

Dharampal and Others Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-12-2012

Judge : Surendra Kumar & Vinod Prasad

Appeal No. : Criminal Appeal No. 2213 of 1983

Appellant : Dharampal and Others

Respondent : State of U.P.

Judgement :

Vinod Prasad J.

Challenge in this appeal by the ten appellants namely Dharampal (A-1), Dhiraj (A-2), Subey Ram (A-3), Mahipal (A-4), Gopi (A-5), Kanahiya (A-6), Jasmal (A-7), Bijaipal (A-8), Jai Singh (A-9), and Daya Chand (A-10) are to the judgement and order of their conviction and sentence dated 19.9.83 rendered by Vth Additional Sessions Judge, Bulandshahar, in S.T.No. 264 of 1982, State versus Dharampal and others, relating to police station Dankaur, district Bulandshahar. Learned trial Judge has convicted appellants Dhiraj (A-2), Sube Ram (A-3), Mahipal (A-4) and Kanhaiya (A-6), u/s 302 /149 I.P.C. and has sentenced them to life imprisonment. Rest of the appellants Dharampal (A-1), Gopi (A-5), Jasmal (A-7), Bijaipal (A-8), Jai Singh (A-9), and Daya Chand (A-10) were convicted u/s 307/149 I.P.C. and were sentenced to 7 years R.I.

Eschewing unnecessary details and recapitulated briefly, prosecution allegations against the appellants as was penned down by the informant Raghuraj Singh, PW2 in his written FIR, Ext Ka-2, and later on deposed during the trial by the four fact witnesses, informant Raghuraj Singh, PW 2, injured Rajendra, PW 3, Jile Singh, PW4 and Harbal PW5, were that one Hari Singh, resident of village Silarpur, P.S. Dankaur district Bulandshahar, had four sons Kinkar Singh, Budha Singh (deceased), Rame and Ram Singh. Smt. Hoshiyari was the wife of Kinkar Singh, whereas Ram Dei was the wife of Budha Singh. After demise of Kinkar Singh, his widow Smt. Hoshiyari remarried with Budha Singh. From Hoshiyari Devi, Budha Singh had four sons Raghuraj Singh (Informant /PW2), Girraj Singh, Sardar and Kamali. They had two daughters also. From Smt. Ramdei, Budha Singh had five issues and they are Rajendra (Injured/ PW3), Jaipal, Chaman, and two sisters. Informant resided separately from his father Budha Singh at a distance of 80-90 paces away and his house was adjacent to the house of appellant Gopi. Appellants Gopi (A-5), Bijaipal (A-8), Jasmal (A-7), Kanhaiya (A-6), and non-accused Jasmal were real sibling brothers being sons of Ratan Singh. Mahipal (A-4) and Dharampal (A-1) appellants are the sons of appellant Gopi. Appellants Jai Singh (A-9) and Daya Chand (A-10) were real sibling brothers being sons of Prem Singh. Ratan Singh and Prem Singh were cousins. Appellant Dhiraj (A-2) is the son of Nathu, whereas Sube Ram (A-3) is the son of Ambar Singh. Nathu Singh and Ambar Singh are the cousin brothers of Gopi Singh.

On the incident date 6.10.81 at 9 p.m., informant, PW2, his brother Chaman and Girraj, his sister Vimla, and children of informant's house and one Brahmpal, started on foot from their village to down town Dankaur to enjoy Ram Lila, a short play/skit, and had reached there at 10 p.m. The said play was organised near Dronacharya temple. Front rows had 250-300 chairs and back rows were of 10-15 benches and 400-500 people had collected to watch the play which had started at 11 p.m. After two or two and half hours accused Dhiraj (A-2), Mahipal (A-4) and Sube Ram (A-3) arrived to watch the play. Some of the ladies, who were watching the play sitting beside Vimla left the play and on that vacant place accused Dhiraj (A-2) and Mahipal (A-4) tried to sit, which was objected to by the informant but those accused did not pay any heed and a scuffle ensued there in which informant slapped both the accused. Thereafter prosecution side returned back to their

houses. After some time on 7.10.1982 at about 2 a.m. some commotion emanated from the abode (Baithak) of the informant where informant's brother Rajendra (PW3), father Budha Singh (deceased) were sleeping. A lantern was also alighted there. Hearing the commotion informant, Jile Singh, Harbal, Raghubar, Harcharan, and Phirey reached at the Baithak, and witnessed that the deceased and injured Rajendra, PW3 were being assaulted by the accused appellants. (A-2, 3 and 4) wielded spear(ballam), (A-1 and 7) had boori (a sharp edged cutting weapon) and (A-5) had a Jeli (A sharp edged weapon) and rest of the accused (A-6, 8, 9 and 10) had clubs (lathis). When Harbal (injured) and Raghubar (injured) tried to rescue their father and brother they were also belaboured by spear and boori. After the assault all the accused retreated from the spot towards west. In the light of lantern and torch, all the witnesses had identified the accused. Underlying motive for launching the assault was the faux pas which had occurred in the play. Because of night terrified witnesses could not muster courage to proceed for Dankaur and only next day at 8 a.m. they started for it and reached Dankaur hospital. Doctor O.P.Verma, PW7, had examined all the injured from 9 a.m to 10.15 a.m. and had prepared their medical examination reports vide Exts Ka-5 to Ka-9, which are reproduced herein below:-

Ext. Ka-5

SUPPLEMENTARY REPORT

"X-ray report of Sri Kanhaiya S/o Sri Ratan Singh R/o Village Salarpur, P.S. Dankaur of Dr. Gupta's X-ray and Pathological Clinic, Ansari Road Bulandshahr, No. 85 dated 14.x.81 shows as follows (No X-ray plates produced)

(1) The skiagram of left shoulder scapula reveals fracture of ACROMION of left scapula. No callous seen.

