

(1999) 11 AHC CK 0170
In the Allahabad High Court
Case No : Criminal Appeal No. 477 of 1992

Heera Mani Tiwari and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-11-1999

Acts Referred:

Arms Act, 1959 — Section 25, 27

Penal Code, 1860 (IPC) — Section 100, 103, 147, 148, 149

Citation : (2000) CriLJ 4960

Hon'ble Judges : R.R.K. Trivedi, J; M.C. Jain, J

Bench : Division Bench

Advocate : Ram Shiramani Shukla, V.C. Tiwari and Prem Prakash, for the Appellant; Satya Narain Dhar Dubey, A.G.A., for the Respondent

Final Decision : Partly Allowed

Judgement

M.C. Jain, J.—This criminal appeal was filed by eight appellants : (1) Hira Mani Tiwari, (2) Sri Pal Singh, (3) Awadhesh Singh, (4) Tej Pratap Singh, (5) Yogendra Singh, (6) Surya Mani Tiwari, (7) Raja Ram Tiwari, and (8) Satya Narain Dhar Dubey against the judgment and order dated 24-2-1992 passed by Sri R. P. Singh, IInd Additional Sessions Judge, Mirzapur in Sessions Trial No. 349 of 1982 and 350 of 1982 which were tried together and had been consolidated, treating Sessions Trial No. 349 of 1982 as the leading case. They came to be decided by the impugned judgment. All the appellants named above were convicted under Sections 302/149 I.P.C. and Sections 307/149 I.P.C. The appellants-Hira Mani Tiwari, Surya Mani Tiwari, Sri Pal Singh, Raja Ram Tiwari and Awadhesh Singh were also convicted u/s 148, I.P.C. and remaining of the appellants u/s 147, I.P.C. the appellants-Surya Mani Tiwari was further convicted under Sections 25/27 of the Arms Act. The sentences passed against each of them were life imprisonment under Sections 302/149, I.P.C. and eight years rigorous imprisonment under Sections 307/149, I.P.C. Those convicted u/s 148, I.P.C. were further awarded rigorous imprisonment for two years and the others convicted u/s 147, I.P.C. were awarded rigorous imprisonment for one year.

Surya Mani Tiwari was awarded three years" rigorous imprisonment under Sections 25/27 Arms Act. All the sentences were directed to run concurrently. The trial was held for the present eight appellants and seven others. One of those seven others, namely, Kailash Nath Pandey died during pendency of the trial and the case abated against him. The remaining six were acquitted. One of the appellants-Hira Mani Tiwari died during the pendency of the appeal and as such the appeal has abated so far as he is concerned.

2. The profile of the prosecution case, shorn of unnecessary details, may be set forth : The informant was P.W. 1 Mahendra Singh. The report was lodged by him regarding this incident of 23-11-1981 at 10.50 a.m. at Police Station Pandari. All the accused were named therein. The incident took place on 23-11-1981 at about 8.15 a.m. in village Bharpura, Police Station Pandari, District Mirzapur. Partition of cultivatory plots between the informant P.W. 1 Mahendra Singh and his brother Virendra Singh had taken effect earlier to the incident in question. Accordingly, plot No. 301 was also said to have been partitioned. Virendra Singh gradually started selling the land that had fallen to his share and ultimately when three Biswas of land of plot No. 301/1 remained with him, he sold the same in favour of the accused-Hira Mani Tiwari, showing it as 5 Biswas. Since only three Biswas of the land was there at the spot in the share of Virendra Singh, Hira Mani Tiwari started making efforts to occupy the remaining two Biswas of land from the share of P.W. 1 Mahendra Singh in which he had grown mixed crop of gram, barley, Alsi and mustard. On the day preceding the date of occurrence, Hira Mani Tiwari threatened the informant that he would upturn the aforesaid crops. The informant P.W. 1 Mahendra Singh told him that he would not allow him to do so unless the matter was settled through Panchayat. On the day and the time of occurrence, the accused persons reached the spot armed with guns, revolver, spear, Gandasa and lathis. The appellants were allegedly armed as detailed below. It may also be stated for the sake of clarity that on verbal information given by one Sharda Singh at the Police Station, local police had reached the spot prior to the lodging of the First Information Report by P.W. 1 Mahendra Singh and the appellants excepting Satya Narain Dhar Dubey were apprehended at the spot itself. Recoveries from the appellants are also detailed below :

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Name	of	the	accused	Name	of	the	weapon recovered
-----							1. Hira
Mani Tiwari (now dead)			Revolver, DBBL gun, 4 cartridges of revolver and 5 cartridges of				gun
-----							2. Sri
Pal	Singh	A	DBBL	gun	and	5	cartridges
-----							3. Surya
Mani	Tiwari	SBBL	Gun	and	4		cartridges
-----							4. Raja
Ram			Tiwari				Gandasa
-----							5.

