathed her last on the way whereas Partap Singh was admitted to the Civil Hospital, Ferozepur. D

The motive for commission of the said offence on the part of the accused persons is said to be a dispute which took place a day prior to the day of the occurrence between the complainant party and Virsa Singh allegedly on the ground that the complainant party scrapped the boundaries of the fields. However, it is said that the matter had been settled at the instance of one Maura Singh, a resident of the same village. E

The doctor attending on Partap Singh informed the Police whereupon the S.H.O. of the Police Station came to the Hospital. The statement of Partap Singh, who was seriously injured could not be taken by the police and only at about 4.30 p.m., the first information report was lodged by Avtar Singh. F

It is not disputed that Partap Singh was medico-legally examined at 12.30 p.m. on 13.6.1987 by Dr. A.S. Mann (PW 2) and the following injuries were found on his person : G

"1. Oblique incised wound 10 cms. X ½ cm. and depth varied from H

A muscle deep to bone deep on back of right hand starting from base of index finger and going upwards and medially with bleeding.

2. Incised wound 3 cms. X 1 cm. (at centre) oblique on front and right side of abdomen 5 cms. medial at the level of right anterior superior iliac spine with bleeding. Omentum and a small loop of intestine was coming out of the wound. Abdomen was tender and tense.

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3. Incised wound 1.5 cms. X ½ cm. oblique in direction on front and upper part of right chest just below the outer half of right clavicle.”

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Injury No.1 was kept under observation for X-ray examination and injury No.3 was kept under observation for surgical report and injury No.2 was declared dangerous to life. In this regard Dr. Mann gave his report Ex.PH and also prepared pictorial diagram Ex.PH/1 showing the seats of injuries. PW 2 Dr. A.S. Mann sent ruqa Ex.PJ to the Station House Officer, Police Station Sarad, Ferozepur, regarding the death of Kartar Kaur and arrival of Avtar Singh (Injured)”

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E The statement of Partap Singh on a certificate issued by the doctor that he was fit to make a statement was recorded on 18.6.1987. Partap Singh, however, succumbed to his injuries 26.6.1987.

Dr. J.S. Dalal (PW 3) who conducted the post-mortem on the dead body of Partap Singh found the following injuries on his person :

F “1. Under the bandages of both ankles vene section wounds were present medially over both ankles.

2. On removing bandage of right hand there was an oblique healed wound except in its middle one third. It was 10 cms. long on the back of right hand starting from base of index finger and going upwards and medially. The unhealed wound was pale and on opening it frank pus came out. There were corresponding cuts in the third and fourth metacarpal bones.

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3. Horizontal healed wound 1.5 cms. long just below outer half of right clavicle.

H 4. An oblique wound with clean cut margins 8 cms. X 3.5 cms. muscle deep on the right side of abdomen starting 5 cms. medially

and above the right anterior superior iliac spine and going downwards and medially. The floor of this wound contained plough and on dissection of surrounding tissues frank pus oozed out. A

5. A stitched wound 20 cms. long on right side of abdomen just lateral to mid line. On removing stitches there was corresponding out in the peritoneum with stitches. The mesentery had been repaired at many places and small gut at two places. The abdominal cavity contained about 300 grams of chocolate colored foul smelling fluid." B

Autopsy examination of Kartar Kaur was held about 6.45 p.m. on the same day by Dr. Tirath Goel (PW 1), which disclosed the following injuries on her dead body : C

- i. Incised wound 5 cms. X 2 cms. on the front and lower part of left thigh. D
- ii. Incised wound 10 cms. X 3 cms. on the back of left leg. Underlying vessels and muscles were cut and bones were fractured. D
- iii. Incised wound 5 cms. X 2 cms. on the back of right wrist joint. Underlying bones were cut through and through. E
- iv. Incised wound 4 cms. X 1 cm. on the back of left leg just below injury No.2. E
- v. Incised wound 3 cms. X 1 cm. on the back of left wrist joint." G

Accused Darbara Singh was also medico-legally examined by PW 2, Dr. A.S. Mann, at about 1.30 p.m. on the same day and the following injuries were found on his person : F

- "1. Incised wound 11 cms. X 2 cms. oblique in palm of right hand on lower part 2 cms. deep with bleeding. G
2. Incised wound 2 cms. X ½ cm. on palmar aspect of right index finger on the proximal phalanx with bleeding. Injury was 1 cm. deep. G
3. Reddish abrasion 1/3 cm. X ¼ cm. on back and upper and of right hand little finger. H