(2) skiagram of left wrist reveals no fracture.

Hence injury no.1 which was kept U.O. is greivous while injury no.2 which was also kept U.O. is simple."

Ext. Ka-6

"At P.H.C., P.S. Dankaur, Distt. Bulandshahr on 7.10.81 at 9.00 hrs examined Sri Rajendra S/o Buddha Singh aged about 35 years R/o village Salarpur, P.S. Dankaur, Distt. Bulandshahr B/B Sri Chaman son of Sri Buddha Singh brother of injured.

M.I.- Black mole on left side of neck 3.5 cm above inner end of left collarbone.

Injury:- Punctured wound 1.1 cm x 0.5 cm x not probed on left side of chest 8 cm below left nipple. Inj. Kept U.O.

Injury caused by some pointed object. Kept U.O. Ref. to District Hospital Bulandshahr for further treatment. Duration about half day."

Ext. Ka-7

"At P.H.C. Dankaur, District Bulandshahr on 7.10.81 at 9.15 hrs. examined Sri Buddha Singh, S/o Sri Hari Singh, aged about 60 years R/o Village Salarpur, P.S. Dankaur, Distt. Bulandshahr B/B Sri Chaman son of Sri Buddha Singh.

M.I.- Black mole on front of left forearm 4 cm below left elbow.

Inj. Punctured wound 1 cm x 0.5 cm x not probed over abdomen left side 7 cm above and outer to umbilicus. Kept U.O. Referred to District Hospital Bulandshahr. General condition of injured poor. Semi conscious.

Inj. Caused by some pointed object kept U.O. Referred to District Hospital Bulandshahr for further treatment. Duration about half day."

Ext.Ka-8

"At P.H.C. Dankaur, District Bulandshahr on 7.10.81 at 9.25 hrs examined Sri Raghubar S/o Risal Singh aged about 45 years R/o Village Salarpur, P.S. Dankaur Distt. Bulandshahr B/B Chaman son of Sri Buddha Singh r/o Salarpur.

M.I.- Black mole over left side of chest 6 cm below inner end of left collarbone.

Inj. (1) Punctured wound 1 cm x 0.1 cm x not probed over abdomen 5.1 cm above and to left side of umbilicus. Kept U.O. Referred to District Hospital Bulandshahr

(2) Abrasion 3.5 cm x 0.5 cm over head right side just above hair line.

(3) Lacerated wound 1 cm x 0.5 cm x bone deep over back of left thumb lower phalanx. Kept U.O. Adv. X-ray.

Inj. No.1 caused by some pointed object. No.2 by friction against hard object. No.3 by hard and blunt object. No.2 simple while No. 1 and 3 kept under observation. Referred to District Hospital, Bulandshahar. Duration about half day."Ext.Ka-9

At P.H.C. Dankaur, District Bulandshahar on 7.10.81 at 10.15 hrs examined Sri Harbansh S/o Risal aged about 55 years R/o Salarpur, P.S. Dankaur Distt. Bulandshahr B/B Chaman son of Sri Buddha Singh r/o Salarpur.

M.I.:- Old healed scar 4 cm x 0.5 cm on lower part of right knee.

"1. Punctured wound 1cm x 0.1cm x muscle deep over back left side 8 cm above and inner to iliac crest. Kept under observation.

2. Punctured wound 0.5 cm x 0.1cm x not probed over right side of abdomen 2 cm inner and outer end of iliac crest. Kept U.O.

3. Punctured wound 1.5cm x 0.5cm x bone over right leg front side middle part. Kept U.O.

4. Abrasion 3.5cm x 1.5cm over back of right elbow lower part.

Injury Nos. 1, 2 and 3 caused by some pointed object while injury no. 4 by friction against hard object. No. 4 simple while other kept U.O. Duration about half day."

According to the doctor, PW7, injured could have sustained above injuries at or about the date and time of the incident. All the punctured wounds were possible by Ballam, and they could be dangerous to life and rest of the injuries could have been caused by hard blunt objects. Seeing their precarious condition, doctor, PW7, had advised the informant to take all the injured to Bulandshahr and therefore informant arranged a car and leaving injured Herbal Singh at Dankaur, carried rest of the three injured Budha Singh (deceased), Rajendra (injured) and Raghubar Singh (injured) firstly to Mohan Nagar, where also doctors advised him

to carry them to Delhi and hence all the injured were brought to Urban Hospital known as LNJP hospital on 7.10.81, where all the three of them Budha Singh (deceased), Rajendra (injured/ PW3) and Raghubar (injured) were admitted and their injuries were examined at 3 p.m. by doctor Mukesh Chelani, PW11 and doctor Mahesh Kumar Grover, PW12, and their medical examination reports were prepared vide Exts.Ka-19 to Ka- 21,which are reproduced below:-

Ext. Ka-19

Assistant casualty Medical Officer L.N.J.P., Hospital has examined Budha Singh on 7.10.81 at 3 P.M. and had detected following injuries:-

"Stab wound 1/2cm long of left side abdomen below sub postal margin in the mid clavicular line.

Said injury was caused by some sharp pointed weapon viz ballam and was one day old. This injury could have been sustained by the injured on 7.10.1981 at 2 A.M."Ext.Ka-20

Rajendra Singh injured was examined at 3 P.M. on 7.10.81 with following injuries:-

"Stab wound cm long on the chest, which was caused by pointed weapon viz ballam and was one day old. This injury could have been sustained by the injured at 2 A.M."Ext.Ka-21

On 7.10.81 in Casualty Ward L.N.J.P. Hospital, Raghubar was examined at 3 P.M. with the following injuries:-

"Clean lacerated wound on interior abdominal wall, which was muscle deep. Patient was conscious and his blood pressure was 110/70 mm of H.G. His pulse was 15 per minutes. Titenus injection was given to the patient and he was admitted in surgery ward for further management of his injuries.

