A

STATE OF U.P.

v.

PUSSU @ RAM KISHORE

June 2, 1983

B

[E.S. VENKATARAMIAH AND V. BALAKRISHNA ERADI, JJ.]

Penal Code—Section 302—High Court—If could conduct a mock scene of occurrence in the Court.

C

Right of self-defence—Aggressor—If could claim right.

Acquittal of one of two accused—If would bar conviction of the second.

D

The prosecution case against the accused-respondent was that when the deceased and his wife were returning home from their field, he and the co-accused armed with a gun and a country-made pistol fired at the deceased causing him injuries, that some passersby, including the two eye witnesses, overpowered the respondent but that he escaped from their hold and ran towards the co-accused who then was standing at some distance, snatched the pistol from his hand and fired at the deceased while he was being carried towards the village. As a result of this shot the deceased was killed instantaneously and one of the witnesses sustained injuries.

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The defence version, on the other hand, was that on the date and time of the occurrence when the two accused were going out of the village the deceased, his servant and the injured witness assaulted them and on hearing their cries, the respondent's father fired at the deceased in self-defence and that this had resulted in the death of the deceased and injury to the witness.

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The trial court found him guilty of the offence punishable under section 302 I.P.C. and sentenced him to death and the co-accused with imprisonment for life.

G

Before the High Court the argument for the respondent was that since the injuries on the person of the witness were superficial, he could have been fired at only from a long distance and being an aged man of 60 years, he could not have run and caught hold of the respondent before the respondent could reload his gun. To test the capacity of the witness to run and to assess the time taken in reloading a gun, the High Court conducted an experiment by asking the witness, who was present in the court, to move briskly to a certain distance. A young lawyer present in the Court was asked to unload and reload a gun exactly of the same make as the gun used by the respondent. On the basis of this experiment the High Court came to the conclusion that

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even if the witness, after receiving gun shot injuries had run some distance towards the respondent; he could neither have caught hold of him nor could he have prevented him from reloading his gun. Disbelieving the prosecution story, the High Court acquitted both the accused. A

The State's Special Leave Petition against the judgment of the High Court was granted only with respect to the respondent.

On the question whether the High Court was correct in conducting the experiment that it did and in coming to the conclusion that the respondent was not guilty of the offence of murder. B

Allowing the appeal,

HELD : The procedure of conducting an experiment in Court two years after the incident with the aid of a young lawyer (about whose proficiency in handling a gun there is no authentic evidence) who was asked to handle a different gun altogether and using the conclusion based on that experiment to reject the truth of the evidence of the eye witness, was highly irregular. The High Court has not addressed itself to the degree of efficiency—or inefficiency—of the respondent in handling a gun. The time taken by any person to reload a gun depends upon several factors, including the condition of the gun and the surcharged atmosphere created by the firing bout which may have preceded the time of reloading the gun. [301 F-H] C D

Ordinarily, this Court would not interfere with the judgment of acquittal on mere reappreciation of evidence. But if there are glaring infirmities in the judgment of the High Court resulting in miscarriage of justice it is the duty of this Court to interfere. [309 F-G] E

In the instant case the High Court was wrong in conducting the experiment carried out by it at the hearing of the appeal. Having been impressed by its result it first rejected the evidence of the eye witness on trivial omissions which would not affect the credibility of the prosecution version on imaginary grounds. From the evidence it is obvious that the two accused were armed with fire arms and were the aggressors. On a careful reading of the evidence, it is clear that the father of the accused-respondent, out of love and affection towards his son, tried to shield him. [306 F-G] F

The plea of self-defence cannot be accepted. A person who was an aggressor and who sought an attack on himself by his own aggressive attack cannot rely upon the right of self-defence if in the course of the transaction he deliberately kills another whom he had attacked earlier. Having regard to the nature of the weapon used, the act by which death was caused by the respondent was done with the intention of causing death and there were no extenuating circumstances which would mitigate the offence committed by him. [309 C-D] G H

State of Punjab v. *Jagir Singh & Ors.* [1974] 1 S.C.R. 328; *Shivaji Sahebrao Bobade & Anr.* v. *State of Maharashtra* [1974] 1 S.C.R. 489 followed.

