

Preetam and ors. Vs. State

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Court : Allahabad

Decided On : Mar-23-2004

Reported in : 2004CriLJ4556

Judge : S.K. Agarwal and ;Onkareshwar Bhatt, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 149 and 300

Appeal No. : Criminal Appeal No. 577 of 1981

Appellant : Preetam and ors.

Respondent : State

Advocate for Def. : R.S. Tiwari, AGA

Advocate for Pet/Ap. : Kamleshwar Singh, ;Gopal Singh and ;D.R. Chaudhary, Adv.

Disposition : Appeal allowed

Judgement :

S.K. Agarwal, J.

1. This appeal was preferred by these five accused-appellants against their conviction under Section 302 read with Section 149, I.P.C. and sentence of rigorous imprisonment for life. Further accused-appellants. Preetam and Mukundi

were convicted and sentenced to 7 years R.I. under Section 307, I.P.C. simpliciter, 2 years' R.I. to accused-appellants-Karan Singh, Tutti and Katti under Section 307 read with Section 149, I.P.C, 6 months' R.I. to accused-appellants-Preetam, Karan Singh, Mukundi, Katti and Tutti under Section 323 read with Section 149, I.P.C. However, all the sentences were ordered to run concurrently.

2. The brief facts of the case are that on 20-8-1977 at about 3.30 p.m. when Gulab son of Pooran and his nephew Chhatrapal son of Bahadur were grazing their cattle in Dhandhai Haar, appellant-Preetam, who is a collateral of the above two, came there and asked Chhatrapal and Gulab, why they are grazing their cattle in his field. Chhatrapal and Gulab told him that they did not graze their cattle in his field. Preetam abused and belaboured them. Gulab and Chhatrapal are said to have defended themselves and also assaulted Preetam. On an alarm raised by Preetam his family men who were working in the vicinity including the four appellants rushed to the spot of incident. Three of them, Preetam, Karan Singh and Mukundi, were armed with axes and two were armed with Lathis. On seeing the appellants-Gulab and Chhatrapal ran towards their home to escape any further assault. The appellants followed them and when Gulab and Chhatrapal reached the field of Hirwa, they were assaulted by Preetam, Mukundi and Karan Singh and seven other accused persons with axes and Lathis. Hearing the alarm the informant and his brother Bahadur, rushed to save their children. They were ploughing their fields nearby. They were also belaboured. Some other witnesses also arrived at the spot of occurrence on hearing the alarm raised by Pooran and Bahadur. They include his daughter Lachchi and Sunkiya, wife of his brother Bahadur. The accused, after assaulting the four, ran away towards the village, Gulab and his nephew Chhatrapal were lying dead in a pool of blood in the field of Hirwa. They too suffered axe and Lathi injuries. Due to rain and fear of the accused persons they did not go to the police Station that day. The report in the case was lodged on 21-8-1977 at 8.30 a.m. The distance between the police station and the place of occurrence is just 5 miles.

3. On the side of prosecution, apart from the two deceased, Chhatrapal and Gulab Punna suffered only blunt object injuries. Bahadur had an incised wound 2 cm. x .5 cm. x muscle deep at the border of the right mandibular angle 4 cm. below right

ear. Rest of his injuries were by blunt object.

4. These injured were medically examined by P.W. 6 Dr. R. S. Mishra on 21-8-1977 between 10.30 and 11.30 a.m. He has proved their injury reports. A perusal of his statement indicates that none of the injuries were found grievous, no X-ray report nor any supplementary medical report is available on the record. In these circumstances, their injuries, apparently, were simple. The colour of contusions was not noted by this doctor. The duration of their injuries was twenty hours. It is an important aspect.

5. The post-mortem examination on the body of the two deceased-Gulab and Chatrapal, was conducted by P.W. 8 Dr. V.D. Mishra. He found three incised wounds on the body of Chhatrapal, two of them being on the head, one covered right side face, lower part of the right ear and part of neck and the other on the left side of head 12 cm. above the left ear. In both the injuries underlying bones were cut. The third injury was on the buttock. In the opinion of the Doctor, cause of death was shock and haemorrhage as a result of injuries Nos. 1 and 2.