Aforesaid injury was caused by sharp edged weapon like spear, knife, sword etc."

In the ward Injured Rajendra, PW3 and Raghubar were also examined by Dr. A.K.Sood, PW 6 same day who had got prepared their case sheets through Dr.

Raghu which are Ext. Ka-4 and Ext. Ka-5. Doctor, PW6 had found following injuries on their body:-

Injuries of Raghubar

"Stab wound in the epigastric region of the abdomen 2cm x 1cm. This wound was entering into the abdomen cavity. The patient was operated upon, on the night 7/8.10.81, 1cm wide hole in the anterior wall of the stomach. It was stitched upon. Rest of the abdomen were normal."Injuries of Rajendra

"Half inch long penetrating wound, muscle deep present in left lower part of the chest."

According to PW6, injuries of Raghubar were dangerous whereas Rajendra injured/PW3, had sustained simple injuries and injuries to both of them were caused by sharp edged weapons.

On the intervening night between 7/8.10.81, at 11 p.m., Budha Singh lost his life in the hospital, which information was received to S.I. Magalu Singh Tyagi, PW13, at 9 a.m. through casualty duty constable Darshan Lal vide Rapat No.4. S.I. Mangalu Singh Tyagi, PW13, thereafter proceeded to M.M.College mortuary and received the cadaver and death summary of the deceased. He performed inquest on the deceased corpse and penned down inquest memo Ext. ka-22. Report to the doctor for conducting post mortem examination on the dead body, prepared by PW13 is Ext. Ka-23. The dead body was handed over to constable, CP578, Harish Chandra, PW10, to be carried to the mortuary. After autopsy was concluded this witness PW10 had handed over the dead body to the relatives of the deceased.

Dr. Bishnu Kumar, PW1, had performed autopsy on the cadaver of the deceased on 9.10.81 at 11 a.m. and had prepared post mortem examination report Ext.ka-1. According to this witness deceased had expired 36 hours before and his peritoneal cavity contained blood mixed fluid. Peritoneum was lustreless and hyperaemic. Loops of intestine were also hyperaemic and angry looking, which was indicative of early setting in of Peritonitis. On the stomach near lesser curvature 2cm long stitched wound was present. There were other operative incisions on the body.

Doctor had found only a single ante mortem injury on the cadaver of the deceased which is noted below:-

"1. Incised punctured wound 2.5cm x 1cm, after removing one stitch in it, margins not so regular or clean cut and angles also not very clear cut rotten round somewhat 3.5cm to the left of midline on the front of abdomen 6.5cm below the level of Xiphisteonum transverse. Abrasion present in an area of 1 x 1 cm around its inner angle.

Operative incision injuries were:-

2. Stitched incised wound left upper paramedia 14cm surgical, vertical with tissues with under neath tissues stitched in and area line upto abdominal cavity with margin.

3. Stitched incised wound 1.5 x 1cm in right iliac fossa 5cm from mid line at the level of anterior superior, iliac spine and drianase tube coming out of it (surgical).

4. Stitched incised wound 1.5cm x 1cm on the right side abdomen at the level of umblicus.

5. Stitched incised wound 2 x0.7 cm on the left side abdomen at the level of umblicus 9.5cm mid line drainage tube coming out of it. (surgical).

According to the doctor deceased had died because of haemorrhage and shock because of injury no.1 noted in Ext. Ka-1, which was caused by some semi sharp edged penetrating object, which could even be by spear(ballam). Injury No. 1 sustained by the deceased was sufficient in ordinary course of nature to cause death. This injury could have been sustained by the deceased at or about the date and time of the incident.

Revisiting role of the informant, PW2, he left Jile Singh and Girraj in LNJP hospital Delhi and himself came to Ghaziabad, where his brother Jaipal was employed and reached there at 6-7 p.m. He met his brother at 9 p.m. They endeavoured to arrange for money but due to ensuing night informant stayed over with his brother. Next day morning at 9 a.m. he proceeded for Dankaur and reached there at 11 or

11 a.m. and went to dairy where he met Brahmapal and Hari Singh. Informant thereafter told Hari Singh regarding lodging of FIR and thereafter dictated FIR Ext. Ka-2, to Brahmapal and after the same was scribed, informant PW2 carried it to P.S. Dankaur where he lodged it. Head Moharrir Trilok Chand registered the crime vide Rapat No. 18 on 8.10.81 at 12.05 p.m. and prepared chik FIR, Ext. Ka-11, and GD entry, Ext. Ka-12.

Investigation into the crime was commenced by S.I. Rajpal Singh, PW9, in whose presence the crime was registered. PW9 firstly copied chik FIR and GD entry and then recorded the statements of the head Moharrir and informant PW2 and thereafter came to the incident spot in village Salarpur , where he conducted spot inspection and sketched site plan map Ext. Ka-13. I.O. inspected and seized lantern and torches of Phirey Ram and Harcharan and prepared it's recovery memos Ext. Ka-14, Ka-15 and Ka-16 and then handed it over to the informant and Phirey Ram and Harcharan. Blood stained apparels of Harbans Singh was also seized by the I.O. and it's recovery memo Ext. Ka- 17 was sketched. Subsequent thereto PW9 penned down statements of Harbal Singh, Phirey Singh and Harcharan, searched for the accused but could not find them. On 10.10.81 , PW9 went to Delhi hospital where he recorded statement of Jile Singh and copied post mortem examination report and other papers regarding treatment and death of the deceased. Thereafter medical reports of injured were copied by him in the case diary. Next Day on 11.10.81 injured Rajendra Singh, PW3 and Girraj Singh were interrogated by the I.O. and their statements were noted. Subsequently, on 27.10.81, statements of witnesses Brahmapal and Bachan Singh were recorded and torch of Jiley Singh was seized and recovery memo Ext. Ka- 3 was prepared. On 28.10.81, statements of witnesses Raghubar, Brahmapal and Chaman Singh were recorded by P.W.9. Further investigation into the crime was carried on by S.O. Jitendra Singh Tyagi, PW 8, who concluding it had charge sheeted all the accused on 26.11.81 vide Ext. Ka- 10.

