

**(1996) 03 AHC CK 0107**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 1306 of 1980

Nathu Singh and Another

APPELLANT

Vs

State

RESPONDENT

**Date of Decision:** March 11, 1996

**Acts Referred:**

- Evidence Act, 1872 - Section 105
- Penal Code, 1860 (IPC) - Section 302, 307, 34

**Citation:** (1996) 20 ACR 417

**Hon'ble Judges:** R.N. Ray, J; N.L. Ganguly, J

**Bench:** Division Bench

**Advocate:** A.D. Giri and G.S. Hajela, for the Appellant; A.G.A., P.N. Misra and Apul Misra, for the Respondent

**Final Decision:** Allowed

### Judgement

N.L. Ganguly, J.

This appeal of Nathu Singh and Rajvir Singh, both sons of Sardar Singh, is directed against the judgment and order dated 10.6.1980 passed by Sri S. N. Saxena, IIIrd Addl. Sessions Judge, Badaun convicting Appellant Nathu Singh u/s 302, I.P.C. and sentencing him to undergo R.I. for life and convicting Appellant Rajvir Singh u/s 302/34, I.P.C. and sentencing him to undergo R.I. for life.

2. The deceased Dhianpal Singh and the Appellants are closely related. The pedigree of the family showing closeness of relations is quoted as under:

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Mulayam Singh

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Sardar Singh

Mahavir Singh	Udaivir Singh	Nathu Singh	Rajvir Singh
		(Accused)	(Accused)
	Krishnapal Singh		
Shripal Singh	Dhianpal Singh		
(Complainant)	(Deceased)		

3. Deceased Dhianpal Singh was related as Sadhu of Appellant Nathu Singh. Nathu Singh had taken a loan of Rs. 2,000 from Dhianpal Singh deceased about a year back. The relations between the deceased and the Appellants were not strained. The taking of loan by Nathu Singh was not shown to be on the basis of any receipt. Nathu Singh had promised to pay back the amount within two months but he had not been able to do so. On the date of occurrence, i.e., 26.6.1978 at about 10 a.m. in village Raipura, deceased Dhianpal Singh and Krishnapal Singh were looking after the roof of their house as it was rainy season. The house of Appellant Nathu Singh adjoins towards west of the house of complainant Krishnapal Singh. The door of the house of Nathu Singh was in the western direction. The deceased Dhianpal Singh while standing on the roof alongwith Krishnapal Singh asked Nathu Singh for payment of the loan money. Nathu Singh accused was carrying ague with him. Rajvir Singh, co-accused, was standing near him. They were talking to each other and were about to leave the house for some other place. Co-accused Rajvir Singh on hearing of the demand for repayment of the loan money exhorted accused Nathu Singh to shoot Dhianpal Singh as he had been making the demand almost daily for repayment of the loan money. Appellant Nathu Singh thereafter opened fire upon Dhianpal Singh from his gun, which hit Dhianpal Singh and he fell down on the roof. The incident was seen by Hakim Singh, Lal Singh and Prem Pal Singh, who were near the Chaupal, close to the place of incident. The accused-Appellants thereafter had escaped in the western direction. Dhianpal Singh had not died instantly. Krishnapal Singh took Dhianpal Singh for his treatment to Badaun on a bullock Tonga. Shripal Singh informant drafted the F.I.R. of the incident in his Baithak and proceeded for the Police Station Hazratpur, which was at a distance of about six miles from the village. The F.I.R. was lodged at 13.10 hours on 26.6.1978 and a case u/s 307, I.P.C. was registered against Nathu Singh and Rajvir Singh Appellants. Dhianpal Singh succumbed to his injuries on way to Badaun between village Alapur and Sakhanu. Krishnapal Singh went to the District Hospital alongwith the dead body of Dhianpal Singh. The police station, Hazratpur where the report u/s 307, I.P.C. was initially registered after receiving information about the death of Dhianpal Singh converted the case u/s 302, I.P.C. The F.I.R. is proved in the case and marked as Ext. Ha. 6. After lodging of the F.I.R. the police investigated the case and charge-sheeted the

Appellants. The Appellant No. 1 was charged u/s 302, I.P.C. simpliciter and the Appellant No. 2 was charged u/s 302 read with Section 34, I.P.C. The accused pleaded not guilty. Rajvir Singh Appellant No. 2 denied his presence in the village at the time of incident. He stated that he was in village Gountra where he used to practice medicine.