6. The post-mortem examination on the body of deceased-Gulab took place at 2.45 p.m. on 22-8-1977 and was conducted by P.W. 8, Dr. V. D. Mishra. In the case of Gulab also three incised wounds were found, one on the upper side of head 10 cm. above from left ear, underlying bone was found cut and the second and third incised wounds were on the left side head. The third injury was just 2 cm. above injury No. 2. However, all the three injuries of his were on the skull. In all five injuries on these two were on the vital part and one was on a non-vital part. So far as the two deceased persons are concerned in both the cases bones were found fractured and cut. The cause of death in this case was also shock and haemorrhage due to above injuries.

7. The prosecution, in support of its case examined five eye-witnesses. P.W. 1 Munna and P.W. 2 Bahadur both are injured witnesses. The third witness, P.W. 3 Kumari Pramod, is daughter of P.W. 2. The fourth witness is P.W. 4 Kunwar. He was declared hostile by the prosecution. The last witness, who completes the chain of eye-witnesses, is P.W. 5 Thakur Das alias Munna. He too turned hostile. Thus, we have the eye-witness evidence from three witnesses only, viz. P.Ws. 1, 2

and 3, who are all inter se very closely related. The other witnesses are P.W. 7 Ram Swaroop, the scribe of the report, P.W. 6 Dr. R. S. Mishra, who examined the injuries of the prosecution witnesses Punna alias Puran Lal and Bahadur and P.W. 8 is Dr. V. D. Mishra, who conducted autopsy on the two dead bodies.

8. On the side of the defence also all these five appellants had injuries. All the injuries suffered by them were of blunt object. Pritam Singh has two lacerated wounds, one on the left elbow joint and the other on the left side of the segital suture. Other injury is a swelling on the left ring finger at the level of second phalangeal joint and the last injury is an abrasion on the left shoulder joint.

9. So far as Hari Singh is concerned He had suffered only an abrasion on the first phalanx of the right thumb.

10. Karan Singh, had a contusion vertically on the left side of the back. Another contusion horizontally at the level of inferior angle of the left scapula, abrasion circular in the radius of .5 cm. on the upper dorsal surface on the left scapula, contusion at the outer aspect of the left shoulder joint, and lacerated wound, bone deep, on the right parietal protuberance. In his case injury No. 5 was on the vital part of his person.

11. Appellant-Mukundi had three contusion, on the right shoulder joint, right side of mid neck and dorsal surface of the right palm.

12. Babu Lal had one lacerated wound and a contusion. The lacerated wound was skin deep at the level of the left temporo mandibular joint and the contusion with swelling was on the dorsal surface of the first phalanx of left thumb.

13. In the nutshell the above injuries were admittedly suffered by the defence. All the injured persons were examined on the same night, i.e. on 26-8-1977 between 9.00 p.m. and 10.15 p.m. All these injuries were suffered from a blunt object.

14. The arguments advanced by late Sri A. D. Girt, learned senior Advocate, have been virtually reiterated by Sri D. R. Chaudhury during further hearing of this appeal before us. He urged that origin of the Marpit is shrouded in mystery. The learned Sessions Judge has come to a conclusion that the incident had not started

between Preetam and the two deceased but it had started between Kunwar and the two deceased. The place of occurrence is not the one suggested by the prosecution, but was the field belonging to the accused. The witnesses examined by the prosecution were so distantly placed from the place of incident that they could not see the incident from there. The F.I.R. in this case is belated and was prepared after consultation and due deliberation with police. Finally, the contention in the nutshell is that since the origin of the Marpit is not clear and both sides had suffered injuries, though prosecution side had suffered serious injuries as compared to the accused, these injuries on the side of the prosecution were caused in exercise of right of private defence of their person as also of Karan. The contention of the defence was that the deceased were grazing their cattle in the field of one of the accused which was resisted and when appellant-Karan Singh was assaulted by two deceased they were belaboured by some of the appellants. In support of his contention he had cited the case of Vijai Singh v. State of U.P., reported in (1990) 3 SCC 190 and drew our attention to paragraphs 26, 32 and 33 of this judgment.

