

**(1994) 02 AHC CK 0112**

**Allahabad High Court**

**Case No:** Criminal Appeal No's. 1768 and 2335 of 1979 and Government Appeal No. 255 of 1980

Jarnail Singh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Feb. 11, 1994

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 304

**Citation:** (1997) 21 ACR 373

**Hon'ble Judges:** Palok Basu, J; A.S. Tripathi, J

**Bench:** Division Bench

**Advocate:** G.S. Chaturvedi, for the Appellant; A.G.A. and A.D. Prabhaker, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Palok Basu, J.

The aforesaid three matters arise out of the judgment and order dated 6.8.1979 passed by II Ird Additional Sessions Judge, Pilibhit, in Sessions Trial No. 46 of 1977. The aforesaid sessions trial was held in pursuance of the committal proceeding relating to case Crime No. 154, police station Puranpur, district Pilibhit, under Sections 147, 148, 149, 302 and 307, I.P.C.

2. Dalip Singh had lodged a first information report on 11.6.1976 at 7.45 p.m. relating to the incident which had happened on the same day at 4.00 p.m. in village Tulapur, police station Puranpur, district Pilibhit. The said first information report was lodged against accused (1) Jarnail Singh, accused (2) Bakhvir Singh (both armed with licensed guns), accused (3) Jagdeo Singh (armed with country-made gun), accused (4) Devendra Singh (armed with country-made pistol), accused (5) Saudagar Singh (unarmed father of accused No. 1), accused (6) Singhara Singh (unarmed) and

accused (7) Himmat Singh (unarmed) with the allegations that at the instigation of accused Nos. 5, 6 and 7 accused Nos. 1, 2, 3 and 4 fired from firearms causing death of Km. Pramjit (female child aged about five months) and causing injuries to Smt. Balvendra Kaur (mother of the deceased) and Mahendra Singh son of the informant. All seven accused had entered in the house of the informant to take revenge against informant and his family members as he did not shift the tube-well which was held to be lying within the chak (consolidated area) of the informant by the Revenue Authority. After considering the evidence, the trial Judge acquitted the accused Nos. 6 and 7 holding that they did not share common intention inasmuch as they were unarmed and not connected with the family of the other accused. The accused No. 7 Saudagar Singh father of the accused-Appellant Jarnail Singh died during the pendency of the trial and, therefore, the trial Judge held the trial as having abated as against him though holding that his participation was proved beyond doubt in the incident. He further held that death of Km. Paramjit (child aged about 5 months) was unintended and there was no common intention inasmuch as her death could not have been common object of the unlawful assembly. Consequently, he has convicted and sentenced accused No. 1 Jarnail Singh, accused No. 2 Lakhvir Singh, accused No. 3 Jagdeo Singh and accused No. 4 Devendra Singh u/s 304 (Part II) read with Section 149, I.P.C. to five years" R.I., u/s 307/149, I.P.C. to four years" R.I. and u/s 148, I.P.C. to one year R.I. Against this conviction and sentence Criminal Appeal No. 2335 of 1979 has been preferred. The State of U.P., however, felt aggrieved by the acquittal of these four Appellants of the charge u/s 302, I.P.C. read with Section 149, I.P.C. Therefore, Government Appeal No. 255 of 1980 has been preferred by the State of U.P. as regards this acquittal. The informant Dalip Singh feeling aggrieved by the acquittal of No. 6 Singhara Singh and No. 7 Himmat Singh have consequently filed Criminal Revision No. 1768 of 1979 challenging the said acquittal.

3. Shri G.S. Chaturvedi, learned Counsel for the accused-Appellants and Respondents as well, Shri O.P. Tiwari, learned A.G.A. for the State of U.P. and Shri A.D. Prabhakar, counsel for the informant have been heard at length in all the three aforesaid connected matters which are being disposed of by this Judgment. The entire record has been thoroughly scrutinised.