Awadhesh	Singh	Spear
Pratap	Singh	6. Tej Lathi
Yogendra	Singh	7 Singh

3. Accused-appellant-Satya Narain Dhar Dubey had tried to run away but he was also ultimately arrested after being given a beating near Bhairapar. Nothing was recovered from him. As per the prosecution case, the accused persons came to the spot from north by the side of Arhar field and told the informant P.W. 1 Mahendra Singh that they were going to upturn his crops. The latter informed them that the Panchas and reached over there and they should do whatever was settled through Panchayat. The accused-Hira Mani Tiwari retorted back that he would not recognize any Panchayat and he would occupy the land for which he had paid the money. Hira Mani Tiwari fired his gun and exhorted his associates to kill the people on the side of the prosecution. Hira Mani Tiwari (now dead), Sri Pal Singh, Surya Mani Tiwari and Kailash Nath Pandey (who died during trial) resorted to firing from their guns. Following persons sustained injuries on the side of the prosecution : (1) Bhagwat Singh, (2) Ram Ji Singh, (3) Hira Mani Singh, (4) Chhatra Dhari Singh, (5) Lakhan Bahadur Singh, (6) Prabhakar Singh, (7) Deo Saran Singh, (8) Bhikai Singh and (9) Gaya Singh.

4. One Kesari Singh on the side of the prosecution was also alleged to have been assaulted by accused-Bidesi by means of a lathi. It was alleged that the said injured persons had assembled on the spot for Panchayat. The investigation of the case was conducted by the S.O. of Police Station Pandari Ram Prasad Bharti, P.W. 18. Initially, the case had been registered under Sections 147/148/149/323/307, I.P.C. Hira Mani Singh, Bhagwat Singh and Ram Ji Singh died on the way while being taken to the District Hospital and the case was registered u/s 302, I.P.C. as well. Ultimately, accused persons were charge-sheeted on the conclusion of the investigation and separate charge-sheet under Sections 25/27 of the Arms Act was also submitted against Surya Mani Tiwari after obtaining sanction from the District Magistrate for his prosecution because he did not have the licence of the gun and cartridges recovered from him.

5. It was P.W. 4 Dr. K. A. Abbas who had conducted the post-mortem over the dead body of Bhagwat Singh on 24-11-1981 at 3.00 p.m. The following ante-mortem injuries were found on his person :

1. One circular firearm wound 1 cm. x 1 cm. x cavity deep upper the right nipple, margins of the wounds were inverted and blackening was present.
2. Lacerated wound 4 cm. x 2 cm. x muscle deep in the front of right upper arm.
3. Circular lacerated wound of entry 1.5 cm. x 1.5 cm. x cavity deep communicating with injury No. 1, margins inverted and lacerated.

6. Death had occurred due to shock and haemorrhage as a result of ante-mortem injuries.

7. P.W. 5 Dr. A. D. Singh had conducted post-mortem over the dead body of Hira Mani Singh on 24-11-1981 at 1.40 p.m. The following ante-mortem injuries were found on his person :

1. Firearm wound of entry 2 cm. x 2 cm. x abdominal cavity deep on the back of right chest. Margins were lacerated.
2. Firearm wound of entry 1.5 cm. x 1.5 cm. on the upper portion of right testicle.
3. Abrasion 3 cm. x 3 cm. on the front of the right knee joint.
4. Abrasion 3 cm. x 2 cm. on the left knee joint.
5. Abrasion 3.5 cm. x 0.5 cm. on the front side 2 cm. below injury No. 4.
6. Abrasion 3.5 cm. x 2.5 cm on the front of right leg.