15. Learned A.G.A. and Sri Tewari representing the complainant on the contrary asserted that the witnesses, no doubt, in the case are partly reliable and partly unreliable, yet the accused cannot go scot free. There is evidence against three accused persons, Preetam, Karan Singh and Mukundi for assault on the two deceased persons, Gulab and Chhatrapal with axes. There were six incised injuries on the person of these two deceased. All of them could be caused by the axes. It cannot be disputed or doubted. Therefore, so far as these three persons are concerned, the evidence needs scrutiny with much sincere care and caution. Even if the initiation of Marpit is not established by the prosecution beyond reasonable doubt its benefit could not be extended to these three accused persons. So far as conviction under Section 307, I.P.C. is concerned, it has been conceded that no case under Section 307, I.P.C. read with Section 149, I.P.C. or Section 307, I.P.C. simpliciter is made out against any of the accused.

16. We have examined the evidence most carefully. We were confronted by the fact that the evidence clearly is suggestive of a different picture. The witnesses have nominated these three accused persons who were armed with axes, viz.

Preetam, Karan Singh and Mukundi, to be the assailants of the two dead persons. Both the deceased had suffered sharp cutting weapon injuries. They had their bone not only fractured but also cut. This is indicative of the use of a heavy cutting weapon like an axe in the incident. The prosecution story in the present case is that P.W. 1 Punna had an information of some Marpit between Preetam and Gulab and Chhatrapal in Dhadhai Haar. It had come in evidence that when Gulab and Chhatrapal were assaulted by Preetam they also assaulted him. The alarm raised by Preetam attracted his family members who were working in their field in the vicinity. They followed these two up to the field of Hirwa and belaboured and killed them there. The prosecution evidence that these two took to their heels after the assault by Preetam and his family members is not proved from any evidence on record. The medical evidence available on record discredits it. The only witness of this part is P.W. 3 Kumari Pramod. The criticism against her is that she was not nominated in the F.I.R. by the informant and, therefore, her presence here at the relevant time is highly doubtful. There is nothing in the F.I.R. which may show to us that how the informant knew about this part of the incident. The other criticism against her is that she is adhering to the same story which was disclosed by Punna in the F.I.R. and subsequently it was not adhered to by him in its totality during trial. Serious modulations have been introduced in the story during the trial. Now assault by Preetam upon the two deceased at Dhadhai Haar was modified by these two witnesses to only a scuffle. The reason is apparent. There was no such injury on these deceased persons. According to them when Chhatrapal and Gulab tried to save them, Preetam raised an alarm and that attracted others to the spot. According to the informant his nephew and son ran towards the village but they were surrounded in the Thakur Baba's Haar. Gulab and Chhatrapal were belaboured according to these witnesses by the three axe men and other Lathiwalas. None of these two injured had suffered any Lathi injury. The witnesses were attracted by the alarm. They ran towards them and tried to intervene. They were also beaten by Lathiwalas and those possessing axes. It was modified later on and the version now is that Lathiwalas were only plying their Lathi in air around these two but they actually did not assault them. It is further admitted to the prosecution that these injured witnesses also wielded their Lathi, in the defence of their son and nephew and their own person. According to P. W. 1, Preetam gave

an axe blow on his head and Mukundi gave axe blow upon the neck of Bahadur. Others assaulted them with Lathis, Karan Singh, thus, clearly did not participate in this later assault. They did not go to the police station immediately after the incident. According to them right had intervened, therefore, they did not go to police due to fear of the accused. They kept sitting near the dead bodies. This conduct of these witnesses was critically assailed by the learned counsel for the appellant, late Sri A. D. Giri. According to him the incident had taken place at about 3.00 or 3.30 p.m. It must have come to an end within 5-10 minutes so there was ample time for the prosecution witnesses to take the two dead persons to the hospital for their medical checkup and medical assistance. Their deaths may not have occurred instantly. The report could also be lodged promptly. Mr. Giri thus argued that this creates a serious doubt in the authenticity of the time of incident. Their conduct exhibits that this incident occurred on the advent of dusk. The visibility became poor. According to him, in order to cover up that difficulty, because in the absence of any light it would have been difficult for them to identify the assailants, they took recourse to change the time to afternoon hours. The report was lodged on the next day at 8.30 a.m., i.e. nearly 17 hours after of the occurrence. It further strengthens the doubt. The medical examination of the two injured was conducted another 6 to 6 1/2 hours after the registration of the case at the police station. At least informant could be sent promptly to doctor for his medical examination at about 9.00 a.m. or so. In the cross-examination this witness admitted that his report was scribed by Ram Swaroop who never read it over to him. Only his thumb mark was obtained. He had given this report to Dewan (Head Moharir) at the police station. He kept it with him. What further happened to it he did not know. A carbon copy of this report was given to him four days after it was received from him. All these discrepancies further rub salt on the wounds. Further he did not know the meaning of words 'Nivedan' (submit), 'Prarthi' (applicant), 'Urf (alias), 'Dinank' (date). It is further admitted to this witness that Chaukidar arrived at the spot soon after the incident. Yet, his help to lodge the report was not taken. No explanation is available for this. He denied that he had given any statement to the I.O. He made an evasive response whether his thumb mark on a blank sheet was obtained by the Police Inspector or not, but admitted clearly that his thumb mark was taken on the way leading to Shreenagar. It is