4. The prosecution story is that Mahendra Singh son of Shri Dalip Singh had purchased land from one Buddha on which a tube-well was in existence. The accused Jamail Singh and others stated that the tube-well was on the chak-road and it should be removed which suggestion was refuted by Mahendra Singh. This controversy brought the Supervisor Kanoongo and Lekhpal to the site on 11.6.1976 around noon and on measuring they declared that the tube-well was included in the land of Mahendra Singh. Still the accused persisted with their demand for removing the tube-well. The Revenue Authorities left at about 3.30 p.m. Further case of the prosecution is that on that day, (11.6.1976), at about 4.00 p.m. accused Jamail Singh, Lakhvir Singh, Jagdeo Singh, Devendra Singh, Saudagar Singh (dead during trial), Singhara Singh and Himmat Singh trespassed into the Jhala (temporary shed) of the

informant with the aforesaid arms and at the instigation of last three accused, the first four of them fired from their firearms indiscriminately. Informant, his wife and son hid behind the wall. However, Mahendra Singh, Smt. Balvendra Kaur wife of Jogindra Singh and her family child of five months, namely, Km. Pramjit Singh received firearms injury. One she-buffalo also received injury and on hue and cry, several persons including P.W. 3 Balkar Singh reached at the place of occurrence. On their intervention, all the accused ran away. All injured were taken to the police station on a buffalo-cart. A cartridge found at the spot by the informant was carried to the police station and deposited there. The child Km. Pramjit succumbed to the injury. Dalip Singh lodged a first information report as Ext. Ka. 1 at 7.45 p.m. P.W. 4 Rameshwar Dayal Head-constable registered a case vide entries of general diary proved as Ext. Ka. 2. The blood-stained baniain of Mahendra Singh and Kurta of Balvindra Kaur were taken in police custody. Two Majroobi-chithi as Ext. Ka. 6 and Ka-7 in respect of Smt. Balvindra Kaur and Mahendra Singh were prepared, both were sent to the Hospital for medical examination. P.W. 10 Sajid Ali (S.I.) was entrusted with the investigation. He prepared inquest report, sketch of dead body and memo of dead body proved as Ext. Ka. 13 , Ka 14 and Ka 15, P.W. 7. Hukum Singh constable was entrusted with the duty of getting the post-mortem examination on the dead body of Km. Pramjit Kaur done who left with the body for the town. Witnesses were examined on 12.6.1976 by the Investigating Officer who prepared the site plan as Ext. Ka-16. She-buffalo was also sent for medical examination.

5. Accused, Jarnail Singh surrendered before the court on 14.6.1976. In his statement u/s 313, Code of Criminal Procedure Jarnail Singh had said that he had gone to lodge the first information report at the police station when he was also arrested and sent to jail where the medical examination was done and other accused remained absconding for whom proceedings under Sections 82 and 83, Code of Criminal Procedure were taken.

6. The post-mortem examination of Km. Pramjit Kaur was made on 12.6.1976 by Dr. R.S. Sharma P.W. 5 and he prepared the post-mortem report Ext. Ka. 8. That report disclosed the following ante-mortem injuries:

1. A gun-shot wound of entry 0.3 cm. x 0.3 cm. x skull cavity deep right side of the head 3 cm. above the middle of the right eye-brow.
2. A gun-shot wound of entry 0.3 cm. x 0.3 cm. x skull cavity deep right side of head 7 cm. above the pinna of the right ear.
3. 2 gun-shot wounds of entry 0.3 cm. x 0.3 cm. x bone deep 2 cm. apart right cheek.
4. A gun-shot wound of entry 0.3 cm. x 0.3 cm. x muscle deep middle of the right side of the back of the neck.