7. Lacerated wound on the lower part of pinna with partial loss of lower tibula.

8. The death had occurred due to shock and haemorrhage as a result of the above ante-mortem injuries. A pellet was recovered from the side of abdomen.

9. It was P.W. 11 Dr. Udai Singh who had conducted the post-mortem over the dead body of Ram Ji Singh on 24-11-1981 at 3 p.m. the following ante-mortem injuries were found on his person :-

1. Firearm wound of entry 2 cm. x 2 cm. x muscle deep on the middle of the left arm. Margins were lacerated and inverted.
2. Firearm wound of exit 2 cm. x 2 cm. x muscle deep on the back of the left arm. Margins were lacerated and everted.
3. Firearm wound of entry 2 cm. x 2 cm. x chest cavity deep on the left side of chest 12 cm. x chest cavity deep on the left side of chest 12 cm. below the nipple. Margins were lacerated.
4. Firearm wound of entry 2 cm. x 2 cm. x abdominal cavity deep. Margins lacerated and inverted.
5. Firearm wound of entry 2 cm. x 2 cm. x chest cavity deep on the right side of chest.

10. The death had occurred due to shock and haemorrhage as a result of the said injuries.

11. It would be recalled that In addition to the aforesaid three deceased on the prosecution side, six others who received injuries were the following persons : (1) Chhatra Dhari Singh. (2) Lakhan Bahadur Singh, (3) Prabhakar Singh, (4) Deo Saran Singh, (5) Chhotey Lal Singh, (6) Bhikai Singh, (7) Gaya Singh and (8) Kesari Singh. All of them also sustained firearm injuries excepting Kesari

Singh who sustained blunt weapon injuries.

12. The appellant-Satya Narain Dhar Dubey pleaded alibi whereas the contention of the other appellants was of having caused injuries to the prosecution side in exercise of the right of private defence. Their tractor was also said to have been burnt by the persons on the prosecution side. The defence version as gathered from the cross-examination of the prosecution witnesses, in brief, was that the persons on the prosecution side were the assailants and accused only acted in self-defence. It would be worthwhile to state here that all the appellants excepting Satya Narain Dhar Dubey also sustained injuries. Surya Mani Tiwari sustained 9 injuries including a punctured wound and a lacerated wound. Awadhesh Singh sustained 12 injuries including lacerated wounds. Yogendra Singh sustained 11 injuries including punctured and lacerated wounds. Sri Pal Singh sustained 9 injuries including two punctured wounds. Tej Pratap Singh sustained ten injuries including a lacerated wound. Hira Mani Tiwari (since dead) sustained 11 injuries including punctured and lacerated wounds. Raja Ram Tiwari sustained fracture of left knee and on the right forearm and wrist. Sri Pal had suffered dislocation of knee joint and a fracture of the shaft of radius and shaft of ulna. Surya Mani Tiwari had also suffered fracture. Hira Mani Tiwari also suffered fracture.

13. The prosecution case rested on the testimony of eye-witnesses P.W. 1 Mahendra Singh, P.W. 2 Chhotey Lal, P.W. 3 Lakhan Bahadur and P.W. 16 Bhikai Singh whose dying declaration had also been recorded. But as he survived, it acquired the status of his previous statement. The defence also examined five witnesses. On sifting the evidence on record, the trial Court passed the impugned judgment and order.

14. We have heard Sri V. C. Tiwary, learned counsel for the appellants and Sri Prem Prakash representing the appellant-Satya Narain Dhar Dubey as also the learned A.G.A. on behalf of the State. We have also carefully gone through the evidence adduced on record. For the appellant-Satya Narain Dhar Dubey it has been argued that he was not actually present at the spot; that as per the prosecution case lathi injury to Kesari on the side of prosecution had been caused by Bideshi accused who has been acquitted by the trial Court; that nothing was recovered from him and that he had been falsely implicated. For others, the argument, in the main. As that actually the prosecution side was the aggressor and the appellants only acted in exercise of right of private defence. Therefore, they did not commit any offence within the ambit of law.