4. The Appellant Nathu Singh gave a counter version of the occurrence and stated that on 24.6.1978 deceased Dhianpal Singh had beaten the sweepress of the village who had, therefore, stopped working in the house of Krishnapal Singh. On 25.6.1978 Krishnapal Singh had complained to Appellant Nathu Singh as he was under an impression that it was Nathu Singh who had directed the sweepress not to work at his place. The Appellant Nathu Singh had explained the position to Krishnapal Singh and on 26.6.1978. At about 10/11 a.m. Krishnapal Singh armed with a gun, Maharam and Shripal Singh armed with lathis reached the door of Nathu Singh's house. Krishnapal Singh, Maharam and Shripal Singh entered into his house and Maharam, Shripal Singh started inflicting lathi blows upon him, Dhianpal Singh from the roof of his house fired a shot from a country made pistol. Krishnapal Singh then directed every body to recede as he was going to murder Nathu Singh. Krishnapal Singh aimed his gun towards him. Nathu Singh apprehending danger to his life caught hold of the gun of Krishnapal Singh. In the meantime his son Om Pal Singh reached there with the gun of his brother Bhagwan Singh. Dhianpal Singh was getting ready for firing another shot. Nathu Singh's son apprehending danger to the life of his father opened fire and in the scuffle the gun of Krishnapal Singh also went off. Both the shots were fired almost simultaneously and he did not know as to which fire hit Dhianpal Singh. Nathu Singh Appellant is said to have received injuries. Thereafter, he had gone to police station Alapur but his F.I.R. was not registered by the police there. Nathu Singh's brother Rajvir Singh had also accompanied him to the police station, Alapur. Nathu Singh is said to have sent an application to the D.I.G. Bareilly as well as to the higher authorities of Lucknow. Nathu Singh got himself medically examined on 28.6.1978. The cross-version of the incident given by the Appellant Nathu Singh was not investigated by the police.

5. The prosecution in the Sessions Trial examined eye-witnesses P.W. 1 Shripal Singh, P.W. 2 Hakim Singh and P.W. 3 Krishna Pal Singh.

6. P.W. 1 Shri Pal Singh before the Sessions Court stated the relationship between him and Appellants Nathu Singh and Rajvir Singh. He stated that Appellants are his uncle according to the relationship. Dhianpal Singh deceased is the "Sadhu" of Om Pal Singh S/o. Nathu Singh. Smt. Atitamati is the sister of Appellant Nathu Singh. Shanti is the daughter of Atitamati i.e. sister's daughter (Bhanji) of Nathu Singh Appellant. Shanti is married to Vijendra Pal Singh Advocate of Bareilly. Younger brother of Vijendra Pal Singh i.e. Yogendra Pal Singh is Deputy Government Counsel. This witness also stated that Nathu Singh had taken Rs. 2,000 from Dhianpal Singh deceased about a year back. Nathu Singh had assured to return the money in two

months but he had not been able to return the money. Since the loan money was asked to be repaid, he became inimical.