5. Exit wound of entry No. 40.4 cm. x 0.4 cm. x communicating with injury No. 4 right side of neck 1 cm. below the mastoid.
6. 3 gun-shot wounds of entry 0.3 cm. x 0.3 cm. x muscle deep back of the right forearm in an area off 6 cm. x 2 cm.
7. 4 gun-shot wounds of entry 0.3. cm. x 0.3 cm. x chest cavity deep in an area of 6 cm. x 1 cm. right side of chest in the mid-axillary line 2.5 cm. below the apex of the axilla.
8. 14 gun-shot wounds of entry 0.3 cm. x 0.3 cm. x muscle deep in an area of 8 cm. x 7 cm. front and outer side of right thigh.
9. 3 gun-shot wounds of entry 0.3 cm. x 0.3 cm. x muscle deep in an area of 4 cm. x 3 cm. middle of the inner side of left thigh.
10. A gun-shot wound of entry 0.3 cm. x 0.3 cm. x muscle deep middle of the outer side of right leg.

There was no charring of skin and no singeing of hair. Clotted blood was present in all the wounds.

On internal examination it was found that the membranes and brain were congested. There were two holes in the scalp and skull. Pleura and larynx were injured and the lungs were congested and lacerated. It was found that the death was due to shock and haemorrhage on account of gun-shot injuries which were about 3/4th day old. Dr. Sharma was of the opinion that all these injuries could have been caused by gun-shots at about 4.00 or 5.00 p.m. on 11.6.1976.

7. The injuries of Smt. Balvindra Kaur and Mahendra Singh were examined by Dr. S.D. Gupta P.W. 8 on 11.6.1976 and he prepared injury reports Exts. Ka-10 and Ka-11. He found the following injuries on their persons:

On the person of Balvindra Kaur

1. 2 gun-shot wounds of entry 1/6" apart on the left side of neck 2/4" below the lobule of left ear. Margins inverted. No pellet palpable. No blackening and charring present. Each wound is circular 1/10" in diameter and muscle deep.
- 2 One gun-shot wound of entry on left cheek 1 1/2" in front of lobule of left ear circular 1/10" in diameter x muscle deep. No blackening and charring. Margins inverted.
3. Gun-shot wound of entry 1 1/2" behind the injury No. 1 Circular 1/10" in diameter x muscle deep. Margins inverted. No blackening and charring.
4. Lacerated wound oblique 3/4" x 1/10" x muscle deep on the middle chin.
5. 16 gun-shot wounds in an area of 12" x 5" front and outer aspect of whole of left upper arm and left elbow. Each circular 1/10" in diameter x muscle deep. Margins

inverted. No pellet palpable. No blackening and charring.

6. One gun-shot wound of entry on the back of left forearm 3/2" above the wrist, circular 1/10" in diameter x muscle deep. No pellet palpable. No blackening and charring.

7. 30 gun-shot entry wounds in an area of 15" x 9 1/2" on the upper 2/3rd of the left side of back x muscle deep. No blackening and charring.

On the person of Mahendra Singh

1. Fourteen gun-shot wounds in an area of 16" x 5" on the back of right elbow and whole of right forearm and right hand and also front side of right wrist. Each Circular 1/10" in diameter x muscle deep. Margins inverted. No pellets palpable. No blackening and charring.

2 Fourteen gun-shot entry wounds in an area of 10" x 6" on the lower 2/3rd of right side of back and right side of trunk each circular 1/10" in diameter x muscle deep. Margins inverted. No pellet palpable. No blackening and charring.

Dr. Gupta was of the opinion that except injury No. 4 of Smt. Balvindra Kaur all other injuries of the two persons had been caused by firearms and they could have been caused at about 4 p.m. on 11.6.76. Injury No. 4 of Balvindra Kaur could have been caused by a blunt weapon or even a fall on the ground.

8. The injuries of the buffalo were examined on 14.6.76 by Dr. A.K. Johri P.W. 6 vide injury report, Ext. Ka. 9. He found the following injuries:

1. Gun-shot wound on left side 6" below hip bone and 3" backward from the last rib.
2. Gun-shot wound on left side 6" backward from hip bone.
3. Gun-shot wound on right side 6" below injury No. 1.
4. Gun-shot wound on right side 6" below injury No. 2.

On completing investigation, P.W. 9 Dayal Tiwari (S.I.) filed charge-sheet against the seven accused.