The trial court was right in convicting the respondent. The acquittal of the co-accused did not effect the prosecution case against him. There is no legal bar for convicting the respondent alone in this case on the facts and circumstances of the case. The principle of issue estoppel is inapplicable here. [309 D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 384 of 1974.

Appeal by Special leave from the Judgment and Order dated the 24he October, 1973 of the Allahabad High Court in Crl. Appeal No. 710 of 1973.

Dalveer Bhandari, H.M. Singh & Ranbir Singh for the Appellant.

R.K. Garg, V.J. Francis & Nikhil Chandra for the Respondent.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. It was about 5.30 P.M. on October 15, 1971. Bankey Lal son of Jang Bahadur Singh and his wife Chandra Kali were returning home from their 'Khalihan' (threshing floor) which was situated towards the north of their village Kishunpur Chirai. As they came near the village they were met by Pussu alias Ram Kishore and his brother-in-law Sheo Rakhan. Pussu was armed with a licensed gun of his father Jia Lal and Sheo Rakhan with a country made pistol. They both fired at Bankey Lal causing him injuries. Chhatrapal and Gaya Prasad who were going that very way towards the village saw the occurrence and asked Pussu and Sheo Rakhan to desist from firing and also tried to stop them from continuing to fire. Pussu fired with the gun towards Chhatrapal who in spite of being fired at tried along with some others who were there to catch hold of Pussu and to snatch the gun from his hands. As Pussu could not reload the gun he assaulted those who tried to catch him with the butt of the gun. Gaya Prasad was, however, able to snatch the gun from the hands of Pussu after delivering few blows with his lathi on the head of Pussu. Pussu suddenly managed to escape from the hold of the witnesses and ran towards Sheo Rakhan who was standing near a mango tree with his country made pistol which he was not in a position to open and reload in spite of his attempts. In the meantime the witnesses were carrying the injured Bankey Lal towards the village and when they came near a pipal tree, Pussu ran towards them

with the country made pistol which he had reloaded by then and fired again at Bankey Lal and killed him instantaneously. This in brief is the prosecution case. A

The defence version appears to be that on the date and at the time of the occurrence Pussu and Sheo Rakhan were going towards the 'Bhagwa Talab' near their village and on the way they came across Bankey Lal, his servant Nanhoon and Chhatrapal. These three persons surrounded both Pussu and Sheo Rakhan and began to assault them. On hearing their cries Jialal, the father of Pussu ran towards them with his licensed gun and fired in self defence at Chhatrapal and Bankey Lal caussing injuries to Chhatrapal and killing Bankey Lal. B C

On the basis of the allegations of the prosecution, Pussu was charged for an offence punishable under section 302 I.P.C. for having committed the murder of Bankey Lal and for an offence punishable under section 307 I.P.C. for having attempted to commit the murder of Chhatrapal. He was also charged under section 323 for having caused hurt to Gaya Prasad and under sections 25 and 27 of the Arms Act for having been found in illegal possession of and for having used a licensed gun for unlawful purposes. He was also charged separately under section 302/34 I.P.C. for having committed murder of Bankey Lal in furtherance of the the common intention of himself and of Sheo Rakhan. Sheo Rakhan was charged under section 304/34 I.P.C. for the murder of Bankey Lal in furtherance of the common intention of himself and of Pussu. Jia Lal, father of Pussu, was charged under section 30 of the Arms Act for contravening the conditions of the licence issued in respect of his gun by allowing Pussu to take and use it as stated above. D E F

The learned Sessions Judge at Fatehpur in Sessions Trial No. 128/72 found Pussu guilty of the offence punishable under section 302 I.P.C. for having committed the murder of Bankey Lal and imposed the sentence of death on him subject to confirmation by the High Court. Pussu was also found guilty of offences punishable under sections 307 I.P.C. 323 I.P.C. and under section 27 of the Arms Act for which he was sentenced to undergo rigorous imprisonment for seven years, for one year and for one year respectively which were to run concurrently. Sheo Rakhan was found guilty of an offence punishable under section 302/34 I.P.C. and was sentenced to undergo imprisonment for life. Jia Lal, father of Pussu, was however acquitted of the charge against him. G H

A On appeal by Pussu and Sheo Rakhan, in Criminal Appeal No. 710/73/Refefred No. 34 of 1973 the High Court of Allahabad set aside the convictions and sentences imposed on them and acquitted them of the changes levelled against them.