7. On the date of the incident at 10 a.m., Shripal Singh, deceased Dhianpal Singh and cousin of Shripal Singh, i.e., Krishnapal Singh were on the roof of the house and were looking after the roof of the house on account of rains. The roof of the house of Shripal Singh is adjoining to the roof of Nathu Singh. Nathu Singh's outlet is towards west. The deceased Dhianpal Singh had asked Nathu Singh for return of the money from the roof of his Baithak. Nathu Singh had a gun at that time. Rajvir Singh was also standing there. Both were standing near the door of their house and were talking to each other for going somewhere. Since Dhianpal Singh deceased asked Nathu Singh to pay the money back, Rajvir Singh exhorted Nathu Singh saying "Mar Do Sale Ko Goli Se. Roj Roj Rupyon Ka Takaja Karta Rahta Hat". "Shoot him by gun, daily he asked for paying back the money", and Nathu Singh Appellant fired a shot immediately on Dhian Pal Singh which hit him and he fell on the roof itself. Hakim Singh, Lal Singh, Prem Pal Singh and Ors. who were near the Chaupal had seen the incident. The accused persons thereafter ran away in the western direction. Dhianpal Singh's condition was serious. Krishnapal Singh took him to Badaun for his treatment. Shripal Singh prepared the F.I.R. and had lodged it before the police and proved the same as Ext. Ka. 1. This witness was cross-examined by the Appellants' counsel. In cross-examination Shripal Singh denied that no daughter of Ram Pal Singh was married to Ompal Singh. Om Pal Singh is the son of Nathu Singh. The witness stated that Ompal Singh is married to the daughter of Maharaj Singh r/o. Sirsoli. He stated that Dhian Pal Singh deceased was married at the place of Ram Pal Singh in village Pachdeora. Ram Pal Singh's brother is an Advocate at Badaun and another brother Rakshpal Singh is also there. Vijendra Pal Singh and Yogendra Pal Singh, who were Advocates practising at Bareilly were known to the witness. The witness Shri Pal Singh stated that he had known that Vijendra Pal Singh and Yogendra Pal Singh were practising at Bareilly. He further stated that they were the persons who were advising the Appellants to litigate the cases.

8. This is not disputed by P.W. 1 Shripal Singh that no notice for refund of the money was given to Nathu Singh Appellant. There had been no dispute about repayment of the money before the Panchayat. There had been no complaint against Ompal Singh also about the money. Shripal Singh also stated that the demand for refund of money by Dhian Pal Singh was made from the roof. He also stated that after the demand of the amount by the deceased, there had been no exchange of hot words between the deceased and Appellant Nathu Singh. Nathu Singh had not responded or replied anything on the demand made by the deceased. In the meantime Rajvir Singh co-Appellant had said to shot Dhianpal Singh. The witness stated that he had not believed that on saying of Rajvir Singh co-accused Nathu Singh would fire the shot. No gun was loaded in his presence. He had not seen the cartridges. He may have the cartridges in the bag. Shripal Singh P.W. 1 stated that Nathu Singh had not put the butt of the gun on his shoulder at the time of firing. He took the gun in his

hand and fired. The gun was in the hand of Nathu Singh in front of his chest. When Nathu Singh had aimed the gun the witness or any one else had not attempted to save by moving aside, The roof, where the deceased Dhian Pal Singh was standing, is about 10-12" away from the Angan where Nathu Singh was standing.

9. P.W. 2 Hakim Singh is also an eye-witness. He also corroborated the statement that Nathu Singh had taken the money for two months but had not returned the same. He has not stated how money was taken by Nathu Singh from the deceased. The witness rather stated that at the time the deceased Dhian Pal Singh had asked accused Nathu Singh that "Chachaji. Apne Do Mah Ke liye Jo Rupye Liye Thai Vah Abtak Nahin Lotaye Hain, Unhen Lota Do. Chachaji, you had taken the money for two months but you have not returned till now, return it". At that time Rajvir Singh co-accused said that he is reminding for return of money dally, shoot him by gun and Nathu Singh fired at deceased Dhian Pal Singh by the butt of his gun and he fell on the roof. This witness stated that before the date of incident in his presence deceased Dhian Pal Singh had not earlier made any demand for return of the money. P.W. 1 Shripal Singh and P.W. 2 Hakim Singh both stated that none of the witnesses or anyone else tried to assault the accused persons. They specifically denied that at the time of the incident Nathu Singh Appellant had received any injury.