9. All the accused have denied the prosecution allegations while accused Jarnail Singh alleged that Mahendra Singh had used a Kanta and not spade and that the prosecution side started forcible cultivation on the chak-road and the tube-well was not existing on the land of the informant or Mahendra Singh, in order to save himself Jarnail Singh resorted to firing. On behalf of the accused D.W. 1 Har Narain Lal Supervisor Kanoongo has been examined. The copy of the application of Jarnail Singh and the report of Kanoongo thereon have been filed as Ext. Kha-2, Kha-3 and Kha-4. The extract of the statement of Mahendra Singh has been proved as Ext. Kha-1. It may be mentioned here that in the first information report lodged by Dalip Singh P.W. 1 as also in his statement in court and that of Mahendra Singh P.W. 2, it

is admitted that spade was used in self-defence by Mahendra Singh who had then ran away to save himself. From the statement of P.W. 10 Sajid Ali it appears that there was a cross-report about the incident, lodged by Jarnail Singh. No attempt has been made in the trial court to prove the said first information report of accused Jarnail Singh. Similarly, no effort was made in the trial court to prove or get summoned the medical report, if any, relating to injuries of accused Jarnail Singh. It may further be mentioned here that even in the course of arguments, it has been admitted by the learned Counsel for the parties that neither any cross-version of the case in the shape of cross first information report has been proved nor the alleged injury of Jarnail Singh has been proved. It may further be mentioned here that no attempt was made in this Court to prove the alleged cross first information report or any injury on Jarnail Singh accused. Prosecution has not admitted having caused any injury to Jarnail Singh as the statement of Mahendra P.W. 2 only shows that he had wielded the spade once and it is not at all put to him or suggested to him or any other witnesses that Jarnail Singh or any other accused had sustained any injury in the incident.

10. The prosecution story as noted above is consistent in the statements made by P.W. 1 Dalip Singh and P.W. 2 Mahendra Singh. As noted above, Mahendra Singh had sustained several injuries. It has been proved beyond doubt by the statement of P.W. 8 Dr. S.P. Gupta that he had medically examined Mahendra Singh on 11.6.1976 at 9.20 p.m. The further statement of Dr. S.P. Gupta to the effect that he had medically examined Smt. Balvinder Kaur at 8.50 p.m. on 11.6.1976 has also remained unchallenged. The sustaining injury by she-buffalo has also been established by the statement of Dr. A.K. Johri P.W. 6. It is true that P.W. 3 Balkar Singh has turned hostile but in view of the cross-examination done by the prosecution it appears that his statement to the Investigating Officer u/s 161, Code of Criminal Procedure had fully supported the prosecution version. It is, however, rightly said that since it is not substantive statement and he is not wholly supporting the prosecution case, therefore, his statement is of no avail to the prosecution.

11. The lodging of the first information report, the medical examination of the injured in the incident and the nature of the injury sustained by two injured, one deceased and one she-buffalo corroborates the prosecution story and there is nothing whatsoever in the cross-examination of either P.W. 1 Dalip Singh or P.W. 2 Mahendra Singh which may render their testimony doubtful. Both these witnesses are wholly reliable and trial Judge has rightly placed reliance on them and believed the prosecution case.

12. As noted above, the trial Judge has extended benefit of doubt to accused Singhara Singh and Himmat Singh whereas he held the participation of Saudagar Singh father of accused Jarnail Singh, proved beyond doubt. It is true that the presence of Singhara Singh and Himmat Singh may have been possible without participating in the incident and, therefore, there is neither any need nor any

ground to interfere with the findings of the trial court giving Singhara Singh and Himmat Singh the benefit of doubt. Since Saudagar Singh had died during the pendency of the trial, it was rightly held by the trial Judge that the trial as against him abated. But then the unlawful assembly continues to be there in view of participation of five persons as assailants.