B Against the judgment of the High Court the State Government applied to this Court for special leave to appeal against Pussu and Sheo Rakhan after a petition for a certificate under Article 134 (1) (c) of the Constitution had been dismissed by the High Court. By its order dated October 28, 1974, this Court granted special leave to appeal against Pussu alone and hence this appeal by special leave against Pussu only.

C

In the present case many facts are not in dispute. That Bankey Lal was killed by injuries caused by a fire arm is not in dispute. The time, the date and place of the alleged occurrence are also not in dispute. The presence of Chhatrapal, Bankey Lal, Pussu and Sheo Rakhan at the scene of occurrence when the occurrence took place D is not also disputed. That the licensed gun of Jia Lal, father of Pussu was used at the time of occurrence is also not in dispute. That Chhatrapal suffered injuries on account of shots fired from that gun is also not in dispute. That there was enmity between the family of Bankey Lal and the family of Pussu owning to some consolidation E proceedings is not seriously questioned before us. The only points in dispute are (1) whether Bankey Lal was killed on account of firing by Pussu as stated by the prosecution or whether he was killed on account of the shots fired by Jia Lal, father of Pussu, (2) whether Chhatrapal suffered injuries on account of shots fired by Pussu with the said gun or whether he suffered these injuries on account of the F firing by Jia Lal, (3) whether Gaya Prasad was assaulted by Pussu and (4) whether Pussu had committed any offence under the Arms Act.

The report containing the first information about the G occurrence, according to the prosecution, was written by Yashwant Singh (P.W.6), a young person of about 18 years who was a resident of Kishunpur Chirai to the dictation of Jang Bahadur Singh, the father of Bankey Lal. Yashwant Singh has stated that he was a student studying in the IXth class, that he had written the report to H the dictation of Jang Bahadur Singh, that after writing it he had read it out to Jang Bahadur Singh who signed before him and that thereafter he had handed over the report to Jang Bahadur Singh. He has denied that he had written the report either to the dictation of

Lakhanlal and others or some time later to the dictation of the police. The report contains details which Jang Bahadur Singh (P.W.13) was able to collect from his daughter-in-law and others who were nearby at the time of the incident. In that report there is no reference to Jia Lal, father of Pussu, at all, (one Jia Lal whose name is mentioned in it is a different person). The presence of Pussu and Sheo Rakhan at the scene is mentioned. The role played by each of them is stated to be as in the prosecution case set out above. The names of persons who were present there including Chhatrapal are also mentioned. The above report and the licensed gun of Jia Lal, the father of Pussu, which had been seized by the witnesses were received at about 8.30 P.M. on that very day at the Police Station at Khakhreru which was about four miles from Kishunpur Chirai where the occurrence had taken place. On the basis of the said report the First Information Report was prepared under section 154 Criminal Procedure Code.

The learned Trial Judge has opined that the First Information Report has been promptly prepared and sent in this case. The only criticism made against it before the trial court on behalf of the accused was that it did not contain some details including the injuries said to be on the person of Pussu and Sheo Rakhan. The trial court has observed that the report was not one dictated by an eye witness but by Jang Bahdur Singh who collected information from people who were there, that Jang Bahadur Singh who had lost his only son could not be expected to furnish all details at the time when the report was prepared and that the report contained broadly all the particulars of the occurrence. The trial court also observed that no motive could be assigned to the omission to refer to the injuries on the person of the accused said to have been caused by lathi blows. The High Court has, however, considered this last aspect namely the omission to refer to Gaya Prasad (P.W.7) giving lathi blows to Pussu and to Chhatrapal catching hold of Pussu and preventing him from reloading the gun was a material omission. We shall advert to this aspect of the matter again at a later stage. One significant aspect of the First Information Report however is that even though there was enmity between the family of Jang Bahadur Singh and the family of Jia Lal, the father of Pussu, and although the defence theory is that the said Jia Lal had fired at Chhatrapal and Bankey Lal, there is no reference to the presence of Jia Lal the father of Pussu, at the scene of occurrence.