- A 4. Reddish abrasion with over lying lacerated wound 1.5 cm. X ¼ cm. Oblique on back of right and ring finger on proximal phallanx. Injury was 1/3 cm. deep with bleeding.
5. Lacerated wound ½ cm. X ¼ cm. X 1/3 cm. on back of right hand middle finger on proximal phallanx with bleeding.
- B 6. Incised wound 2.5 cm. X ½ cm. on palmer aspect of left hand index finger on the distal phallanx with bleeding, 1 cm. deep.
7. Incised wound 3 cms. X ½ cm. on outer side of root of left thumb with bleeding 1.5 cms. deep.
- C 8. Incised wound 20 cms. X 7 cms. slightly oblique and almost vertical on back of right abdomen crossing the mid line. Depth could be easily traced upto 10 cms.
9. Incised wound 3 cm. X 2 cms. X 2.5 cms. oblique on postere medial side of left thigh in middle one third with bleeding.”
- D Accused No.1, Virsa Singh, was also medico-legally examined by the same doctor at about 2.20 p.m. on that day and following injuries were found on his person.
- E “1. Incised wound 5 cm. X ½ cm. and bone deep on right side of skull, oblique in direction 6.5 cms. vertically behind the middle of right eye brow with bleeding.
2. Lacerated wound 1 cm. X 1/3 cm. and bone deep in mid line and centre of forehead.
3. Incised wound 8 cms. X ½ cm. starting from the tip of nose and going transversally over the right cheek varying in depth from ½ cm to 1 cm. Right ala of nose was cut through and through with bleeding.
- F 4. Incised wound 3.5 cms. X 1.5 cms. transverse in mid line and front of neck 5 cms. below the thyreid cartilage with bleeding. The depth could be easily traced upto 2 cms.
- G 5. Lacerated wound ½ cm. x 1/3 cm. x 1/3 cm. on palmer surface of left hand in the V space of thumb and index finger with bleeding.”

H The statement of PW 6 was recorded by the police at 8.10 p.m. on 14.6.1987.

Despite the fact that two of the accused persons were in the hospital itself, they were not arrested immediately as they were undergoing treatment. Accused Nos. 2, 3 and 5 were arrested on 20.6.1987; whereas Accused Nos. 1 and 4 were arrested on 29/30.6.1987. A

PW 5 and PW 6 who are also said to have suffered minor injuries in the said incident were examined by Dr. Tirath Goel and Dr. A.S. Mann respectively on 13.6.1987 at 5.30 p.m. and on 14.6.1987. B

The injuries on the person of Avtar Singh as found were as under :

- “1. Lacerated wound 1 cm. X 1 cm. superficial on the front and lower part of left thigh. Fresh bleeding was present on touching. C
2. Abrasion 1 cm. X 1 cm. on the right side of abdomen 5 cms. above the umlicus.”

The following injuries were found on the person of Balkar Singh :

“a blush contusion 3 cms. X 3 cms. on back of left hand index finger over the meta carpe phallangeal joint with overlying partially scabbed brownish abrasion 1.5 cms. X ¼ cm.” D

Upon completion of the investigation, the accused persons were charge-sheeted. The learned Sessions Judge, Ferozepur disbelieving the prosecution case acquitted the accused persons by a judgment and order dated 26.8.1988. The State of Punjab aggrieved thereby and dissatisfied therewith preferred an appeal thereagainst before the Punjab and Haryana High Court which was marked as Criminal Appeal No.402-DB of 1989. E

By reason of the impugned judgment, the High Court disagreeing with the view of the learned Sessions Judge came to the conclusion that the accused persons were guilty of commission of the offences under Section 302 and 302/149 IPC and sentenced them to undergo the rigorous imprisonment for life and passed the following sentences : F

“Name of the accused	Offence committed	Sentence	G
Kulwant Singh	U/s 302 IPC for committing murder of Kartar Kaur	He shall undergo life imprisonment and pay a fine of Rs. 10,000 and in default thereof shall further undergo rigorous	H