15. Certain telling facts emerge from the evidence on record which are of determinative character and are helpful in reaching the truth. So far as appellant-Satya Narain Dhar Dubey is concerned, he did not sustain any injury. No specific role has been assigned to him by the eye-witnesses in the testimony delivered before the Court. It is alleged that he was armed with a lathi. However, it has come in the testimony of the eyewitnesses that it was the accused-Videshi Seth (acquitted by the lower Court) who had struck lathi blow on Keshari Singh. Only

Keshari Singh received blunt weapon injury on the side of the prosecution. It is also to be observed that as per the own case of the prosecution this accused-appellant-Satya Narain Dhar Dubey had not been arrested at the spot along with other appellants. Rather he was allegedly arrested in Bhairapar and at that time nothing was recovered from him. To be short, there is no corroboration of the presence or the participation of the accused-appellant-Satya Narain Dhar Dubey in the actual incident. This being so, his conviction recorded by the lower Court is without any foundation and he has to be afforded the benefit of doubt.

16. Now we take up the case of the other appellants all of whom are themselves injured. It is significant to point out that as admitted by P.W. 1 Mahendra Singh, there had been a partition between him and his brother Virendra Singh in respect of plot No. 301. The half eastern portion numbered as plot No. 301/2 had fallen to his share and the other half western share had fallen to the share of his brother Virendra Singh which was numbered as plot No. 301/1. Virendra Singh had been selling his share in the said plot in installments to different persons and the sale deed of remaining piece of his plot No. 301/1 had been executed by him on 12-10-1981 in favour of deceased-appellant-Hira Mani Tiwari. P.W. 1 Mahendra Singh has stated that his brother Virendra Singh was addicted to wine and other intoxicants and used to roam about aimlessly. What seems to be likely is that the sale of the last piece of land by Virendra Singh to Hira Mani Tiwari was not to the liking of his brother P.W. 1 Mahendra Singh who might have been benefiting himself thereby because of the profligate character and wandering attitude of Virendra Singh. It was natural that after purchasing the land from Virendra Singh through sale deed dated 12-10-1981 Hira Mani Tiwari thought of possessing the same and to put it to his use. It cannot be accepted in the light of the evidence on record and attending circumstances that on the day of occurrence. Hira Mani Tiwari with other accused-appellants actually wanted to possess the eastern Plot No. 301/2 belonging to P.W. 1 Mahendra Singh over which he had sown certain crops. The testimony of P.W. 1 Mahendra Singh is not convincing that on the preceding day of the incident Hira Mani Tiwari had held out that he would upturn the crops of his plot and he had collected certain persons for participating in a Panchayat to settle the dispute. No sign of upturning his crops was found at plot No. 301/2. His own testimony is that when the accused-Hira Mani Tiwari had come with his other accused associates, he had parked his tractor under Mahua tree and thereafter they proceeded to his plot No. 301/2 and that it was for the purpose of stopping them from the nefarious and criminal activities that he had his associates had come forward. If his crops of plot No. 301/2 were to be upturned there could hardly be any point in leaving the tractor under Mahua tree, away of plot No. 301/2. Rather the tractor would have been used to upturn the crop standing on plot No. 301/2. Actually, the accused side did not reach plot No. 301/2 at all and the incident did not take place in that plot. It goes without saying that Hira Mani Tiwari had every right to proceed to that piece of plot No. 301/1 which he had purchased from P.W. 1 Mahendra Singh's brother Virendra Singh by sale deed dated 12-10-1981 and

P.W. 1 Mahendra Singh with his supporters had no right to prevent him from doing so. It appears that P.W. 1 Mahendra Singh twisted the genesis according to his convenience by saying that he had collected certain persons to hold a Panchayat at the spot. It has been admitted by him that all the persons on his side were of his Khandan. If a panchayat was to be held, there would have been a fair mixture of impartial persons who could take an unbiased decision. But that was not the case as per the own revelation of P.W. 1 Mahendra Singh as all the persons with him were of his Khandan. What appears to be the truth is that it was a predeclared show-down from both the sides. Each side assembled with his supporters. Each party wanted to have an upper edge over the other on the strength of muscle power. Hira Mani Tiwari with his supporters and associates wanted to possess the piece of land of plot No. 301/1 purchased by him from Virendra Singh on 12-10-1981. His such attempt was seemingly resisted by P.W. 1 Mahendra Singh with the help of his supporters on the pretext that he (Hira Mani Tiwari with his supporters) was trying to grab his plot No. 301/2. It was simply the fancy and imagination on the part of P.W. 1 Mahendra Singh, because, as we said, no sign of upturning the crops or of trespass by Hira Mani or his supporters over plot No. 301/2 owned by P.W. 1 Mahendra Singh was found. It is clear from the site plan that the place of incident was a little away from this plot No. 301/2 in the northern side at points shown by letters "A" and "B." Hira Mani Tiwari and his supporters could reach the piece of land of plot No. 301 / 1 purchased from Virendra Singh through the northern side. Before it could be done, the two parties clashed and the incident occurred.