10. P.W. 3 Krishna Pal Singh reiterated the statements of P.Ws. 1 and 2 Krishna Pal Singh made a little improvement in the statement of Hakim Singh saying that Nathu Singh accused-Appellant had asked Dhian Pal Singh deceased "Chachaji, Apne Jo Hamare 2,000 rupye Do Mah Ke Liye Thai Lota Do. Uncle, you had taken Rs. 2,000 for two months, return the same". P.W. 3 Krishna Pal Singh clarified the amount of Rs. 2,000 which was not so said by P.W. 2 Hakim Singh. Prem Pal Singh, Lal Singh, Sohan Pal Singh and Hakim Singh were said to be present in front of the door of the house of Nathu Singh. P.W. 3 Krishna Pal Singh stated in cross-examination that on the date of the incident Dhian Pal Singh deceased had asked Nathu Singh Appellant that return the money today, as I need it. This statement is also with little variance from the statements of P.Ws. 1 and 2. Krishna Pal Singh P.W. 3 also admitted that Nathu Singh had not aimed at by keeping the butt of the gun on his shoulder. He had taken the gun in his hand and fired, P.W. 3 Krishna Pal Singh stated in his cross-examination that the gun of the Appellant Nathu Singh was a double barrel gun. He had no belt of cartridges. P.W. 2 Hakim Singh in cross-examination in para 13 of cross-examination stated that the gun was of single barrel. The learned counsel for the Appellants Sri A. D. Giri pointed out the said contradiction in the statements of P.Ws. 2 and 3. He further pointed out that P.W. 2 Hakim Singh admitted to be a history sheeter. He was convicted in 1972 in a dacoity case and sentenced to seven years R. I. He, however, stated that he was acquitted in the said case from the High Court. He admitted that he was sentenced to one year R.I. for keeping unlicensed firearm.

11. Sri Ram Kumar Singh P.W. 4 is the first I. O. in whose presence the F.I.R. was lodged and chik report was prepared on the basis of the F.I.R. The entries in the G. D. have been proved by him. He proceeded to the village of the incident and stated to have recorded the statements of Shripal Singh P.W. 1, Hakim Singh P.W. 2 and Ors. prepared the site plan with the assistance of the witnesses, made a note and prepared the index. He had proved the site plan as Ext. Ka. 4. He also took bloodstained and plain clay from the place of incident prepared a memo in presence of the witnesses. Since the roof was pucca, he had scraped the cement with blood stains and took simple clay from the site. He prepared the specimen seal after keeping the recovered cement separately in sealed cover. The accused were not available on search. The post-mortem report of the deceased Dhian Pal Singh was received by him on 29.6.1978 and he converted the case in the G. D. from 307, I.P.C. to one u/s 302, I.P.C. He proved the G. D. entries of 29.6.1978 and had recorded the statements of witnesses Krishna Pal Singh and Ors.

12. P.W. 4 Ram Kumar Singh stated that at the time of his inspection of the place of incident he could not find any mark of pellate on the wall nor could he find any empty cartridges or pellets. He also could not find any sign of fresh repair on the roof at the time of his inspection. The place where the witnesses Shri Pal Singh and Krishna Pal Singh were present at the time of the incident is not shown in the site plan. P.W. 4. Ram Kumar Singh said in his statement that it was mere omission to mention the places of the witnesses on the roof at the time of the incident. The place of Chaupal, as stated in the evidence by the witnesses, is not shown in the site plan.

13. P.W. 6 Mahavir Prasad S. I. of P. S. Kotwali got the information on 26.6.1978 at 3.20 p.m. from the District Hospital, Badaun that Dhian Pal Singh of village Raipura had died whose dead body was lying there which was brought by Krishna Pal Singh. S. I. Mahadeo Prasad reached the hospital, took possession of the dead body of Dhian Pal Singh, appointed Panches and prepared the inquest report. The sketch of the dead body was also prepared. The dead body was sealed in cloth and sent for post-mortem examination through constables Subhash Singh and Balbir Singh with necessary papers.

14. The post-mortem examination was conducted by Dr. E. A. K. Tewari P.W. 5. The post-mortem report has been proved and marked as. Ext. Ka. 6. There is no dispute that deceased Dhian Pal Singh had received gun shot injuries and the ante-mortem gun shot injuries received by him are quoted as under:

1. Gunshot wound of entry measuring 0.5 cm x 0.5 cm. bone deep which had been fractured above the left eye brow, almost in its middle part.
2. Gunshot wound of entry measuring 0.5 cm. x 0.5. cm. x muscle deep upon the left side of the neck, about 7 cm. below the left ear.

3. Gunshot wound of exist measuring 0.75 cm. x 0.75 cm. x muscle deep situate upwards and laterally, 8 cm. away from injury No. 2.