Criminal Case No. 2159 of 1981, State versus Dhrampal and others, u/s 147,148,149,307,324,323,452,302 I.P.C. was registered against the accused on the basis of submitted charge sheet, Ext. Ka-10 in the committal court of C.J.M., Bulandshahar. Finding disclosed offences trial by Sessions Court, C.J.M. has

committed the case to the Sessions Court for trial, on 5.5.82, where it was registered as S.T.No. 264 of 82, State versus Dharampal and others.

5th Additional Sessions Judge, charged accused Kanahiya(A-6), Bijaipal (A-8),Jai Singh (A-9), and Dayachand (A-10) with offences u/s 147,452,307/149,302/149 I.P.C, on 23.2.83. Same day rest of the accused Dharampal (A-1), Dhiraj(A-2), SubeyRam(A-3), Mahipal (A-4), Gopi (A-5), Jasmal (A-7) were charged with offences u/s 148,452,307/149 and 302/149.I.P.C. All the charges were read out and explained to the accused who all abjured them and hence to establish their guilt and bring them to books, Sessions Trial procedure was adopted by the learned trial judge to prosecute them and accused prosecution commenced.

In the trial prosecution examined thirteen of it's witnesses, which included informant Raghuraj Singh, PW2, Injured Rajendra Singh, PW3, Eye witness Jiley Singh, PW4, and injured Harbal Singh PW5 as fact witnesses. Residue of formal witnesses were post mortem doctor Vishnu Kumar, PW1, Dr. A.K. Sood, PW6, Dr. O.P. Verma, PW7, second I.O. S.O. J.N. Tyagi, PW8, first I.O. S.I. Rajpal Singh, PW9, Constable Harishchandra, PW10, Dr. Mukesh Chelani, PW11, Dr. M.K.Grover, PW12, and inquest S.I. M.S. Tyagi, PW13.

In accused examination by the court under Section 313 Cr.P.C. appellants (A-1), (A-3), (A-10), (A-7), (A-5), (A-8), (A-9) denied their presence and involvement in the crime and took a common defence that because of enmity they have been falsely implicated. Rest of the appellants (A-2), (A-6), (A-4) admitted their presence at the spot. Appellant (A-2) stated that he was sitting at the house of Gopi when Raghubar and Harpal assaulted him and therefore, in exercise of right of private defence he had also assaulted them. (A-6) stated that the boys of his family had teased the girl of Buddha's Singh family and therefore, Harpal, Raghubar, Buddha Singh and Rajendra came to the spot where he Kanhiya (A-6), Dheeraj (A-2), Subey Ram (A-3) and Mahipal A-4) were sitting and they started assaulting them and as a result, they also saved themselves by assaulting prosecution side. (A-4) further stated that on 6.10.1981 at 10 p.m. he, his uncle Kanahiya, Dheeraj, Subey Ram were sitting when Buddha Singh, Rajendra, Raghubarr and Harpal armed with lathi and ballam approached them and

accosted them that boy of their locality had teased the girl. When Mahipal Singh forbade them, aforesaid persons started assaulting them and therefore, in exercise of right of private defence, they have also made a defence assault with lathi and danda. Mahipal Singh and others have also got themselves medically examined. To prove their defence, appellants had examined Dr. B.K. Gupta, D.W.1, who had stated that on 14.10.1981, he had X-rayed appellant Kanahiya (A-6) of his left shoulder and left wrist in which fracture of acromion bone was detected. He had proved the X-ray plate as material Exhibits 1 and 2. X-ray report was prepared by D.W.1, which is Exhibit Kha-6.

Besides this, through Dr. O.P. Verma, P.W.7, accused have got the injuries of appellants Kanahiya, Mahipal, Dheeraj and Subhash through their medical examination reports Exhibits Kha-1, Kha-2, Kha-3 and Kha-4 proved. Supplementary report in respect of appellant Kanahiya after his X-ray is Exhibit Kha-5. These defence exhibits are reproduced below:-

"Kha-1

At P.H.C. Dankaur, District Bulandshahar on 7.10.81 at 11.30 hrs. examined Sri Kanhaiya S/o Sri Ratan Singh aged about 45 years R/o village Salarpur, P.S. Dankaur Distt. Bulandshahr B/B Gopi son of Ratan Singh brother of injured.

M.I.: Tiny black mole over outer aspect of left arm 11 cm below left shoulder tip.

Injury:-

1. Contusion 4.5cm x 3.5cm over left scapula region. Kept U.O. Advised X-ray.
2. Contusion 4.5cm x 2.5cm over back of middle part of left forearm.
3. Contusion 3.5cm x 2cm over back of left wrist. Kept U.O. Advised X-ray.
4. Abraded contusion 1cm x 0.5cm over back of root of left middle finger.

Injured complain of pain all over body but no external visible injury except injury written above.

All injury caused by some hard and blunt object. Nos. 1 and 3 kept U.O. and Advised X-ray while other simple. Duration about half day."