strange that despite immediate arrival of the Chaukidar no attempt was made to inform the police. It is clearly admitted by this witness that Chaukidar was not sent to the police station during the night because they had suffered injuries. In our opinion, in the above discussed circumstances, not much reliance could be placed on the F.I.R. and its version so far as the initiation of Marpit is concerned.

17. Coming to this version itself we find that this witness had made a huge summersault and had denied making any statement under Section 161, Cr. P.C. regarding Lathiwalas. He denied that he had given out in his report that those who were armed with lathi also belaboured his son and nephew. He failed to offer any explanation for the presence of these words (Baki Logon Ne Lathion Se Markar Gira Diya). He has suggested that because there is no Lathi injury upon the two deceased, therefore, they modified his version regarding the Lathiwalas. He stated that they had not wielded any Lathi in their defence. Paina is a small pointed instrument fixed in a tiny stick used to drive cattle or the bullocks. He denied that he was having any Kulhari. He clearly admitted that his field and the field of his brother are segregated. A partition has already taken place between them. He further admitted that Haar is away from their houses and they use to go to field with axes also. He clearly admitted that when he came to the small Bund over the Nala he saw that his son and nephew were running towards the field of Hirwa. If they would not have gone to the Bund incident could not have been seen by them. He admitted that he never disclosed this fact of his coming to the Bund to I.O. He further accepted that it may be possible that he had not named his niece Km. Pramod scrubbing grass in the vicinity in Dhadhar Haar in his F.I.R. He did not offer any explanation for this omission. He claimed that it may be possible that some facts may not have been written by the scribe. Then stated that Ram Swaroop wrote down some facts only. He again denied making any statement to I.O. and admitted that his thumb mark was obtained on a blank sheet on way to Sringar by the I.O. These omissions and improvements we have discussed so elaborately make it difficult for us to place any implicit reliance on the version brought forth by them in the trial Court. It is further clear that this witness has only thumb marked the F.I.R. but he was not its author. It is apparent from his failure to tell the meaning of some words, four in number, in his F.I.R. which we have elaborately dealt with earlier. Thus it became clear to us that this F.I.R. was not

prepared by him nor it was read over to him. He received its carbon copy four days after the registration of the case. 18. We find that there is no reliable evidence as to how the Marpit originated and where. The only witness on this aspect is Km. Pramod. Her testimony cannot be accepted by this Court for the simple reason that she is supporting the informant and her father Bahadur in its entirety in the trial Court. In her statement in response to a Court question she admitted that when quarrel between her brothers and the accused persons was going on Karan also arrived there and he supported them. She claimed that she ran behind her brothers and chasing the accused persons. According to her Preetam came to her brothers and asked them why they were grazing their cattle in his field. A Marpit started between them and when the two deceased ran to safety they were followed by Preetam, who went on raising alarm that surrounded and killed them. This is something new and had been introduced for the first time after the two injured were examined. None of the injured had stated any such fact. Therefore, we find it difficult firstly to accept that she was present in the vicinity and secondly that she had seen the accused persons quarrelling or assaulting her brothers. Her name did not figure in the F.I.R. In our opinion she had been introduced subsequently to bolster the prosecution case. The two ladies (daughter of the informant and wife of Bahadur) were withheld by the prosecution though according to the F.I.R. they witnessed the incident that took place in the field of Hirwa. Thakurbaba and Jageshwar have also been withheld by the prosecution. Their names occur in the F.I.R. Her evidence is that on the challenge thrown by Thakurbaba and Jageshwar the assailants fled from the spot leaving the two (Chhatrapal and Gulab) dead. She claimed that she informed the I.O. that she was scrubbing grass in Dhadhai Haar but she had not shown that spot to I.O. It is noticeable that in the site plan no such place of her presence is shown. She had also made serious modulation in her version. We have already dealt with such modulation while dealing with the evidence of injured witnesses. These modulations seriously affect the authenticity of her version as well. In the light of the discussions made above we are not prepared to accept her testimony.