A After the receipt of the information regarding the occurrence, the Sub Inspector of Police, Dharam Singh (P.W.14) and the Station Officer Yamuna Prasad Pandey (P.W.15) conducted the investigation. Pussu and Sheo Rakhan could not be arrested till October 23, 1971. They were absconding till then and they surrendered in the court of the Additional District Magistrate (J) on B October 23, 1971. Pussu has admitted this fact in his examination under section 364 Criminal Procedure Code, 1898 by stating that on learning about the report they surrendered before the court. After the investigation was over a police report was filed in the court of the magistrate which ultimately led to the committal of Jia Lal, C Sheo Rakhan and Pussu to take their trial before the Sessions Court.

Exhibit Ka 35 is the post mortem certificate issued by Dr. S.C. Misra, who had conducted the post mortem examination on the body of Bankey Lal. He has stated therein that there were a number D of gun shot injuries on the person of the deceased, and the death was due to shock and haemorrhage caused by gun shot injuries. There is no comment made by either side on this report. It is relevant to mention here that Dr. S.C. Misra has stated in his deposition (Ex. Ka 34) that on October 16, 1971 at about 2.30 p.m. he had also examined the injuries of Ram Kishore son of Jia Lal (Ram Kishore is the other E name of Pussu) and had found three lacerated wounds, one abrasion, one contusion and one abraded contusion and had issued a certificate as per Exh. Ka 1. He also stated that the said injuries could be caused by lathi blows. Pussu has admitted that he was so examined in his statement under section 364 Criminal Procedure Code, 1898.

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P.W.2 Dr. V.P. Singh is the person who examined the injuries on the person of Chhatarpal Singh (P.W.5), on the person of Gaya Prasad (P.W.7) and on the person of Ram Gopal. He has stated that there were gun shot injuries on the person of Chhatrapal Singh and an abrasion and a lacerated wound which could have been G caused by a blunt weapon on the person of Gaya Prasad. Ram Gopal is stated to have a small contusion and an abrasion on his person.

H P.W. 5 Chhatrapal Singh, P.W. 7 Gaya Prasad, P.W. 1 Lakhanlal and P.W. 10 Ramnath are the eye witnesses. Of them P.W. 5 Chhatrapal Singh and P.W. 7 Gaya Prasad are injured witnesses. The statement of Lakhanlal was recorded by the police on

October 15, 1971 itself when he handed over the report about the occurrence and the statements of Chhatrapal Singh, Gaya Prasad and Ramnath were recorded by the police on October 16, 1971. Before considering the evidence of these eye witnesses, it is necessary to refer to a curious experiment which was carried out by the High Court in the course of the hearing of the appeal. The experiment relates to the capacity of Chhatrapal to run when he was fired at by Pussu. One of the arguments addressed on behalf of the accused before the High Court was that Chhatrapal could not have been fired at from a short distance but he must have been shot from a long distance as the injuries on his person were superficial and hence he could not run and try to catch hold of Pussu by his waist before Pussu could reload his gun. Chhatrapal was about 60 years of age at the time of the incident. In support of its conclusion that Chhatrapal could not run towards Pussu in order to catch hold of him this is what the High Court says :

> "Chhatrapal appeared in the Court and we asked him to move briskly to a certain distance in order to demonstrate his ability. He did so. We also got one of the young lawyers present in Court unload and reload a single barrel gun of exactly the same make as the gun, material Ex. 1. Our assessment on the demonstration about the brisk movement of Chhatrapal and the time taken in reloading the gun by the young lawyer is that even if Chhatrapal aged 60 years after receiving the gun shots injuries had run from 8 to 10 paces, he could neither catch hold of Pussu, a young lad, nor prevent him from reloading his gun."