"Kha-2

At P.H.C. Dankaur, District Bulandshahar on 7.10.81 at 11.45 hrs. examined Sri Mahipal S/o Sri Gopi aged about 25 years R/o village Salarpur, P.S. Dankaur Distt. Bulandshahr B/B Sri Gopi father of injured.

M.I.: Tiny black mole over right aspect of neck 4 cm above middle of right collarbone.

Injury:-

1. Contusion 4cm x 2.5 cm over back of left hand. Kept U.O. Advised X-ray.
2. Contusion 5.5cm x 2.5cm over back left side just below left shoulder.

Caused by hard and blunt object. No. 1 Kept U.O. Advised X-ray. No. 2 is simple. Duration about half day."Kha-3

At P.H.C. Dankaur, District Bulandshahar on 7.10.81 at 11.55 hrs. examined Dheeraj Singh son of Sri Nathu Ram aged about 20 years R/o village Salarpur, P.S. Dankaur Distt. Bulandshahr B/B Gopi son of Ratan Singh Village Salarpur.

M.I.: Black mole over left side of neck 2.5 cm below and outer to Adams Apple.

Injury:-

1. Abraded contusion 4.5cm x 2.5cm over back of left shoulder.

Injured complaining of pain at left at collar bone but no external visible injury.

Injury caused by hard and blunt object. Simple. Duration about half day."Kha-4

1. Contusion 2.5cm x 2cm overhead left side 2.5cm above shoulder
2. Abrasion 2cm x 0.5cm over bridge of nose middle.

3. Contusion 2.5cm x 1.5cm over right scapular area upper part.

No. 2 by friction against same hard object other by hard and blunt object. Simple.
Duration about half day."Kha-5

SUPPLEMENTARY REPORT

1. The skiagrome of left shoulder and scapula reveals fractures of acromious of left scapula. No callous seen.

2. Skiagrome of left wrist reveals no fracture.

Hence injury no. 1 which was kept U.O. is grievous while injury no. 3 which was also kept U.O. is simple."

As has already been recorded herein above, learned trial Judge found the prosecution story credible and convincing and therefore has convicted and sentenced the appellants as is mentioned in the opening paragraph of this judgment and consequently in the present appeal, the said conviction and sentence has been challenged by all the convicted accused.

Pending consideration and final outcome of the appeal, three of the appellants Mahipal (A-4), Gopi (A-5) and Kanhiya (A-6) expired and therefore, in their respects their appeals have been abated vide order dated 12.7.2012. This has left this Court to consider the appeal of rest of the seven appellants (A-1), (A-2), (A-3), (A-7), (A-8), (A-9) and A-(10).

In the aforesaid facts and circumstances, we have heard Sri G.S. Chaturvedi, learned senior counsel assisted by Sri Mangla Prasad Rai and Sri Samit Gopal for the appellants and Sri P.N. Mishra, learned senior counsel for the informant assisted by Sri Rahul Mishra advocate and Smt. Raj Laxmi Sinha, learned AGA for the State and have perused the entire trial court record including evidences and exhibits and the impugned judgment and order.

Assailing the impugned judgment and castigating the prosecution story, learned senior counsel submitted that the place of the incident is not fixed and in fact it was the prosecution side, which were the aggressors and they had come to the

house of the accused and for the motive that the girl of their family was teased that they had started assaulting the accused Kanhaiya, Mahipal, Dheeraj and Subhash and in exercise of right of private defence, these accused had caused injuries to the prosecution side. It was further submitted that none of the prosecution witnesses including the informant have explained the injuries sustained by these accused, which were proved by Dr. O.P. Verma, P.W. 7 through Exts. Kha-1 to Kha-5 and, therefore, the prosecution witnesses are not wholly reliable and they have suppressed the genesis of the incident and have deposed a feigned story. One of the appellant Kanhaiya (A-6) even had sustained grievous injury as his left shoulder bone was found fractured by Dr. V.K. Gupta (D.W. 1). It was further submitted that although the number of assailants were ten but the three injured from the side of the prosecution had sustained only nine injuries in all, which unerringly indicate that all the accused had not participated in the incident, and therefore, also the prosecution allegation regarding assault being made by all the ten accused is a false story. It was further submitted that the deceased Buddha Singh had sustained a single incised wound with no other injury by any other weapon and consequently, prosecution allegation of assault being made on him by all the accused persons by spear, boori and lathi is also an afterthought story, which is contradicted by medical evidence. Supplementing the argument, it was contended that the ocular testimony is at variance vis-a-vis the medical report and lesser number of injuries unerringly indicate that all the accused did not participate in the crime and some of them have been definitely falsely implicated. Since the prosecution story is so inextrecably mixed up and woven in such a manner as separating the grain from the chaff is not possible, therefore, all the appellants are entitled to the benefit of doubt and they deserve acquittal. Since the deceased had sustained a single fatal injury, no common object to commit murder pervaded the unlawful assembly, if at all it was in existence argued appellants' counsel. It was next submitted that the motive to falsely implicate the appellants was much more with the prosecution side because the girl of their family was teased and, therefore, this must have been taken to be a temerity by them and resultantly, it had all the reasons to implicate the appellants in a concocted version. It was further submitted that all the fact witnesses were suggested that the accused had caused injuries in exercise of right of private defence and, therefore, the defence

story is quite probable when tested on the anvil of preponderance of probability and, therefore, all the appellants deserves to be acquitted. Primarily on these submissions, it was contended that the appeal be allowed and the surviving appellants be acquitted.