13. The learned Government Advocate argued that the conviction of four accused u/s 304 (Part II), I.P.C. is unwarranted and they must be convicted u/s 302, I.P.C. The argument proceeds that all the four accused had carried firearms and resorted to firing, which resulted in the death of five month old child in the lap of her mother Smt. Balvindra Kaur. It is argued that all the accused should share the liability of killing the said child because the act was dangerous and having already committed trespass over the Jhala of the informant, they should be held jointly responsible for having killed the child. This argument is refuted by the learned Counsel for the accused on the footing that none of the accused had really intended to kill the child inasmuch as the prosecution evidence shows that Smt. Balvindra Kaur was herself carrying her child in lap with the help of left hand and none of the accused could have any motive or intention to kill the child or even knowledge of the child's presence.

14. It would have been easier to get persuaded by the argument of the learned State Counsel but for the latest case law cited by the learned Counsel for the Appellants-accused reported in *Haramant Laxmappa Kukkadi and Ors. v. State of Karnataka* (XXXI) 1994 ACC 11. There is striking similarity in the facts of the decision cited and of the present case though distinction, however, exists with regard to the weapons with which the accused were armed. It is true that at the time of incident in this case, four accused were carrying and used firearms whereas in the reported decision the accused were carrying heavy cutting and also blunt weapons which were used by those accused indiscriminately. In the instant case, Smt. Balvindra Kaur tried to intervene with a child in her lap and no specific named accused has been attributed the role firing at her or the child. In the reported case, the blow was attempted on mother but it fell on the child. The blow was thus intended on the mother and not the child. The child died accidentally. A. 1 and A. 3 had attacked the deceased Allappa with sticks and A-10 cut him with an axe and Allappa died thereafter. On these facts, the Hon"ble Supreme Court considered the argument as to whether all the accused could be convicted u/s 302, I.P.C. with the aid of Section 149, I.P.C. It has been observed by the Hon"ble Supreme Court that the common object of unlawful assembly "has to be inferred from the membership, the weapons used and the nature of the injuries as well as other surrounding circumstances." Going in a body alone cannot be the decisive factor in inferring common object. Other factors mentioned above, have to be taken into consideration. It was held that the prosecution had failed to prove that all the accused persons were members of unlawful assembly. The Hon"ble Supreme Court held that "having given our earnest consideration, we think it is highly unsafe to convict all the Appellants u/s 302/149,

I.P.C."

15. In the instant case, all the injuries on all the injured are, simple except the injuries sustained by the deceased Premjit Kaur, the unfortunate child who accidentally received those injuries. Premjit Kaur may have been fired upon only by one accused who wanted to inflict the injury on some other male member and Smt. Balvindra Kaur Jumped in between the barrel and the target and the shots hit the delicate body of Km. Premjit. It is impossible to hold all accused members of an unlawful assembly the object of which may have been to kill Km. Premjit. Moreover, this is also not known whose firing hit Km. Premjit. Therefore, following the reasoning of the Hon"ble Supreme Court, it may not be safe to convict all the four Appellants u/s 302, I.P.C. with the aid of Section 149, I.P.C.

16. Since the trial court has convicted all the four accused Jarnail Singh, Lakhvir Singh, Jagdeo Singh and Devendra Singh u/s 304 (Part II) read with Section 149, I.P.C. and sentenced each of them to five years" R.I., the said conviction and sentence do not call for any interference whatsoever. Similarly, the conviction and sentence of all the Appellants u/s 307/149, I.P.C. to four years" R.I. each and u/s 148, I.P.C. to one years" R.I. each also does not call for any interference.

17. In view of the aforesaid discussion Criminal Appeal No. 2335 of 1979 fails and is hereby dismissed. The conviction and sentences awarded to the Appellants Jarnail Singh, Lakhvir Singh, Jagdeo Singh and Devendra Singh u/s 304 (Part II), I.P.C. read with Section 149, I.P.C. to five years" R.I. each, u/s 307/149, I.P.C. to four years" R.I. each and u/s 148, I.P.C. to one years" R.I. each are upheld. All the sentences shall run concurrently. The Appellants are on bail. They shall surrender to their bail bonds to serve out the sentences awarded to them.

18. Government Appeal No. 255 of 1980 is dismissed. Criminal Revision No. 1768 of 1979 is also dismissed.