19. The most independent and important witness in this chain is P.W. 4 Kunwar. He was declared hostile by the prosecution for the lone reason that he stated that Karan asked the deceased persons, 'why they were grazing their cattle in his field'

and on this they started quarrelling. Seeing them quarrelling he intervened and stopped them from doing so. The deceased thereafter went to their houses and he too went to his house. According to him the field in which the cattle were grazing belongs to Gulab as well. On this the witness was declared hostile. He had very clearly stated in the cross-examination by the State counsel that the cattle of the two deceased were grazing in the field that belongs to Bahadur. He denied that he had given any statement to the I.O. that Preetam Gulab and Chhatrapal were quarrelling and Preetam shouted for help that he was being killed. Thus, this witness gave out a different story regarding the initiation of Marpit. According to him after he intervened the parties retired to their houses. He did not say anything about any chase being given by any accused. His version corroborates the defence case.

20. The last witness P.W. 5 Thakurdas alias Nanha has denied having seen any incident at 3.00 p.m. According to him when he reached the spot the assailants had already taken to their heels and the two dead bodies were lying on the field of Hirwa. Their father, mother and sister were present there, but he claimed that he had not seen the assailants or the assault. He was the person who was grazing his cattle near the field of Hirwa. He claimed that day was almost coming to an end when this incident occurred. His testimony is, therefore, of no help to the prosecution except to throw doubt on the time of occurrence.

21. P.W. 6 Dr. R. S. Mishra had examined the injuries at 11.30 a.m. of Punna alias Puran Lal, the informant. He had one incised wound 5 cm. x 2 cm. x muscle deep on the forehead. Rest of the injuries were lacerated wounds, contusions, and abrasions (in all six in number). Except injury No. 1, which was caused by some sharp edged weapon, rest of the injuries were caused by a blunt object. X-ray for his injuries No. 4 and 5 was advised but there is no X-ray examination report or any supplementary report on the record. He also examined the other injured Bahadur on the same day at 10.30 a.m. during the day. In all eight injuries were found on the person of Bahadur and out of them two were lacerated wounds, one was an incised wound in the dimension of 2 cm. x .5 cm. x muscle deep at the dorsal border of the right mandibular angle, 4 cm. below the right ear. Three injuries were contused wounds and two were swellings. The injuries were about 20

hours old barring injury No. 4 rest of the injuries were caused by blunt object and were simple. Injury No. 4, according to the Medical Officer, could be caused by some pointed object. Regarding injury No. 4 the opinion of the Medical Officer was that it could be caused by an axe only if the ends of the axe are pointed and sharp. Both the injury reports are Exts. Ka-2 and Ka-3. No tailing was noted in the injury of Punna. It is admitted to the doctor that forehead is a bony part. He further admitted that any injury caused by a blunt object on any bony part may also give an appearance of an incised wound. He admitted that he had seen Khalwa. It is used for levelling the ploughed soil by the agriculturists. It has point and edges as well, but its edges are blunt. It is possible that by continuous use the edges may grow sharp.

22. He had also medically examined all the five accused persons. Their injury reports are on the record. They had gone to the Doctor for their medical examination themselves. They were not sent by the police. He had admitted that except injury No. 2 of Preetam rest of the injuries were superficial. This question was put by the State Counsel on a recall of this witness. The question was objected to by the defence.