4. Gunshot wound of entry measuring 0.5 cm. x 0.5 cm. x cavity deep below the middle part of the left clavicle bone.

15. After investigation charge-sheet was submitted and the trial concluded with the conviction and sentence as mentioned above.

16. The defence of the Appellant No. 1 is denial of the prosecution case, as said. Appellant No. 1 Nathu Singh stated that on 24.6.1978 Dhian Pal Singh had beat the sweepress. The sweepress stopped working at the house of Krishna Pal Singh and the Appellant. On 25.6.1978 Krishna Pal Singh blamed the Appellant, then Appellant Nathu Singh told him that his impression that Appellant Nathu Singh got the work of sweepress stopped was incorrect. On 26.6.1978 at about 10-11 a.m. Krishna Pal Singh armed with a gun, Maharam and Shri Pal Singh armed with lathis came to the door of Appellant No. 1 and called him to come out. Surajpal Singh and Dhian Pal Singh had come on the roof. Krishna Pal Singh, Maharam and Shri Pal Singh entered the house of Appellant Nathu Singh. Maharam and Shri Pal Singh started labouring Appellant Nathu Singh with lathis. Dhian Pal Singh fired a shot from the roof. In the meantime Krishna Pal Singh asked others to get away so that he may kill Appellant No. 1. Krishna Pal Singh had set his gun straight. Seeing it Nathu Singh caught hold of the gun. In the meantime Nathu's son brought the gun of Bhagwan Singh, younger brother of Nathu Singh. In the meantime Dhian Pal Singh was trying to fire second shot from the roof. Nathu Singh's son seeing the danger to the life of his father and in the process of catching hold of the gun of Krishna Pal Singh, fires were shot together. It could not be said by him as to whose shot caused injuries to Dhian Pal Singh. Nathu Singh stated that he received injuries in the assault on him. He went to the police station Alapur with his brother Rajvir Singh. The report was not recorded. The Appellant sent an application to the D.I.G. Bareilly and Lucknow. The Appellant was medically examined in the hospital on 28.6.1978 and X-ray was also done. The police had not investigated the case on the application of the Appellant No. 1.

17. The defence of Appellant No. 2 is denial. He said to be at his dispensary at a distance where he was practising as a doctor.

18. The defence examined D.W. 1 K. P. Sharma A.S.I. (M) in the office of the D.I.G. Bareilly, who proved the entries of the application given by Nathu Singh Appellant at Serial No. 347A on 2.7.1978. The said application was despatched to the Superintendent of Police, Badaun for investigation on 3.7.1978 through special messenger constable Ramvir Singh. D.W. 2 Dr. B. K. Endlay, Medical Officer Incharge of Bareilly District Hospital proved to have examined the injuries of Nathu Singh on 28.6.1978 and stated that the injured Nathu Singh had contused wound 5 cm. x 0.5 cm. x muscle deep on the left side of the head above 11 cm. and abrasion with

swelling 14 cm. x 10 cm. on the left knee. The injury report of Nathu Singh is proved and marked as Ext. Ka. 2 D.W. 3 Dr. K. S. Tewari. Senior Radiologist of District Hospital Bareilly had X-rayed the injury of Nathu Singh, proved the X-ray plate showing that there was hair line fissured fracture of potela bone. D.W. 4 Ram Lal Pathak Record Keeper of Police Office. Badaun stated that the applications, which are received for enquiry in the office of the Superintendent of Police, after enquiry and investigation are consigned in the office of the Superintendent of Police, Badaun. There was no record to show that the application of Nathu Singh Appellant was consigned after investigation by the police. The last D.W. 5 Hulas Singh appeared on behalf of the defence as a witness of fact to corroborate the statement and defence case of Appellant Nathu Singh.

19. Heard Sri A. D. Giri, counsel for the Appellant at length, and perused the evidence on record. Sri K. C. Saxena, A.G.A. appeared for the State and Sri P. N. Misra and Sri Apul Misra appeared alongwith A.G.A. for the complainant-informant.