This procedure of conducting an experiment which was carried out two years after the incident in court with the aid of an young lawyer (about whose proficiency in handling a gun we know nothing) who was asked to handle a different gun altogether and which had been used to reject the truth of the evidence of the eye witnesses appears to be highly irregular. The High Court has not addressed itself to the degree of efficiency, or shall we say, inefficiency of Pussu in handling a gun. The time taken by any person to reload a gun depends upon several factors including the condition of the gun and the surcharged atmosphere created by the firing bout which may have preceded the time of reloading the gun. We shall now refer to what Chhatrapal has stated in the course of his deposition. He has stated :

"At the time when I saw Pussu and Sheo Rakhan near the mango tree, I saw weapons in their hands. At the place where the firing took place for the first time, both the accused person were opening and loading the cartridges. They had loaded the cartridge near the mango tree. On the first occasion, at the time of loading of the cartridges, I was at a distance of 1 -15 paces towards east behind Bankey. At the time of first firing, t e sounds of the gun fires made by the two accused person were separate. They had fired from some distance from each other. Both the accused persons were almost at equal distance. They were not one behind the other. I can not, however, rule out the difference of 1 or 2 paces. At the first gunfire, Bankey ran towards the village. He must have run upto a distance of 5-10 paces when the second fire was opened. Bankey Lal was hit by the Ist as well as the 2nd gunfire. At the time of firing, the accused persons were on the north-eastern side of the passage. The third gun fire was made by the accused persons at that very place. Bankey could not go ahead. At the time of 3rd fire, the accused persons were on the western side of Bankey Lal. After this third fire, I rebuked the accused persons. Thereupon Pussu fired at me and then I caught hold of him from behind..... The snatching of the gun took place at a distance of ten paces on the eastern side of the place where Bankey Lal had sat down... ,... ... ...

As soon as Pussu fired at me, I caught hold of him by his waist. After I had caught hold of his waist Pussu could not fire again so long as he did not get himself freed.

To Court :—

At the time when Pussu fired at me and I caught him by his waist, the empty cartridge fired at me remained inside the gun. Pussu could not take it out or throw it away nor could he open the gun.

To counsel :

And in the meantime the gun was snatched."

There is nothing elicited in the cross examination of this witness which could discredit his testimony. There was no ill-will between Chhatrapal and the members of Pussu's family. He denied a suggestion that there were some proceedings under section 107 Criminal Procedure Code against him. There was also no evidence in support of that suggestion. Chhatrapal had been in fact injured by gun shots and the gun used on that occasion had in fact been seized. Why he should exonerate Jia Lal the father of Pussu from the responsibility of injuring him if Jia Lal was in fact responsible for it but implicate Pussu is incomprehensible.

Gaya Prasad (P.W. 7) who was also an injurnd eye witness stated in the course of his deposition thus:

> "When Bankey Lal and his wife reached near Har Sakri well, Pussu accused, who was armed with the gun of his father, and Sheo Rakhan accused who was armed with a country made pistol began to fire gunshots at Bankey Lal. Bankey Lal and his wife raised alarm and ran towards the village. Chhatrapal and I, following him were going towards the village by the same passage. Chhatrapal forbade him but Pussu said that he would not leave Bankey Lal alive. At this Chhatrapal ran to catch hold of Pussu whereupon Pussu aimed the gun at Chhatrapal. Chhatrapal turned and the gunshot hit him on his back. Even after being hit by the gunshot, Chhatrapal caught hold of Pussu by his waist.
>
> Ram Gopal, Lakhan Lal, Jia Lal Gadaria, and Ram Nath came running to the place of occurrence from the south. Ram Gopal and I went just close to Pussu, Ram Gopal and I advanced to snatch the gun, but Pussu gave one blow of the butt of the gun to each of us on the head. At this I gave 4-5 blows of lathis to Pussu and then we jointly snatched his gun. When we snatched his gun he went away towards the mango tree where his sala (brother-in-law) was present On receiving the injury, Bankey Lal had sat down in the way. Ram Nath and Jia Lal lifted him on their arm and started for the village. When they reached near the peepal tree, Pussu came with the pistol of his brother-in-law Sheo Rakhan struck it with the abdomen of Bankey Lal and fired, Bankey Lal

A died just on receiving the pistol shot. Thereafter Pussu and Sheo Rakhan ran away towards Raeepur."