23. P.W. 7 Ram Swaroop is the scribe. He is a sculptor. The report was got scribed by Puran alias Punna from him at about 7.00/7.30 a.m. The report was transcribed by him at his house. It was taken down on the dictation of P.W. 1 Puran alias Punna. It was read over to him though Puran denied that it was ever read over to him. It is Ext. Ka-1. He knew Punna for the last 5/6 years. He admitted that he had never scribed any report in the past. Thana Srinagar was just two furlong from his house. He denied that the report was prepared at the police station on the dictation of the S.I. He admitted that in the report Shreeman Thanedar Sahib Srinagar was transcribed by him on his own. Prarthi and Nivedan words were dictated by Puran alias Punna. He denied that he was in close contact with the police of P.S. Srinagar. Since Puran alias Punna denied this report being ever read over to him its authenticity is open to doubt. He has clearly admitted that he did not know the meaning of 'Prarthi,' 'Nivedan,' 'Urf,' and 'Dinank.' It further fortified that it was not prepared on his dictation. It is admitted to this witness that his thumb mark was taken by the I.O. on the way to P.S. Srinagar. From this it

unerringly follows that it was dictated to P.W. 7 Ram Swaroop by someone other than Puran alias Punna. Thus, we cannot attach any value to this F.I.R. and the version contained therein.

24. P.W. 9 Bhagwan Din is the Investigating Officer. According to him the case was registered at the police station at 8.30 a.m. on 21-8-1977. The report was presented by Punna in his presence at the police station. Its check report and G.D. were prepared by Suraj Pal. This witness has further in cross-examination admitted that he did not find the Lathis belonging to Chhatrapal and Gulab deceased at the spot of occurrence. He further stated that Bahadur had not disclosed to him that Mukundi had struck an axe on his neck. He had given a statement that rest of the accused armed with Lathi assaulted both the deceased. This has been filed in evidence as Ext. Kha-6. He has admitted that Km. Pramod made a statement before him that persons armed with Lathis also assaulted Gulab and Chhatrapal. He admitted that he had not shown in the site plan that spot from where Km. Pramod saw the occurrence. He had not shown that spot where Km. Pramod was scrubbing grass. He arrested all the accused persons himself on different dates. He recorded statement of two of the witnesses while he was on way to the spot. These witnesses are Punna and Bahadur. He reached the spot at 12.15 p.m. There he prepared the inquests on the dead bodies of Gulab and Chhatrapal. The inquest memo of Gulab is Ext.Ka-8 and that of Chhatrapal is Ext. Ka-8A.

25. The defence has come up with a different case specifically in the statement of Karan Singh that in the Haar of Hirwa Gulab and Chhatrapal were grazing their cattle in his field. He objected to that. They told him 'we are grazing. What will you do?' When he again remonstrated them, they started assaulting him. He raised alarm, which attracted Mukundi and Preetam who were ploughing their field in the vicinity. They bet Gulab and Chhatrapal in his defence. The statement of Mukundi is also on the same line. They have further added that when they reached there and challenged Gulab and Chhatrapal they attacked them also and they in defence of their own person and that of Karan Singh plied their Lathis. This is the statement of Babu Lal alias Tutti also who according to Mukundi had also accompanied them to the spot of occurrence. The statement of Katta alias Hari

Singh, who was present at the spot and reached there along with Preetam, Mukundi and Tutti is also in the same vein that Chhatrapal and Gulab were assaulting Karan Singh in the field of Hirwa. Mukundi and Preetam rushed on his alarm and they gave two or four blows on Gulab and Chhatrapal. Bahadur and Puran also came to the spot and they also belaboured them. They had also plied their Danda in their defence. Thus, according to defence, the incident had taken place when the deceased persons forcibly and brazenly grazed their cattle in the field of Karan Singh and these two axewalas had acted in exercise of right of defence of Karan Singh and their own person when they too were attacked. Coming to the defence injuries we find that most of the injuries are simple in nature and are from a blunt object. Two of them had suffered injuries on their vital parts like skull. Karan Singh had suffered a lacerated wound, bone deep, on the right parietal protuberance. Babu Lal has also suffered a lacerated wound on the left temporo mandibular joint. In these circumstances we are of the opinion that it cannot be said that their injuries are wholly superficial or self-suffered and cannot be looked into especially when the prosecution tried to explain them in the beginning and thereafter tried to wriggle out of it by denying use of any weapon.