17. Much stress has been laid by the learned counsel for the appellants on this aspect of the matter that all the appellant received injuries which have not been explained by the prosecution side. It has been argued that actually the prosecution side was the aggressor. It has also been pointed out that the tractor of Hira Mani Tiwari was burnt and it has been admitted by the Investigating Officer Ram Prasad Bharti, P.W. 18 that Hiramani's burnt tractor had been taken in possession by S.I. Ramanand and the same had been lodged at the Police Station which was ultimately returned to Hira Mani on his application. We wish to point out that in the site plan that place has not been shown where the tractor of Hiramani was found in burnt condition. It means that the tractor was not there in the immediate neighbourhood of the plot. There is no evidence as to at what point of time the tractor was burnt, whether before the actual incident or during the course of the incident and by whom. It is quite possible that the burning of the tractor of Hira Mani was the sequel of the incident in which three persons on the side of the prosecution had died and many others had received injuries. In other words, as the fall out of the incident in which three persons on the prosecution side lost their lives, the tractor of Hira Mani might have been burnt in retaliation and as an aftermath. But in any view of the matter, the burning of the tractor of Hira Mani cannot be taken to be the proof of the prosecution side to be the aggressor. True it is that the prosecution side has not explained the injuries of the accused-appellants, but that alone would not come to the rescue of the

defence under the facts and circumstances of the present case. The fact that the appellants also received injuries only indicates that the injuries were suffered by them in the same incident at the hands of the prosecution side. This is the duty of the Court to separate the chaff from grain and to reach the bottom of the truth on the judicial scrutiny of the evidence adduced at the trial. The Apex Court held in the case of State of U.P. Vs. Mukund Singh and Others, that the evidence of the prosecution witnesses cannot be rejected on the ground that they have not explained the injuries of the accused. When plea of right of self-defence is raised by the accused and where large number of persons are injured with three persons killed, the Court should always consider the individual acts of the accused in examining whether they have exceeded the right of private defence. In the case at hand also, the appellants have raised the plea of right of private defence.

18. What emerges from the scrutiny of the evidence on record is that the accused-appellants have proved the infliction of injuries on them by the complainant's side in the course of occurrence. The result is that the obligatory initial presumption against them is removed and their plea appears to be reasonably true that they were entitled to the right of self-defence. But this alone would not clinch the issue. Even on giving the benefit to the accused-appellants that they had the right of self-defence, we have to necessarily examine whether they exceeded the same. It is the fundamental principle of right of private defence that in no case it extends to the inflicting of more harm than is necessary to inflict for the purpose of defence. It has been argued by learned counsel for the appellants that some of the appellants had sustained punctured wounds too and as such, the accused-appellants could cause death of anyone on the side of the complainant. This argument does not carry conviction with us. It should be pointed out that there is nothing to presume or indicate the nature and damaging capacity of the weapons whereby the accused-appellants sustained injuries at the hands of the prosecution party. There is nothing to draw inference or presumption that a contingency had arisen for the accused-appellants to stretch their right of private defence to the causing of death of anyone on the side of the complainant. It is also not there that the accused side had been outnumbered by the complainant's side. Whether a person having right of private defence used more force than necessary would depend on the facts and circumstances of a particular case. So, the facts, evidence and circumstances of the present case would be relevant as to whether the accused-appellants could cause death of as many as three persons on the side of the complainant in exercise of right of private defence. We find that the accused did not adduce any evidence indicating the circumstances which necessitated the shooting dead three persons, namely, Bhagwat Singh, Ram Ji Singh and Hira Mani Singh on the side of the complainant by the accused-appellants-Hira Mani Tiwari (now dead), Sri Pal Singh and Surya Mani Tiwari. Of course, it has been gathered from the evidence adduced from the prosecution that the case falls under the general exception of the right of private defence. But it does not automatically follow that