A			imprisonment for a term of one year.
B	Virsa Singh Kulwant Singh Tara Singh Darbara Singh	U/s 302/149 IPC for committing the murder of Partap Singh	They shall undergo life imprisonment and pay a fine of Rs.10,000 each and in default thereof shall further undergo rigorous imprisonment for a period of one year each.
C	Sahiba Singh	U/s 323 IPC for causing injuries to Avtar Singh	He shall undergo rigorous imprisonment for six months and pay a fine of Rs.1000/- and in default thereof, shall further undergo rigorous imprisonment for one month.
D	Virsa Singh Kulwant Singh Tara Singh and Darbara Singh	U/s 323/149 IPC	They shall undergo rigorous imprisonment for six months and pay a fine of Rs.1000/- each and in default thereof shall further undergo rigorous imprisonment for one month each.
E	Virsa Singh	U/s 323 IPC for causing injuries to Balkar Singh	He shall undergo rigorous imprisonment for six months and pay a fine of Rs.1000/- and in default therefor, undergo rigorous imprisonment for one month.
F	Kulwant Singh Tara Singh Darbara Singh and Sahiba Singh	U/s 323/149 IPC	They shall undergo rigorous imprisonment for six months and pay a fine of Rs. 1000 each and in default thereof, shall further undergo rigorous imprisonment for one month each."
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H All the substantive sentences awarded to the respective accused persons were directed to run concurrently. It was further directed that the fine, if recovered, shall be paid by way of compensation to the heirs of the respective deceased in equal shares.

Mr. UU Lalit, learned counsel appearing on behalf of the appellants would submit that the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration that in the facts and circumstances of this case, the appellants, their brother and father should have been held to have exercised their right of private defence having regard to the nature of injuries suffered by Accused Nos. 1 and 4.

Mr. Lalit would submit that the nature of injuries on the person of the said accused are pointers to the fact that the complainants were the aggressors. The learned counsel would contend that the alleged immediate cause leading to the occurrence was that Harnam Singh's field used to be irrigated through the water drawn from the tubewell of the complainant and when Darbara Singh was cleaning the water channel, Partap Singh came whereupon the verbal altercation ensued; whereafter they came being armed with weapons and attacked Darbara Singh. According to the learned counsel, Harnam Singh was armed with 'Khund', a hard and blunt weapon whereas Partap Singh came with a sharp-edged weapon and while he was attacked Darbara Singh tried to ward away the attack with his both hands, as a result whereof he suffered as many as five injuries on his two palms.

The learned counsel would point out that Darbara Singh was evidently working in the field as he had been found by the doctor to be bare chested. It was contended that only upon noticing Darbara Singh being assaulted with 'Khund', a blunt weapon, Virsa Singh came to his rescue and he had also been attacked and only in the said scenario Virsa Singh exercised his right of private defence. Kartar Kaur, however, who had come in the meanwhile at the place of occurrence unfortunately suffered injuries resulting in her death.

Mr. Lalit would urge that had the complainant been not aggressors, there was no reason as to why PW 5 and PW 6 would suffer only minor injuries. Sufferance of such injuries by the said witnesses, Mr. Lalit would contend, is doubtful, as in the opinion of the doctor they could be self-inflicted. Mr. Lalit would further argue that there is nothing on records to show that except Darbara Singh and Virsa Singh, any of the other three accused persons was present at the place of occurrence and participated therein. According to Mr. Lalit, only in the aforementioned fact situation, the trial court found the presence of PW 5 and PW 6 at the place of occurrence to be doubtful and furthermore held that having regard to the injuries on the persons of Darbara Singh and Virsa Singh, they were entitled to exercise their right

A of private defence. In that view of the matter, the learned counsel would argue, that the High Court should not have interfered with the judgment of acquittal passed by the leaned Sessions Judge having regard to the fact that the said defence had been raised from the very beginning of the trial.

B Mr. Lalit would further submit that the statements of Partap Singh in the facts and circumstances of the case, should not have been treated to be a dying declaration.

C So-called dying declaration of Partap Singh in effect and substance, Mr. Lalit would submit, was a statement under Section 161 of the Code of Criminal Procedure and the same was not reliable in view of the fact that Partap Singh died five days thereafter.

D The learned counsel would urge that the High Court failed to consider the nature of the injuries suffered by the accused persons which having regard to the materials brought on records would clearly prove that the accused persons exercised their right of private defence. Mr. Lalit would further submit that the prosecution failed to prove that the injuries caused to the accused persons by PW 5 and PW 6 were by way of exercise of their right of private defence as merely a bald statement had been made in the first information report to the said effect and furthermore PW 5 and PW 6 also did not elaborate thereabout in their depositions before the Sessions Court.