20. The learned counsel for the Appellant submitted that there was no sufficient motive for the accused persons to have committed the offence as alleged by the prosecution. He submitted that the motive suggested is flimsy. Secondly, Sri Giri submitted that the manner, in which the occurrence is said to have taken place, is highly improbable. No person would commit the offence in the manner, as suggested by the prosecution. He also submitted that on the alleged version of demand of the loan Nathu Singh had not retorted or shown anger or tamper. The case of the prosecution that the incident took place because of the reminder by the deceased Dhian Pal Singh for repayment of the loan taken by Nathu Singh is doubtful. Since the payment of loan itself was not corroborated by any documentary evidence nor there is any allegation that earlier to the date of occurrence any demand was made by the deceased for repayment of money or there was any Panchayat held for solving the controversy. The learned counsel for the Appellant submitted that the witnesses examined in the case are not independent and reliable witnesses. There were independent witnesses, as admitted by the prosecution witnesses, but the prosecution did not examine such independent witnesses. Sri Giri submitted that the Appellant Nathu Singh did receive injuries on his head and fracture of the potela bone of the knee. The injury, which was on the head of Nathu Singh and was bleeding, was proved. The prosecution failed to explain the injury of the Appellant rather denied the injuries on the person of Nathu Singh Appellant. The learned counsel submitted that the application of Appellant Nathu Singh to the D.I.G. Bareilly was sent to the Superintendent of Police, Badaun for enquiry. The I. O. did receive the application of the Appellant sent through D.I.G. and the Superintendent of Police but the I. O. did not consider it necessary or proper to investigate the defence version.

21. Sri Giri vehemently submitted that Appellant Nathu Singh was assaulted and had received injuries on head and knee of the leg causing fracture of the bone. Shri Pal



Singh was about to shoot Appellant Nathu Singh, the deceased Dhian Pal Singh had also fired shot from the roof towards the place where Nathu Singh Appellant. Shri Pal Singh and Hakim Singh were said to be present. Shri Pal Singh was about to shoot, Dhian Pal Singh was also preparing to shooting from the roof, Nathu Singh tried to catch hold and snatch the gun of Shri Pal Singh. In the meantime, Nathu Singh's son came with the gun of Nathu Singh's younger brother Bagwan Singh when he apprehended danger to the life of his father. In the snatching and catching hold of the gun of Shri Pal Singh the fire was shot. It may be that the shot hit Dhian Pal Singh, which was in exercise of right of private defence.

22. We have already referred the gist of the statements of P.W. 1 Shri Pal Singh, P.W. 2 Hakim Singh and P.W. 3 Krishna Pal Singh. It is apparent from appreciation of evidence of these three witnesses that the motive for the commission of the alleged offence is the demand of repayment of the loan by Nathu Singh to the deceased Dhian Pal Singh. The prosecution has not been able to show any document or receipt to show that Rs. 2,000 were paid as loan to the Appellant Nathu Singh. The manner, in which the occurrence took place, is also not probable in view of the facts and statements of the witnesses Shri Pal Singh, Hakim Singh and Krishna Pal Singh. It Is not said by these prosecution witnesses that when Dhian Pal Singh reminded for return of the loan money, then Nathu Singh became infuriated or retorted as to why reminder for refund was being made. The Appellants No. 1 and 2 were going somewhere and talking together. The Appellant No. 2 is said to have exhorted the Appellant No. 1 to kill Dhian Pal Singh. The variance in the statements of these three witnesses about the manner and words used for return of the money by Dhian Pal Singh is not consistent and appears to be tutored having contradictions when their statements were recorded in Court. The language used by Dhian Pal Singh, as stated by P.W. 2 Hakim Singh is "Chachaji, Apne Do Mah Ke Liye Jo Rupye Liye Thei, Vah Abtak Nahin Lotai Hain, Unhen Lota Do". The deceased had not said any such word which might infuriate Nathu Singh, P.W. 3 Krishna Pal Singh further added In his statement that the deceased Dhian Pal Singh had said that money be returned and specified Rs. 2,000 be returned today, as he needed it. These small variance, omission and improvement in the statements of these three witnesses show that the witnesses were not consistent and their evidence cannot be solely relied in view of the fact that P.W. 2 Hakim Singh admitted that a history sheet was opened for him. He was involved in a dacoity case and was sentenced to 7 years R.I. but was acquitted in appeal by the High Court. It is admitted that he was convicted and sentenced for possessing firearm. This witness is thus not wholly reliable. P.W. 2 Shri Pal Singh admitted that no notice for return of the money was earlier given to Nathu Singh by the deceased or any Panchayat was ever held for refund of the money. He admitted that before the incident or at the time of the demand, there had been no exchange of hot words between the deceased and Nathu Singh, rather he admitted that on making demand Nathu Singh had not said a word or replied to it. He also stated that he had not seen Nathu Singh loading the gun. P.W. 1 Shri Pal Singh