Arguing to the contrary, learned AGA as well as learned senior counsel for the informant submitted that since in the skit / short play (Ram Lila), the informant had beaten to members of the accused family and, therefore, they were affronted because of the said assault and the faux pass brought to their entire family and it was because of this reason that they had raided the house of the informant at 2 A.M. in the night and had caused injuries to the prosecution side. It was, therefore, argued that the motive to launch an assault was with the accused and they were the aggressors and consequently, they cannot claim exercise of right of private defence, which is not available to that side, who launches an assault as aggressors. It was further submitted that the number of injuries being less than the number of accused in the facts and circumstances of the case will be of no help to the accused because nobody will remain static and stand still to sustain injuries from the assault launched by the assailants. Some of them must have endeavoured to save themselves from such an assault and, therefore, the lesser number of injuries were sustained by the prosecution side. It was further submitted that the nature and dimensions of the injuries sustained by the prosecution side is much more serious than the appellants side and hence the nature and number of injuries is indicative of the fact that it was the appellants, who were the aggressors. Injuries sustained by the accused side were insignificant and minor in nature and, therefore, did not require any explanation from the prosecution side argued both the respondents counsels. It was further submitted that all the prosecution witnesses have given a consistent, truthful and creditworthy evidence corroborated by the medical evidences and other circumstances and resultantly, there is no reason to disbelieve the prosecution story, which is truthful and confidence inspiring. Guilt of the appellants has been anointed with sufficient clarity without any ambiguity and consequently conviction of the appellants is well merited and does not require any interference by the court argued both the learned counsels. It was next submitted that the injury caused to the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, it cannot be said that

the assault was not made without an intention to commit murder. Primarily on the aforesaid reasons, it was submitted that the appeal lacks merit and deserves to be dismissed and conviction and sentence of the surviving appellants be affirmed.

We have considered rival submissions and have meticulously examined oral and documentary evidences in the light of those arguments. From such an exercise, what is evident is that some vital aspects of the case are un-controverted and undisputed as neither prosecution nor defence are at variance with each other on those issues. These facts includes that a Ram Lila short play was organised in down town Dankaur and informant and his sister Vimla and children had gone to enjoy it. It is also not disputed that younger members of accused appellants house had also gone there for the said purpose and in that Ram Lila, younger members of accused house had teased Vimla because of which a scuffle had ensued in between both the factions in which they had flexed their muscles and thereafter both the sides had returned to their village. It is categorical deposition of the informant that he had slapped Mahipal (A-4) and Dheeraj Singh (A-2) in the presence of gathered crowd, which were in hundreds. This must have abashed and humiliated them and it seems that they had taken it to be a faux pas. Thus bte noir for the accused appellants to avenge their insult, as a motive for committing the crime, was very much present with them. All the fact witnesses informant PW2, injured PW3 and 5 and eye witness PW4 have corroborated each other on the said aspect of the matter. Further, since prosecution side had an edge over accused youths, and informant had got better of them, they would have less grouse to be the aggressors and harbour a motive to launch an assault on the accused side. Appellants counsel has argued that the motive lied with the prosecution to launch an attack on the appellants side because of disrepute brought to their family is a ludicrous submission because no family would like to publicise a scurrilous act where the prestige of a married girl of their house is involved. Slapping of young ones in front of entire public was a much more hated act and hence accused appellants had graver reasons to execute the crime than the prosecution and hence we are of the opinion that motive alleged by the prosecution seems to be a correct narration of facts.

Besides above aspects, participation of Raghuraj Singh (informant), Budha Singh(deceased), Rajendra, Raghubir Singh and Harbal Singh (all injured) from the prosecution side and that of appellants Dhiraj (A-2), Subey Ram (A-3), Mahipal (A-4) and Kanahiya (A-6) in the incident is also proved, as defence has admitted their participation in the occurrence vide para 23 of the deposition of informant PW2. Both the sides have also admitted use of lathi and ballam in the assault. Thus, on all these aspects, prosecution story is well supported by defence of the accused itself. In view of above uncontroverted adumbrated facts what remains to be examined is as to whether prosecution allegations are correct or defence of the accused appellants is probabalised, when tested on the anvil of preponderance of probabilities. Stated the other way it is to be judged as to which side was the aggressor and whose version is creditworthy and inspires confidence.

Collating prosecution and defence stories to unravel the truth for above narrated purpose, it becomes apparent from both the versions, that prosecution allegations are more probable and acceptable. As has already been held herein above that the motive of being the aggressors was more with the accused appellants than with the prosecution. Further, assault had taken place at the door of the deceased/informant's house, when Deceased and injured were sleeping. All the facts witnesses have corroborated each other on the said aspect without any ambiguity. But for a hollow and incipient suggestion, defence has not at all been able to shatter their testimonies. It was the appellant side, who had gone there with an idea to register their grievance against the assault made on the Mahipal and Dheeraj Singh by the informant. It was the appellant side, who had picked up quarrel of enticing the girl in the Ram Lila short play. They were trying to sit besides Vimla, sister of informant forcibly and in spite of the fact that they were inhibited to desist from such an insult they resisted it and scuffle had ensued. Since Mahipal and Dheeraj Singh were at the receiving end in the said scuffle, it cannot be said that they the accused appellants had no motive to commit the crime as the previous muscle flexing must have affronted them and they would have taken it to be a temerity.