E Mr. Lalit would argue that as the judgment of acquittal passed by the learned Sessions Judge in the aforementioned situation was reasonable, the High Court should not have interfered therewith.

F Mr. OK Khullar and Mr. Arun Kumar Sinha, learned counsel appearing on behalf of the State and the complainant, on the other hand, would submit that from the site plan prepared by the investigating officer, it would appear that the occurrence took place in the field of the first informant. The learned counsel would contend that as the date and place of occurrence as also the nature of offence stand admitted, it was for the accused persons to prove that the informant party were the aggressors and they exercised their right of private defence. The learned counsel would contend that even if the contention of the appellants is accepted, no explanation has been offered as to why Kartar Kaur was done to death. It was pointed out that from the materials on records, it would appear that she was subjected to assault despite falling down on the field.

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The principal questions which arise for consideration in this appeal, in view of the rival submissions made by the learned counsel for the parties are: A

- (i) whether the accused persons were entitled to exercise their right of private defence;
- (ii) in any event whether they exceeded the same in doing so; B
- (iii) Whether the statement of Partap Singh recorded on 18.6.1987 should be construed to be a dying declaration? C

Before advertng to the rival contentions, as noticed hereinbefore, it may be noticed that Accused Nos.1 and 3 have since died. C

It is not in dispute that the deceased Kartar Kaur and the injured Partap Singh were brought to the hospital by PW 5, Avtar Singh. According to the prosecution, Balkar Singh had gone to his maternal uncle's place to inform him about the incident and as such he was examined by the police on the next day of occurrence. The materials on records further show that the investigating officer having been informed about the incident by Dr. Mann waited to record the evidence of Partap Singh as he was an injured witness but as he was not declared fit to make a statement, the statement of PW 5 was recorded and the same was treated as the first information report. D

We may at the threshold examine the question as to whether the statement of Partap Singh could be treated to be a dying declaration. E

Section 32 of the Indian Evidence Act, 1872 nowhere states that the dying declaration must be recorded in the presence of a Magistrate or in other words no statement which has not been recorded before the Magistrate cannot be treated to be a dying declaration. The fact that the investigating officer from the beginning intended to take the statement of Partap Singh is not in dispute. The endorsement made by the doctor in Ex.PQ/1 and Ex.PR/1 would clearly show that he had not been found fit to make such statement. Only on the fifth day i.e. 18.6.1987, the statement of Partap Singh could be recorded. F G

Section 32 of the Indian Evidence Act also does not state that a dying declaration should be made only in expectation of death and in that view of the matter the fact that Partap Singh died on 26.6.1987 after a period of one week is of no consequence. Explanation-I appended to Section 32 specifies that when the statement is made by a person as to the cause of his death, or H

A any of the circumstances of the transaction which resulted in his death where cause of death of that person's death comes into question would be a relevant factor.

B PW-9, the investigating officer Hukam Singh has proved the statement of Partap Singh. He deposed that he was fully conscious when he made the statements which were read over to him. In that view of the matter the said statements are admissible under Section 32 of the Indian Evidence Act.

The statement of PW-1 in no unmistakable terms shows that the condition of Partap Singh was very serious.

C In *Ramawati Devi v. State of Bihar*, AIR (1983) SC 164, this Court observed :

D "...A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question, becomes admissible under section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement

E must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. In the instant case, the dying declaration has been properly proved..."

F In *Tehal-Singh and Ors v. State of Punjab*, AIR (1979) SC 1347, this Court negated the contention that a dying declaration should be made only in expectation of death, stating :

G "... We do not also see any force in the suggestion of Dr. Chitale that the statement of Harmel Singh was not made in expectation of death and was, therefore, not entitled to weight. Apart from the fact that Section 32 of the Evidence Act does not require that a statement should be made in expectation of death, it is clear from the evidence that the condition of Harmel Singh was serious at that time. In the requisition made by the Medical Officer to the Police it has been

H clearly mentioned that the condition of Harmel Singh was serious.

The very circumstance that Dr. Pasricha advised that Harmel Singh should be removed to Bhatinda Hospital for better treatment clearly indicates that the condition of Harmel Singh was serious..."

A

In that view of the matter, the statement of Partap Singh, in our opinion, would be admissible under Section 32 of the Indian Evidence Act.