such a right exercised by the accused-appellants could extend to the causing of death of three persons on the side of the complainant. Sections 100 and 103 of the Indian Penal Code provide that the right of private defence of body and property can extend to causing of death only under certain contingencies mentioned therein. The accused could lead the evidence to indicate the existence of any or more of such contingencies, which they have not done. We are well aware that it could be gathered from the prosecution evidence itself and other relevant circumstances emerging there from, but we find that the prosecution evidence and attending circumstances also do not indicate of any such contingency which could have extended the right of private defence on the part of the accused to the causing of death of three persons on the side of the complainant. We are of the firm view that it is not possible to draw any such inference that the accused-appellants could cause the death of Bhagwat Singh, Ramji Singh and Hira Mani Singh in exercise of right of private defence.

19. It would be recalled that none of the appellants received any injury of firearm meaning thereby that no firearm had been used by the prosecution side. It were the accused-appellants-Hira Mani Tiwari (now dead), Sri Pal Singh and Surya Mani Tiwari who resorted to firing killing Bhagwat Singh, Ramji Singh and Hira Mani Singh on the prosecution side. They also injured seven others by firing on the side of the prosecution. Since right of private defence had accrued to the accused appellants, they could inflict any injury on the persons on the prosecution side short of causing death. To say simply, causing injuries on the prosecution side by the accused-appellants other than causing of death is excusable and covered under the exercise of right of private defence, but causing of death of three persons on prosecution side, namely, Bhagwat Singh, Ram Ji Singh and Hira Mani Singh by the three accused-appellants-Hira Mani Tiwari (now dead), Sri Pal Singh and Surya Mani Tiwari cannot be covered under the exercise of right of private defence having regard to the facts, evidence and circumstances of the present case. It is doubtless that these three accused-appellants exceeded the right of private defence by causing the death of three persons Bhagwat Singh, Ram Ji Singh and Hira Mani Singh on the side of the complainant. Of course, they would be individually liable for their such act of cutting short the lives of three persons on the side of the prosecution by exceeding the right of private defence and the other accused-appellants cannot be held to be vicariously liable for the same. Since one of them, namely, Hira Mani Tiwari has died during pendency of appeal, the appeal abates so far as he is concerned. But the case of the other two accused-appellants-Sri Pal Singh and Surya Mani Tiwari who opened fire using firearms and were arrested also at the spot immediately after the incident along with firearms and cartridges, fall under Exception 2 of Section 300 I.P.C. They committed culpable homicide not amounting to murder covered by Part I of Section 304 I.P.C. it is a fit case where each of them should be awarded ten years" rigorous imprisonment under Part I of Section 304 I.P.C.

20. Further, the conviction of Surya Mani Tiwari under Sections 25/27 of the

Indian Arms Act is perfectly justified and three years rigorous imprisonment awarded for the said offence does not call for any interference in appeal.

21. So far as the remaining appellants, namely, Awadhesh Singh, Tej Pratap Singh, Yogendra Singh, and Raja Ram Tiwari are concerned, they are entitled to be acquitted, their case being covered by the general exception of right of private defence.

22. So far as the appellant-Satya Narain Dhar Dubey is concerned, he is entitled to be acquitted as his participation in the incident has been held to be doubtful in the discussion made hereinabove.

23. In view of the above discussion and in ultimate analysis, we partly allow the appeal. We set aside the conviction and sentences passed against the appellants-Awadhesh Singh, Tej Pratap Singh, Yogendra Singh, Raja Ram Tiwari and Satya Narain Dhar Dubey by the learned trial Court. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

24. The appeal has abated so far as appellant-Hira Mani Tiwari is concerned who has died during the pendency of appeal.

25. The appellants-Sri Pal Singh and Surya Mani Tiwari are convicted u/s 304 Part I, I.P.C. and each of them is sentenced to undergo ten years" rigorous imprisonment. The appellant-Surya Mani Tiwari further stands convicted under Sections 25/27 of the Arms Act and also sentenced to three years" rigorous imprisonment which shall run concurrently with his ten years" rigorous imprisonment awarded under Part I of Section 304, I.P.C. These appellants are on bail. They will surrender forthwith to serve out the sentences passed against them.