A comparison of injuries sustained by both the sides further brings home the said opinion. Whereas prosecution side had sustained much graver and serious

injuries, accused appellants had escaped comparatively with much minor and insignificant injuries, that too on non-vital parts of their bodies. Another reason for discarding defence version is that according to the defence suggestion only four persons from defence side defended themselves against an attack made by five persons but received much simpler injuries. This story does not go down well with natural course of incident. Prosecution side had received injuries with sharp edged weapons, whereas accused had sustained only lathi injuries. This also negates defence story of appellants being at the receiving end. From our above analysis and on an overall assessment of evidences, facts and circumstances, it is not difficult to conclude that it were the appellants who were the aggressors. Since we have concluded that the appellants were the aggressors, hence we hasten to add that appellants contention that they had exercised right of private defence and had caused injuries to the informant, injured and the deceased, in defending themselves, against an attack made by the prosecution side, dissipates, as an aggressor does not have any right of private defence, which is a right of defence and not of aggression. It is trite law that Right of private defence has been conferred to defend one's person or property but it does not confer right to assault or act in retaliation. There are plethora of judicial pronouncements by the apex court on this legal aspect, which is now too well settled to be dislodged. As supporting examples we refer some of those decisions as under:-

In *Bhanwar Singh and Ors. v. State of M. P.*:AIR 2009 SC 768 it has been held by the apex court as under:-

"51. To put it pithily, the right of private defence is a defence right. It is neither a right of aggression or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self-creation. Necessity must be present, real or apparent.

52. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the

violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence."

In *Raghubir Singh and Ors. v. State of Haryana*:AIR 2009 SC 1223 it has been held by the apex court as under:-

"14. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived."

At this juncture we take up appellants contention that since injuries sustained by the accused appellants have not been explained by the prosecution witnesses and hence prosecution case be discarded altogether, we do not agree with said contention on the peculiar facts and circumstances of the present appeal. We have already held that the motive to commit the crime was with the appellants rather than with the prosecution and they had no reason to prevaricate a story. We have also held that appellants were the aggressors. In such a situation non

explanation of accused injuries, most of which were minor and insignificant, does not cast a doubt on the prosecution version. It is not under all circumstances that none explanation of the injuries sustained by the accused singularly be enough to discard entire prosecution story. This aspect has to be examined in the context of facts and circumstances of each case, as each case is dependent upon peculiar facts and circumstances and all those factors have to be considered in its totality, in a pragmatic manner, to absolve the accused of the crime and acquit him in his favour. Similar contentions, as has been raised before us, has met with a rebuff and has been held to be a tenuous argument in many pronouncements by the apex court. In *Bhanwar Singh and Ors.* (Supra) it has been held by the apex court as under:-

"48. In *Onkarnath Singh and others v. The State of U.P.* [(1975) 3 SCC 276], it was held :

"36. Such non-explanation, however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses, and the court will scrutinise their evidence with care. Each case presents its own features. In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsify the substratum of its story, while in others it may have little or no adverse effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set up by the accused. But it cannot be laid down as an invariable proposition of law of universal application that as soon as it is found that the accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of private defence would stand prima facie established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises."

49. In *State of M.P. v. Ramesh* [(2005) 9 SCC 705], it was observed :11. The number of injuries is not always a safe criterion for determining who the aggressor

was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See *Lakshmi Singh v. State of Bihar*.) A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting."

In *Katta Surendra v. State of U. P.*:AIR 2009 SC(Suppl) 459 it has been held by the apex court as under:-

"10. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting."

The aforesaid view has been consistently followed by the apex court as well as various High Courts. In view of above exposition of law it cannot be accepted as an invariable rule of universal application that in each and every case non explanation of injuries of accused will make prosecution case suspect and unworthy of credence and thereby must be rejected as such.

Applying said opinion on the facts of the appeal in hand we find that it is not a case where no explanation of accused injuries has not been offered at all by the prosecution witnesses. As canvassed by appellants counsel themselves informant PW2 in para 23 of his deposition, injured PW3 in para 10 of his testimonies, another injured PW5 in para 14 of his deposition have offered an explanation about the injuries sustained by the accused, albeit feebly. More over most of the accused injuries were insignificant and were caused on non- vital parts of their bodies. (A-6) has all the injuries on his limbs except one on scapula. (A-4) had injuries on hand and back, (A-2) had injuries on left shoulder and Subhash had injuries on head, nose, left scapula. All these injuries were contusions and abraded contusions. As against injuries sustained by the deceased and the injured of prosecution side these were negligible injuries and hence no benefit of the same can be conferred on the appellants because of that.

Now revisiting appellants submission that no unlawful assembly with common object to commit murder ever existed, as no offence u/s 302 I.P.C. is disclosed against the appellants and established crime will fall only within the ambit of section 304 (I) I.P.C., we find some force in the said contention, the reasons being obvious. Firstly, that accused appellants were variously armed with three of them carrying spear (ballam), one with Jeli (Sharp edged weapon), two with boori (Sharp edged weapon) and four with lathis but the deceased had sustained only a single injury, which, in his autopsy report, is noted as injury no.1. Rest of his injuries were operative incisions as is perceptible from the depositions of post mortem examination doctor, Vishnu Kumar, PW1. He, in no uncertain terms, had stated in paras 7 and 9 of his depositions that except injury no.1, injuries no. 2 to 5 were operative injuries. Secondly, it is not clear as to who was the author that injury no.1. Thirdly, that had the unlawful assembly had a common object to commit murder of the deceased he would not have been spared with a single injury. Fourthly, there was no previous enmity and incident was the outcome of all of sudden incident. Fifthly, that number of injuries (nine) is less than number of assailants (ten) and hence it is too diecy to cogitate that each and every member of the assembly shared the same common object to commit murder. Sixthly, that all the injured were caused only one punctured wound which does not indicate orchestrating a common object to commit murder. Sevethly, that out of four lathi

wielding accused only one had assaulted Raghubar and to nobody else, which also belies sharing of common object to commit murder. On the objective assessment of attending circumstances, we are of the view that the offence disclosed against the appellants will not be outside the purview of section 304 (I) I.P.C for which crime alone appellants can be held to be guilty. In our view we benefittingly draw support from following apex court decisions:-

In Laxminath v. State of Chhattisgarh: AIR 2009 SC 1383 it has been held by the apex court as under:-

"20. Considering the factual scenario and the facts that one arrow was shot the offence is covered by Section 304, Part I, IPC and not Section 302, IPC. Though it cannot be laid down that whenever one arrow is shot Section 302, IPC will not apply, on the facts of the present case it appears to be so. Therefore conviction is altered from Section 302, IPC to Section 304, Part I, IPC. Custodial sentence of eight years would meet the ends of justice."