B

The prosecution case as emerging from the first information report would clearly show the respective parts played by the accused persons. The allegations made in the first information report and the statements made before the court by PW 5, Avtar Singh and PW 6, Balkar Singh, who were the eye-witnesses as also the dying declaration of Partap Singh clearly indicate the manner in which the offence had been committed and injuries had been inflicted upon the deceased.

C

The autopsy report of Kartar Kaur further demonstrates that injury no.2 inflicted on her, an incised wound of 10 cms. X 3 cms. on the back of left leg as a result whereof underlying vessels and muscles were cut and bones were fractured, was in the opinion of the doctor, sufficient to cause death in the ordinary course of nature.

D

The injury report of Partap Singh also would clearly show that injury no. 2 suffered by him which was an incised wound 3 cms. x 1 cm. (at center) oblique on front and right side of abdomen 5 cms medial, was in the opinion of the doctor was dangerous to his life, which came to be true.

E

The injuries caused on the deceased Kartar Kaur and Partap Singh were found to have been caused within six hours. The boundary dispute between the parties as also a dispute with regard to irrigation of the accused field from the water taken from the tubewell of the complainant are admitted.

F

The statement of Partap Singh is also material. He was seriously injured and was examined by Dr. Tirath Goel (PW-1). He, continuously for days was not found fit to make any statement and endorsement to the said effect was made by the said doctor to the investigating officer in Ex.PQ/1 and Ex.PR/1. Only on the fifth day, he was found fit to make a statement as would appear from the endorsement marked as Ex. P.5/1 made by the Dr. Goel whereupon only a statement was recorded by the investigating officer. The statement of Partap Singh marked as Ex.P00 was recorded on 18.6.1987 by ASI Hukam Singh.

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A The appellants did not dispute the aforementioned facts; neither the statements of PW-1 and PW-9 in this behalf were put to test in cross-examination.

.It is not essential that a dying declaration should be made only before a Magistrate.

B

We would deal with the question of admissibility of the statement made by Partap Singh, a little later but suffice it to point out at this juncture that the statements of Partap Singh stand corroborated by the evidence of Avtar Singh (PW-5) and Balkar Singh (PW-6). Even if the evidence of Balkar Singh is held not to be reliable, as has been submitted by Mr. Lalit, we find no reason to disbelieve the statements of Avtar Singh (PW-5). He categorically stated that when they were working in the field, their mother had come with food and when they just finished taking the same, the accused persons came and Virsa Singh gave a 'lalkara' whereupon accused persons inflicted blows on Partap Singh, Kartar Kaur and PW-5 and PW-6. The sufferance of minor injuries by PW-5 and PW-6 at the hands of the accused persons appears to be more probable as by the time they realized their position and went to the actual place of occurrence upon collecting their weapons and assaulting Darbara Singh and Virsa Singh therewith, the accused persons might have realized that they had already inflicted fatal blows on Kartar Kaur and Partap Singh and in the meanwhile they had also suffered injuries at the hands of the informant party. Partap Singh suffered two Barchha blows at the hands of Sahiba Singh, one in the abdomen and another in the chest whereas Virsa Singh appears to have inflicted a Takwa blow. These injuries are corroborated by medical evidence.

F Similarly, the statements made in the first information report as also before the court by PW-5 as regard nature of injuries suffered by Kartar Kaur also stands corroborated by medical evidence. The presence of PW-5 and PW-6 at the place of occurrence cannot be disbelieved only on the ground that the injuries found on their persons were found to be simple in nature. They might have suffered simple injuries because they might have collected their arms so as to make counter attacks after seeing unarmed Kartar Kaur and Partap Singh having been seriously injured.

Chapter IV of the Indian Penal Code provides for the general exceptions. Sections 96 to 106 which occur in the said chapter deals with the right of private defence. Section 96 says that nothing is an offence which is done in

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exercise of the right of private defence. This right, however, is available to a person who is suddenly confronted with immediate necessity of averting an impending danger which is not his own creation. The necessity must be present, real or apparent. It is preventive and not retributive. See *Laxman Sahu v. State of Orissa*, AIR (1988) SC 83. A

The question, whenever a right of private defence is claimed, must be judged from the nature of occurrence, the circumstances in which it had occurred and whether the person claiming such right has acted legitimately. Attending circumstances would also be relevant for judging the same. B