26. In our opinion, the first part of the prosecution case has not been established beyond any reasonable doubt. As earlier discussed we are not prepared to place any reliance upon the testimony of P.W. 3 Km. Pramod. She had been supporting the prosecution story in its totality which, for cogent reasons, we do not find reliable. The incident initially may have happened at Dhadhai Haar, but at that time the parties were separated. After sometime this second incident occurred when the prosecution party tried to graze their cattle in the field of Karan Singh perforce and when he objected, they started belabouring him. On his alarm Preetam, Mukundi, etc. came to the spot and wielded their weapons (the axes) in their defence as well as in the defence of Karan Singh. This girl even if she was present at the Dhadhai Haar could not be a witness of the occurrence at the Hirwa's field at a later stage. The other witnesses, especially P.W. 2 Bahadur, can also be not relied upon because they have tried to suppress the genesis of the Marpit, which had taken place at a later stage and at a considerable distance from Dhadhai Haar. The distance, as measured by the learned Sessions Judge during a spot inspection was found to be five furlongs. In the F.I.R. it has not been stated by

Punna alias Puran that any one had chased the two deceased persons up to the field of Hirwa. The fields of these accused persons are not shown in Dhadhai Haar, on the contrary from the cross-examination of the eyewitnesses it emerged out that they had their fields in the vicinity of the second place. These witnesses at a later stage have introduced important modulations in their statements in the trial Court. According to P.W. 1, the two deceased had run towards their village. It has not come in the evidence that the Hirwa's har and the field fall on the way to the village. His statement that Chhatrapal and Gulab raised alarm that 'the accused persons are surrounding him and will kill him' is also a serious improvement. Finding the medical evidence incompatible with the prosecution case with regard to the assault upon Gulab and Chhatrapal by Lathis he further modulated his version that those who were armed with Lathis were plying them in air around the two deceased, therefore, they felt that Lathiwalas also beat the deceased persons. They have admitted that they had plied Lathis in defence of his son and nephew. Gulab is son of Pooran and Chhatrapal is son of Bahadur. We have further noticed that they have not stated in the Section 161, Cr. P.C. statement that any axe injury was caused to them. Now for the first time in the trial Court they have stated that Preetam caused the injury from an axe on the head of P.W. 1 Punna and Mukundi gave a blow on the neck of Bahadur. The medical evidence on the point of these injuries being caused by an axe is quite discrepant. One incised injury each on the persons of these two is so superficial in nature that we cannot subscribe it to an axe. It could be the result of a Lathi blow as well, specially that of Punna, as it was on a bony part, i.e. forehead. It is admitted by the Medical Officer that it can give a look of an incised injury if a Lathi blow lands on such a bony part. No independent witness has come forward to support the prosecution story. There is absolutely no explanation why no F.I.R. was lodged promptly after the incident came to an end at 3.30 p.m. and why the report was lodged on the next morning at 8.30 a.m., i.e. nearly 17 hours later. No attempt was made to get their injuries medically examined that very night. These two persons were examined for their injuries at 11.30 and 10.30 a.m. on 21-8-1977. Chaukidar was available yet his services were not used. These facts clearly lead to the inference that the prosecution has coloured its version to such an extent that truth is lost in the mire. These four persons, P.W. 1, P.W. 2 and the two deceased were probably together

while they attempted to graze their cattle in the field of appellant-Karan Singh in a planned manner. When Karan Singh objected to) they beat him it is here the other appellants-Preetam, Mukundi etc. stepped In the quarrel and probably it converted Into a Marpit between the two sides.

27. In the circumstances, we are inclined to accept that the accused persons had exercised their right of private defence against the deceased persons and the other Injured, especially Preetam, Mukundi and Katti, those who were armed with axes. Learned A.G.A. argued at this stage that the three accused had undoubtedly exceeded their right and, therefore, the question is whether Section 34 is applicable in the present situation against these persons for causing grievous injuries to two which ultimately proved fatal.