stated in his statement that Nathu Singh had not put the butt of the gun on his shoulder for aiming at the deceased before shooting. He simply took the gun in his hands and shot at. The deceased was on the roof, which is 10-12" in height from the ground where the Appellants were standing. The shot could touch the victim when aimed at. Merely holding the gun in between two hands without putting the butt on the shoulder, it is not believable that the gun fired would cause injuries on the deceased down to upwards, as is evident from the post-mortem report. The three witnesses have denied the injuries on the person of Appellant Nathu Singh. The nature and size of the injury on the person of the Appellant are such, which cannot go unnoticed specially the head injury on the top, which was sufficiently large and said to be bleeding.

23. Now we proceed to examine and scrutinise the arguments of the Appellants and defence pointwise, as submitted by the learned counsel. Sri A. D. Giri placed reliance on the decision in [Vijayee Singh and others Vs. State of U.P.](#), . He placed paras 10 to 13, 26 and 34 to 37 of the said judgment. Sri Giri referred specially para 10, which is reproduced as under:

...in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inference:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

24. It is submitted that the Appellant Nathu Singh lodged a complaint before the D.I.G. Bareilly giving narration of facts and counter version. The said application was sent to the Superintendent of Police, Badaun, who also in his turn directed the I.O. to take necessary action. It is established from the record and admitted by the I.O. that the application of Appellant Nathu Singh before the D.I.G. Bareilly did reach him but the I.O. stated that he did not consider it necessary or proper to investigate on those lines. The other aspect of the matter is that the injuries of the Appellant Nathu Singh are proved by the defence witness. Dr. B. K. Englay D.W. 2 and X-ray report is proved by Dr. K. S. Tewari D.W. 3.

25. We now proceed to consider the argument of the learned counsel for the Appellants Sri A. D. Giri whether the eye-witnesses examined by the prosecution about the place and the manner of the incident, as stated in the evidence, are reliable or the defence version, as set up by Appellant Nathu Singh, is more probable. We have held above that the statements of P.W. 1 Shripal Singh, P.W. 2 Hakim Singh and P.W. 3 Krishna Pal Singh are not consistent and cannot be solely relied and the manner of the incident, as stated by the prosecution witnesses, has also not been found to be wholly reliable.

26. We analysed and examined the case of the defence and have to see whether the plea of self-defence, as set up on behalf of Appellant Nathu Singh, is acceptable in the facts of the present case. The plea of self-defence u/s 105 of the Evidence Act has been under consideration by the High Courts and the Apex Court in a number of cases. The settled law about the burden of proof and onus of proving any exception in a penal statute is on the accused. It is also settled law that the burden of proof, which rests on the accused, does not absolve the prosecution from discharging its initial burden of establishing the case beyond all reasonable doubt. It is also well-settled that the accused need not set up a specific plea of his defence and adduce evidence. We would like to refer to the celebrated decision of our Court, namely, *Prabhu v. Emperor* 1941 ALJ 619 (FB). The above law, as held by the Full Bench (supra), the matter was again considered by further larger Bench of our Court in [Rishi Kesh Singh and Others Vs. The State](#). We would refer to the observations of the Apex Court in the case [State of U.P. Vs. Ram Swarup and Another](#). The observations of Hon'ble Chandrachud, J. in the said case are quoted as under:

The judgment of one of us, Beg, J., in *Rishi Kesh Singh v. State* explains the true nature and effect of the different types of presumptions arising u/s 105 of the Evidence Act. As stated in that judgment, while the initial presumption regarding the absence of circumstances bringing the case within an exception may be met by showing the existence of appropriate facts, the burden to establish a plea of private defence by a balance of probabilities is a more difficult burden to discharge. The judgment points out that despite this position there may be cases where, though the plea of private defence is not established by an accused on a balance of probabilities, yet the totality of facts and circumstances may still throw a reasonable doubt on the existence of "mens rea", which normally is an essential ingredient of every offence. The present is not a case of this latter kind.