Jia Lal referred to in the above passage is Jia Lal Gadaria and not Jia Lal the father of Pussu.

B Even this witness is not shown to be interested in giving false testimony. Lakhan Lal (P.W. 1) and Ram Nath (P.W. 10) who were also eye witnesses have given substantially the same version as the evidence of Chhatrapal and Gaya Prasad and their evidence is not also shown to be unworthy of acceptance.

C As against the above evidence adduced by the prosecution, we have the evidence of Jagannath (D.W.1). He has stated that at the time when the occurrence took place he was in his plot near Bhagwa Talab which was close to the scene of occurrence, that he heard the cries of Pussu 'Run up, save me, Bankey Lal and Ghaseetey are D killing me'. What took place thereafter may be narrated in his own words thus :

Having gone there, I saw that Bankey Lal deceased and Ghaseetey were assaulting Pussu accused with lathis. E Jia Lal challenged both of them and said "Do not beat him, otherwise I shall shoot you down". On Jia Lal's saying so, Chhatrapal and Bankey stopped for a short time; but they again rushed to assault Pussu. In the meantime Pussu accused took shelter behind the mango tree. Then Jia fired 2-3 shots at Chhatrapal and Bankey. On receiv- F ing the gun shots injuries Chhatrapal fell down on the ground. Bankey Lal, too, received some injuries. In the meantime Bankey Lal's servant Nanhua caught hold of Jialal accused from behind, as a result of which his arms also got bound. Nanhua shouted "Run up. I have caught G hold of the sala". At this Shiva Rakhan accused reached there. He caught hold of Nanhua and felled him down and Jia Lal accused was released from his hold. Bankey Lal deceased rushed to snatch the gun of Jia Lal accused, but as soon as his hand fell on the barrel of the gun, it got H discharged and the shot hit Bankey Lal on his right flank, as a result of which Bankey Lal fell down dead then and there. The accused persons ran away with their licensed gun towards their house.

This defence witness has not been believed by the trial court. Nor do we find that any reliance has been placed on his evidence by the High Court. The statement of this witness was recorded by the police on January 31, 1972 after P.W. 15 Yamuna Prasad Pandey came to know that the name of this witness had been mentioned in the report given by Pussu at the Kotwali Police Station. He has stated in his cross-examination that "When I sighted for the first time, I saw that Jia Lal was firing shots at Ghaseetey alias Chhatrapal and Bankey". If that is so his version about what all had preceded that stage is manifestly his imagination. We have carefully gone through his evidence and it does not inspire confidence. The prosecution evidence cannot be rejected on the basis of the evidence of this defence witness, particularly because the minor injuries stated to be on the person of Pussu are not sufficient to hold that Pussu and Sheo Rakhan were the victims of the aggression on the part of Chhatrapal and Bankey Lal. This defence version is also contradicted by the conduct of Pussu immediately after the incident. If he was an innocent person and his father had fired the gun in defence of Pussu and Sheo Rakhan he would also have been an informant of the incident at the Khakhreru Police Station which was only about four miles from his village or he would have been available for interrogation by the police, if they came at the instance of somebody else. But he ran away from the village and he was found at 8 A.M. on the next day i.e. October 16. 1971 at the Kotwali Police Station, Fatehpur which was about forty five miles from his village. In order to reach that place he had to pass through at least three places where there were police stations. As the trial court has observed he must have gone there to have proper legal advice before gaving his version of the incident at a police station where he could find an officer who would oblige him by not arresting him. Ordinarily in a case of this nature a police officer would have contacted the concerned police station to ascertain facts and to seek instructions. Pussu, as mentioned earlier, was arrested on October 23, 1971 when he surrendered before court. The gist of the version in the F.I.R. (Exh. Ka. 10) given by Pussu at the Kotwali Police Station, Fatehpur is summarised by the trial court in its judgment and the relevant portion of that judgment reads thus :