28. On a careful consideration of this submission we are of the opinion that. Section 34, once we accept their right of private defence, will not be applicable. It is to be considered in the light of the facts that are available to us from the record. Can we hold that the acts done by these three persons were in furtherance of their common intention to kill the two? Undoubtedly, the primary intention in the mind of these persons must have been to protect the person of Karan Singh from the assault by Gulab and Chhatrapal and his other companions. We do not find it safe to presume that in this assault they had shared any intention of causing deaths. Even that knowledge could also not be attributed to them though the weapon used by them was a heavy cutting weapon, it is admitted to the witnesses that in their village people normally carry axes and Lathis when they go to Haar or their fields. In these circumstances presence of axes and Lathis in their hands cannot be presumed to be an act done in furtherance of any common intention of theirs or that the act done by them was with any criminal intention or knowledge that deaths would ensue. It is difficult for us to disbelieve the two injured witnesses to the extent that these three persons had plied axes upon the two deceased. We have not accepted that the two incised wounds suffered by these witnesses were caused by them. In these circumstances since both the deceased had suffered three axe injuries each, we are of the opinion that these accused had caused these injuries in exercise of their right of defence of their person and the person of Karan Singh when they were aggressed by the complainant and the deceased.

There are only six incised injuries on the person of these two deceased. Five of them are on vital parts. Three persons with axes are their assailants. Only one blow on each deceased will come to their share. Witnesses have not attributed any specific injury to any of these accused. In the circumstances we cannot infer anything beyond it. Therefore, it cannot safely be said that they had used more force than what was necessary to ward-off the assault upon Karan Singh and themselves. So far as the Lathiwalas are concerned, they had not participated in the assault upon the two deceased. Punna had admitted that in order to see the incident he had climbed the Bhita. If he would not have done so, he would not have seen the incident from the place where he then was. Bahadur, according to him, was in the adjoining field. This fact was stated by him for the first time in the trial Court. Up to the stage of investigation none of them had stated this fact. They were placed at a distance of 250 yards from the field of Hirwa where the incident occurred. Therefore, we find that they were present at the spot from the outset or if at all they had gone later on then they could not see their son and nephew launching any assault on Karan Singh with the Lathis. In our opinion, they were present there from the very beginning. The two were to abandon Dhadhai Haar unwillingly and they grazed their cattle later on fully prepared for any eventuality in Karan Singh's field. This inference is emerging out from the close scrutiny of their evidence. P.W. 4 Kunwar has admitted clearly that the dispute was not between Preetam and the two deceased but was between Karan Singh and the two deceased. This is the statement of all the accused persons, specially Karan Singh. We have no reason to doubt the statement of these accused persons that the quarrel took place between Karan Singh and the two deceased and when they started belabouring him these persons came to the spot and used whatever weapon they could lay their hands on. In the circumstances we come to the conclusion that these accused persons could not be convicted under Section 304, Part II, I.P.C. for exceeding the right of private defence. None of them could be held guilty for exceeding the right of private defence. Two of the accused had one injury each on their scalp region. It was sufficient for them to retaliate in the manner in which they had. Blows in such a situation generally cannot be regulated or counted. By ordinary arithmetic one blow each could be attributed against each deceased to these three accused. It cannot by any stretch of imagination be called

excess use of force than necessary to ward-off the aggression.

29. The law regarding exceeding of right of private defence is well-settled. Specific roles are to be discerned. Individual offence is created. No application of Section 34 or Section 149 in the case of exceeding of any right of private defence is permissible.

30. In the result these three appellants (Preetam, Karan Singh and Mukundi) are acquitted of the charges under Ss. 302/149, 307/149 and 307, I.P.C. simpliciter. It will suffice to say that the prosecution has not come in this case with clean hands. It has suppressed the genesis of the incident as also concealed from the Court the true facts. However, we had tried our best to segregate the grain from the chaff and the result is in the negative. This appeal in the result is allowed. All the appellants, who were convicted either under Sections 302/149 or Section 307/149, I.P.C. or Section 307, I.P.C. simpliciter or under Ss. 323/149, I.P.C. are acquitted of these charges. Bail bonds of all the appellants are cancelled. They need not surrender. Their surety bonds are hereby discharged.

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