In Ramchandra Dhondiba Kaware v. State of Maharashtra: AIR 2009 SC 1835 it has been held by the apex court as under:-

"It appears that the accused and the deceased were in inimical terms. Only one blow was given with the yoke in the night. PW-4 has categorically admitted that it was dark, but he identified the accused because he was known to him. Number of injuries is always not a determinative factor regarding applicability of Section 302, IPC. The nature of the weapon, place where it was struck and several other relevant factors throw light on this aspect. Considering the background facts of the present case according to us the appropriate conviction would be under Section 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice."

In Ramesh Kumar @ Toni v. State of Haryana: AIR 2009 SC 2447 it has been held by the apex court as under:-

"9. We find that the prosecution story itself spells out that all these conditions are satisfied in the present case. As per the eyewitnesses, P.W. 8 and P.W. 9, the incident had happened when the deceased accompanied by the two witnesses

were passing through the vacant field of the accused, the appellant had abused him for having entered his field on which the deceased had also abused the appellant. It appears that it was after this altercation that the appellant inflicted a spade (kassi) blow on the head of the deceased. We also see from the prosecution evidence that though the fields of the two parties were adjacent to each other, no quarrel of any kind had earlier taken place. In this view of the matter, we are of the opinion that the case of the appellant would fall under Exception 4 and be punishable under Section 304, Part I of the IPC as a single injury had been inflicted on the head of the deceased.¹⁰ We, accordingly, allow this appeal and convert the conviction of the appellant from one under Section 302, IPC to Section 304, Part-I, IPC and reduce the sentence from life imprisonment to seven years' R.I. We also direct that if the accused has already undergone seven years of imprisonment, he shall be released forthwith, if not required in any other case."

From our above conclusions, regarding non-existence of unlawful assembly with common object to commit murder, as a natural corollary, also lead us to opine that conviction and sentence of the appellants Dharmpal (A-1), Jasmal (A-7), Bijaipal (A-8), Jai Singh (A-9), and Daya Chand (A-10) for offences u/s 307/149 I.P.C. is also unsustainable and they can be held guilty only u/s 326/149 I.P.C. They have caused grievous hurt with sharp edged weapons to the injured persons and hence said offence is well anointed against them. Appellants counsel has also not harangued much on the said aspect.

Concluding our discussion we allow the appeal in part. Conviction of appellants Dhiraj (A-2) and Subey Ram (A-3) u/s 302/149 I.P.C. and imposed sentence of life imprisonment therefore is set aside and instead they are convicted u/s 304(I) I.P.C. and each of them is sentenced to undergo 10 years R.I. with Rs. 40000/= fine and in default of payment of fine to undergo 3 years further RI as default sentence, which in our opinion shall meet the ends of justice. In case fine is deposited by them Rs. 60000/=, out of it, is awarded as compensation to all the injured persons in equal share.

Conviction and sentences of rest of appellants Dharmpal (A-1), Jasmal (A-7), Bijaipal (A-8), Jai Singh (A-9), and Daya Chand (A-10) for offences u/s 307/149 I.P.C., as is recorded in the impugned judgement and order, are also hereby set aside. Jasmal (A-7) and Daya Chand (A-10) are convicted under sections 326/149 I.P.C. and are imposed sentence of seven years RI with fine of Rs. 20,000/-. Rest of the three appellants Dharmpal (A-1), Bijaipal (A-8) and Jai Singh (A-9) are convicted under sections 325/149 I.P.C. and are sentenced to five years RI with fine of Rs. 20,000/-. All the aforesaid appellants shall undergo to two years further RI, in case of default in payment of fine as a default sentence, which to us seems to be adequate sentence on the facts and circumstances of the case. In case fine is deposited by these appellants Rs. 10,000/- from each of the appellants is awarded as compensation to the injured persons for the injuries caused to them.

All the appellants are on bail. Their bail bonds and surety bonds are cancelled and they are directed to be taken into custody forth with and sent to jail to serve out their sentences.

Before parting with this judgement we would like to express our anguish and dismay for the view taken by the learned trial court on the aspect that albeit, it had held guilty and had convicted accused also for offences u/s 148 and 452 I.P.C. but had not sentenced them for those offences for the reason that they were already sentenced in graver offences. It is recollected that offence u/s 148 is punishable with 3 years R.I., whereas offence u/s 452 I.P.C. is punishable with 7 years R.I. Both of these offences are independent offences. In respect of both these offences section 360 (3) Cr.P.C. does not apply. Learned trial Judge could have proceeded u/s 360(1) of the Code, which course also it did not adopt. We have not been able to trace out any legal sanction for such a course either in the Cr.P.C. or I.P.C. and to us such a course does not seem to be a licit (sanctified by law). It is too late in the day to issue subpoenas for all those appellants to appear before us to answer on question of sentence. No appeal has been preferred against such non-sentencing, either by the informant or by the state, and hence, noting our concern we consign this aspect, but not without rectifying the said mistake and hence, for offences under sections 147, 148 and 452 IPC, we hereby convict the respective accused appellants for the period of substantive imprisonment already undergone

by them.

Let a copy of this judgment be certified to the learned trial court for intimation and follow up action.

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