> "When both these accused reached near "Bhagwa Talab" they found deceased Bankey Lal. Ghaseetey alias Chhatrapal and Bankey Lal's servant Nanhoon coming from north side of the village towards them armed with lathis. On account of fear both these accused left that

A passage but the aforesaid three persons rushed up at them and began to assault them with lathis. On hearing their cries his father accused Jia Lal who was having his licensed gun, Jagannath and Sheo Autar reached there and began to save them from the assault. The assailants namely Bankey Lal, Chhatrapal and Nanhoon threw B down his father Jia Lal on the ground and began to snatch his gun. In the meantime he ran away from there but when he was running away he heard a gun shot sound. He did not go to his police station due to fear and, therefore, reached Police Station Kotwali, Fatehpur. He had also stated about injuries over his head, hand and C back caused by lathi blows".

This version, apart from the other infirmities pointed out by the trial court, contradicts the version of Jagannath (D W. 1) that when he first 'sighted' Jialal the father of Pussu was already firing D shots. The story contained in Exh. Ka-10 appears to be one spun out after a lot of deliberation.

We have set out above in some detail the prosecution evidence and the defence version only to show how demonstrably the High Court was in error in rejecting the case of the prosecution. We E have already referred to the experiment carried out by High Court at the hearing of the appeal by asking Chhatrapal to run about and an advocate to load a gun in their presence. Having been impressed by the result of that experiment the High Court first rejected the evidence of Chhatrapal that he had tried to catch hold of Pussu. F The High Court then found that there was a material omission in the information given by Jang Bahadur Singh as "there was no mention about Gaya Prasad having inflicted four or five lathi blows on Pussu and it is only in the trial court that the eye witnesses have asserted that four or five lathi blows were inflicted on Pussu". Having regard to the several details about the incident given by G Jang Bahadur Singh who was in fact not an eye witness, the omission referred to above appears to be a trivial one not affecting credibility of the prosecution version. The third ground on which the High Court found the prosecution case as not being worthy of acceptance is again a strange one. The relevant part of the judg- H ment of the High Court reads thus:

"The eye-witnesses have asserted that after the gun had been snatched away, Pussu freed himself and

taking the pistol from appellant Sheo Rakhan fired a fatal shot at Bankey Lal from point blank range. It is highly improbable that after Pussu had been arrested and disarmed he could be allowed to free himself from the hands of young men like Lakhan Lal, Gaya Prasad and Ram Pal. The normal conduct of Pussu after he had freed and rearmed himself with pistol would have been to demand the return of his gun from Gaya Prasad on the point of his pistol rather than to pursue his injured victim Bankey Lal and to shoot him dead".

What is improbable about the prosecution version, we fail to see. If Pussu's object was to kill Bankey Lal, he would instead of demanding the return of the gun on the point of his pistol, run towards Bankey Lal and shoot at him, which in fact is what he is alleged to have done in this case. The High Court's opinion that the normal conduct of a person in the position of Pussu would have been what the High Court has stated in the course of its judgment is a mere surmise. At any rate on such an imaginary ground the evidence of the eye witnesses could not be rejected. Another reason given by the High Court is again a supposition resting on no solid ground and that relates to the condition of the gun (Exh. Ka-1). The High Court has observed :

"None of the eye-witnesses has stated that any blow of lathi plied by Gaya Prasad fell on the butt of the gun. Gaya Prasad has stated that he inflicted four or five lathi blows on Pussu. The gun was deposited in the Mal Khana at the Police Station and a piece of the wooden part of the butt of the gun was found broken. This was noted in the recovery memo (Exh. Ka-1). The gun was examined by us and we found a wooden piece of the butt having chipped off and the opening lever of the gun had become inoperative. This could only happen if lathi blow fell on the butt of the gun. None of the eye-witnesses has deposed that any blow from lathi plied by Gaya Prasad registered a hit on the gun. There is no explanation as to how the wooden butt of the gun (material Exh. 1) got broken and consequently the gun could not be opened."