It is well-settled that the burden to prove the same is on the person who raises such plea. For the purpose of proving the same, the accused may rely upon the materials on records brought by the prosecution in addition to examining the witnesses and adducing positive evidences, if any. A person has a right of private defence of body under Section 97 and in the event it is found that he was entitled to exercise the same, he necessarily must be held to have a right to cause death in terms of Section 100 of the Indian Penal Code, if there was a reasonable apprehension that death or grievous hurt would be caused. C D

For arriving at a finding as to whether the accused persons had legitimately exercised their right of private defence, it is necessary to pass the question as to who had started the assault. E

The place of occurrence is the agricultural field of the informant. It will, therefore, be safe to presume that the accused persons trespassed into the property of the informant. The fact that at least two of the accused persons were armed with sharp-edged weapons like Kirpan or Kappa is not disputed. If they had trespassed into the agricultural field of the informant with deadly weapons, it is difficult to presume in absence of any material on record that the initiation of the assault was from the side of the informant. It stands admitted that the Accused Darbara Singh was cleaning the water channel which passes through the field of the informant. There is also no reason to disbelieve the statements of PW-5 and PW-6 as also the dying declaration of Partap Singh that their mother had brought food for them and they had taken the food and incident took place immediately thereafter. As noticed hereinbefore, the injuries inflicted on deceased Kartar Kaur is not disputed. She was not and could not have been armed with any weapon. She did not take any part. She ever did not incite her sons to assault the accused persons. If the informant party was the aggressor, there was no reason as to why she F G H

A would run towards the place where the fight was taking place, resulting in causing of injuries on the person of Partap Singh. She apparently tried to intervene seeing her sons being assaulted with sharp cutting weapons. She had been inflicted with as many as five sharp-cutting injuries, three on the leg and two on the wrist. There does not appear to be any reason as to why an aged lady was done to death. The impact of the blows on her person would be evident from the autopsy report. Apart from the cumulative effect of five injuries inflicted on her person, as noticed hereinbefore, injury no.2 was sufficient to cause death in ordinary course of nature. It defies common sense, if the prosecution story is accepted that PW-5 and PW-6 were not present at the place of occurrence, that the deceased Partap Singh alone would single handedly attack the accused persons who were five in number and variously armed.

Virsa Singh himself and his four sons are said to have taken part in the occurrence. There were five male members on the side of the accused whereas three were there on the side of the informant. The nature of the weapons used in the commission of offence also suggests that they are not ordinarily required to be carried on their persons, even on religious ground.

It may be true that Darbara Singh suffered five injuries out of nine injuries on both palms but only because he might have tried to ward off the assault of the blows which were inflicted on him by themselves cannot be conclusive that he was attacked first. Another factor which deserves attention of this Court is that the occurrence which had taken place at about 10.30 a.m. on 13.6.1987 whereafter, PW-5 went back to the village to inform his cousin, brought a tractor and took the injured Kartar Kaur and Partap Singh to hospital. The distance between the place of occurrence and the hospital is said to be about 9 k.m. On the way Kartar Kaur died and Partap Singh was examined at 12.30 p.m. It is not in dispute that they were brought to the hospital by PW-5 and in that view of the matter his presence at the place of occurrence appears more probable. On the other hand, the injured Darbara Singh and Virsa Singh were brought to the hospital by Kulwant Singh at least one hour thereafter. Presence of Kulwant Singh also, thus, appears to be probable. Despite suffering such injuries why they were not rushed to hospital has not been explained. Furthermore, Dr. A.S. Mann (PW-2) immediately informed the officer incharge about the incident. The police came to the hospital, the first information report was lodged at 4.30 p.m. If the informant and his brothers were the aggressors, it was expected, that the injured Darbara Singh and Virsa Singh or the Appellant no.1, Kulwant Singh, would have made

such statements before the police officer giving details as to the mode and manner in which the incident had happened and as to how Virsa Singh and Darbara Singh suffered such grievous injuries, particularly when PW 2 in his evidence categorically stated that Virsa Singh was fully conscious and could talk clearly. A

The records also reveal that weapons of attacks were recovered at the instance of both Kulwant Singh and Sahiba Singh. The spear and kirpan which were recovered were found to be blood-stained. We, therefore, are of the opinion that there does not exist any legal infirmity in the findings of the High Court. B

For the reasons aforementioned, we are of the opinion that the accused persons have not been able to discharge their onus of proof that they had killed the deceased in exercise of their right of private defence. C

The appeal being devoid of any merit is dismissed.

B.S.

Appeal dismissed. D