27. The Hon'ble Supreme Court in the judgment of [Vijayee Singh and others Vs. State of U.P.](#), which are as under:

Applying the principle of benefit of doubt, as I had explained above, to the plea of private defence of person in the instant case. I think that, even if the Appellant did not fully establish his plea, yet, there is sufficient evidence, both direct and circumstantial, to justify the finding that the prosecution has not established its case beyond reasonable doubt against Pratap on an essential ingredient of the offence of

murder, the required mens rea. After examining all the facts and circumstances revealed by the prosecution evidence itself and the defence evidence and considering the effect of non-production of the better evidence available which, for some unexplained reason, was not produced, I am not satisfied that the plea of private defence of person can be reasonably ruled out here. This is enough, in my opinion, to entitle the Appellant to get the benefit of doubt.

28. We have already referred to the evidence led by the prosecution and the evidence adduced on behalf of Appellant No. 1. It is also important to note as to the conduct and manner of the investigation conducted by the I.O. The I.O. admitted to have received the application given by Appellant Nathu Singh to the D.I.G. Bareilly, which was transmitted to the Superintendent of Police, Badaun, who passed orders for necessary action. The I.O. is an independent authority Invested with the power of investigating the case impartially to find out the truth in the allegations of the informant-complainant not only with a restricted angle to prosecute and secure conviction of the accused persons against whom the F.I.R. has been filed. The I.O. had received information. It was a legal duty cast on him to have interrogated the witnesses, namely, the doctor, who had examined the injuries of the Appellant Nathu Singh and the doctor Radiologist, who had X-rayed the knee injury of the Appellant. By mere saying of the I.O. that he had not Investigated in respect of the complaint and application of Nathu Singh Appellant, we have no hesitation in holding that the I.O. had not acted as an independent investigating agency rather acted as a partisan so as to secure conviction of the Appellants.

29. From the discussion of law and consideration of the evidence on record, we are of the clear view that the prosecution evidence is not above-board and cannot be implicitly relied as the witnesses cannot be said to be independent witnesses of the case. The fact that the defence version that the Appellant Nathu Singh received injuries on the top of the head, which was a bleeding injury and injury on the knee with fissured fracture on potela also suggest that the defence version, as set up, cannot be discarded on the ground that the defence has not proved the case beyond all reasonable doubt. The law is that the defence has to lead only that much evidence which may indicate that the probability of the defence version is substantiated. The other aspect of the case, as considered above, is that the I.O. failed to examine and investigate the case after he had received the complaint of Nathu Singh transmitted through the Superintendent of Police, Badaun for necessary action. Had he examined and interrogated the witnesses and investigated the defence version himself, the true facts would have come before the Court. It is also not necessary for the defence to plead and substantiate the right of private defence if from the prosecution evidence the defence can show that there was preponderance of probability of the right of private defence, a reasonable doubt is created in the mind of the Court and In such circumstances, the accused would be entitled to get benefit of doubt.

30. So far as co-Appellant Rajvir Singh is concerned, we have discussed the evidence of the prosecution witnesses and the presence of Rajvir Singh at the time of occurrence is denied, the plea of alibi proved may not have been proved beyond all reasonable doubt. The witnesses of prosecution discussed above since do not inspire confidence and are not believed for the allegations levelled against Appellant Nathu Singh, we are of the view that the same set up of witnesses, who said about the exhortation by Appellant Rajvir Singh is also rendered unbelievable and not beyond all reasonable doubt.

31. Considering the facts and circumstances of the case discussed above, we are of the view that the judgment of the court below convicting and sentencing the Appellant cannot be sustained and is hereby set aside. The appeal is allowed. The Appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.