In reaching the above conclusion, the High Court has overlooked the evidence of Gaya Prasad (P.W. 7) in his examination-in-

chief that when they were trying to snatch the gun Pussu gave one blow with the butt of the gun on his head and one blow on the head of Ram Gopal and the further statement in his cross-examination that on account of its being snatched with jerks, the wood fixed at the lower part of the gun was left in the hands of Pussu himself and that the gun could have been damaged by being used as mentioned above. The High Court was wrong in holding that the gun could have been damaged only if a lathi blow had fallen on it. The explanation given by the prosecution is quite satisfactory indeed. We are not also impressed by the other ground relied on by the High Court that "in cases of emergency is repeated firing a shooter does not normally start collecting empty cartridges automatically ejected from the gun before reloading the gun" and "the non-recovery of the fired cartridge either in the breach of the gun or from the spot is a suspicious circumstance" having regard to the overwhelming evidence in this case in support of the prosecution case.

The rule governing the appreciation of evidence in a criminal case is laid down by this Court in *State of Punjab* v. *Jagir Singh & Ors.*(1) in which this Court set aside the judgment of acquittal passed by the High Court which had reversed the conviction and sentence imposed by the trial court thus :

> "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is *ex facie* trustworthy on the grounds which are fanciful or in the nature of conjectures".

(1) [1974] 1 S.C.R. 328.

We have pointed out above the manifest errors committed by the High Court in the course of its judgment accquitting the accused Pussu. A

On a careful reading of the evidence in this case, we feel that Jia Lal had out of love and affection towards his son from the beginning tried to shield Pussu but has ultimately not been successful. From the evidence it is obvious that Pussu and Sheo Rakhan were armed with fire arms and they were the aggressors. The plea of self defence urged on behalf of Pussu cannot be accepted. A person who is an aggressor and who seeks an attack on himself by his own aggressive attack cannot rely upon the right of self-defence if in the course of the transaction he deliberately kills another whom he had attacked earlier. In the instant case having regard to the nature of the weapon used it has to be held that the act by which the death of Bankey Lal was caused by Pussu was done with the intention of causing death, and we do not find any extenuating circumstances which would mitigate the offence committed by Pussu. The trial court was, therefore, right in convicting Pussu of an offence punishable under section 302 I.P.C. The acquittal of Sheo Rakhan does not affect the prosecution case against Pussu. There is no legal bar for convicting Pussu alone in this case on the facts and in the circumstances of the case. The principle of issue estoppel is inapplicable here. B C D E

This is not a case in which it could be said that two views were reasonably possible. The only reasonable view to be taken is the one taken by the trial court. We are aware of the rule of practice that ordinarily this Court should not interfere with judgments of acquittal on a mere reappreciation of evidence. But if there are glaring infirmities in the judgment of the High Court resulting in a gross miscarriage of justice, it is the duty of this Court to interfere. In the instant case we find that the approach of the High Court is basically erroneous and its judgment is founded on false assumptions, conjuctures and surmises. On a consideration of the entire mass of evidence adduced in this case we are satisfied that the prosecution has established beyond reasonable doubt that Pussu had committed the murder of Bankey Lal. In cases of this nature it is advisable to bear in mind the following observations of Krishna Iyer, J. in *Shivaji Sahebrao & Anr.* v. *State of Maharashtra*[1] at pages 492-493 : F G H

(1) [1974] 1 S.C.R. 489.

"Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thro' the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr should not suffer is a false dilema. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. . . ." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic."

In the result, we set aside the judgment of the High Court in so far as Pussu is concerned and restore his conviction for the offence punishable under section 302 I.P.C. as ordered by the trial court. As regards sentence we feel that ends of justice would be met if we impose the punishment of imprisonment for life on him. We.

accordingly sentence Pussu to imprisonment for life. We also restore the conviction of Pussu for the offences punishable under sections 307 I.P.C., 323 I.P.C. and section 27 of the Arms Act and the sentences imposed on him on that account as ordered by the trial court. All the sentences shall run concurrently. A

The appeal is accordingly allowed. Pussu is on bail. He is directed to surrender in accordance with the terms of his bail and undergo the punishment imposed on him. B

P.B.R. *Appeal allowed.*