

Baljore Vs. State of U.P.

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Court : Allahabad

Decided On : May-15-2000

Reported in : 2000CriLJ4981

Judge : R.R.K. Trivedi and ;U.S. Tripathi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 33, 34, 302, 307, 320, 323 and 324

Appeal No. : Criminal Appeal No. 1659 of 1979 and Government Appeal No. 2819 of 1979

Appellant : Baljore

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : M.P. Misra and ;Rajesh Verma, Adv.

Judgement :

U.S. Tripathi, J.

1. The appellant Baljore preferred Criminal Appeal No. 1659 of 1979 against the judgment and order dated 1-5-1979 passed by VIth Additional Sessions Judge, Azamgarh in Sessions Trial No. 533 of 1977 convicting the appellant under

Section 302, I.P.C. and sentencing him to life Imprisonment.

2. The State of U.P. preferred Government Appeal No. 2819 of 1979 against the above judgment and order in the said sessions Trial, acquitting the respondents Mohar, Tikori and Tapsi for the offences punishable under Section 302, 324 and 323 read with Section 34 I.P.C.

3. Both the appeals arise out of same judgment and common questions of the fact and law are involved. Therefore, these appeals are decided by a common judgment.

4. The prosecution story, briefly stated, was that appellant Baljore, (hereinafter called the 'accused') and respondents Mohar and Tikori are sons of respondent Tapsi (hereinafter called the 'accused') and are residents of village Ultahawa Dewara, P.S. Maharajganj, District Azamgarh. Ramraj (P.W. 1) and his brother Ram Awadh deceased, were also residents of said village. Towards north of houses of Ramraj (P.W. 1) and Ram Awadh deceased, there was agricultural field of Baljore, accused. Near the said field there was agricultural field of Ram Awadh deceased. In the year 1977 peas crop was existing in the field of Ram Awadh deceased, while there was heat crop in the field on Baljore accused. On the morning of 29-1-1977 at about 7-8 A.M. Km. Kamli, daughter of Ram Awadh deceased, was removing 'Akri' in the field of her father. Tuphania, S/ Baljore accused was also removing 'Akri' in his field. Some altercation took place between Km. Kamli and Tuphania. Balli (P.W. 3) and Ayodhya intervened the altercation between above two children and both went to their respective houses.

5. At about 9 A.M. on the same day i.e. 29-1-1977 Ramraj (P.W. 1) and Ram Awadh deceased were present in front of their houses and Jagarjit (Jagdish) (P.W.4), S/o Ram Awadh deceased was milching cow in front of his door. Accused Tapsi armed with Lathi, Balijore, Mohar and Tikori armed with spears came in front of the house of Ramraj (P.W. 1). Tapsi accused exhorted and on his exhortation Baljore accused attacked on Ram Awadh deceased with spear while Tapsi accused attacked on Jagarjit (Jagdish) (P.W.4) with Lathi. In the meantime, Hanshraj deceased who was on the well also came there. Tikori and Mohar attacked on him (Hanshraj) with spear. The above accused started causing

injuries on Ram Awadh, Jagarjit and Hanshraj with their respective weapons. Jagarjit (Jagdish) (P.W. 4) and Ram Awadh deceased, tried to save themselves by using Hasuwa (sickle) and Lathi respectively. Ram Awadh deceased, sustained spear injuries caused by Baljore accused and Hanshraj sustained spear injuries caused by Baljore accused and Hanshraj sustained spear injuries caused by Mohar accused and fell down. Jagarjit (Jagdish) Sustained Lathi Injuries. On the alarm raised by Ramraj (P.W. 1) and injured persons Vibhuti (P.W. 2), Balli (P.W. 3) and Ayodhya came to the spot and witnessed the occurrence.

6. Ramraj (P.W. 1) along with Radhey and others took Ram Awadh and Hanshraj, deceased, who were at that time injured, to the police station Mahrajganj, where he lodged oral report.

7. Chick, F.I.R. (Ext. Ka-1) was prepared by Head Constable Yadunandan Singh (P.W. 6), who made an endorsement of the same at G.D. report (Ext. Ka-2) and registered a case against Baljore, Mohar, Tikori and Tapsi under Sections 323, 324 and 307 I.P.C. The investigation of the case was taken up by Sarabdeo Singh, I.O. (P.W. 7), who interrogated Hanshraj and Ram Awadh at the police station and sent them to Primary Health Centre for medical examination. Ram Awadh was medically examined at 9.25 P.M. on 29-11-1977 at Primary Health Centre, Mahrajganj by Dr. B.P. Pandey (P.W. 10), who found following injuries on his person :-

8. Punctured wound 1-2/10' x 4/10' x 4/10' over the left side of the chest. 4 1/2' below and lateral to left nipple (wound with bleeding).

9. The injury was simple caused by pointed sharp edged weapon and was about Vi day old.

10. Dr. B.P. Pandey (P.W. 10) also examined injuries of Hanshraj on same day at 9.40 P.M. and found following injuries on his person :-

1. Punctured wound 7/10' x 1/10' x 4/ 10' over the left side of chest, 8' below and lateral to the left nipple and 9 1/2 lateral to the umbilicus.

11. The injury was simple caused by pointed sharp-edged weapon and was about 1/2 day old.

12. Both the injured were referred to District Hospital for further treatment. But before they could be taken to District Hospital, Ram Awadh succumbed to his injuries in the said night.

13. Information regarding death of Ram Awadh was received at Police Station Maharajganj at 4.30 A.M. on 30-1-1977 and accordingly, the case was altered under Section 302 I.P.C. vide endorsement at G.D. report (Ext. Ka-3).

14. On 30-1-1977 the I.O. Sarabdeo Singh (P.W. 7) reached Primary Health Centre, Maharajganj, where he appointed puchas and conducted inquest of the dead body of Ram Awadh and prepared inquest report (Ext. Ka-6) and other relevant papers (Ex. Ka-7 & Ka-8). He sealed the dead body and sent it for post-mortem. He also inspected the place of occurrence prepared site plan (Ext. Ka-9), interrogated Jagdish (P.W. 4) and sent him to Hospital for medical examination. Thereafter, he interrogated Vibhuti (P.W. 2), Balli (P.W. 3) and Ayodhya. He took into possession blood-stained and simple earth from the spot sealed it in different containers and prepared recovery memo (Ext. Ka-10).

15. Autopsy on the dead body of Ram Awadh deceased was conducted on 30-1-1977 at 4 P.M. by Dr. O.P. Khatri (P.W. 1), who found following ante mortem injuries on his person :-

1. Abrasion V2 cm. x 1 cm. on the right side nose middle.

2. An stitched wound 2.5 cm. long with one stitch on the left side of chest lower part 22 cm. from anterior auxiliary fold. On removing stitch margins were clean cut and triangular in shape and the wound was up to cavity deep running from left to right and down wards and vertically. The injury was in the part of 7th intra coastal space.

16. On internal examination, the Doctor found walls distended under ante-mortem injury. Pleura was punctured on left side. Diaphragm and peritoneum were punctured underneath injury No. 2 Peritoneum cavity contained one pint blood

material with food material. Stomach wall perforated (1' x 1/2" x cavity deep), 5' from the pylorus. Stomach contained about 4 ounce digested material. According to Doctor, the cause of death was due to shock and haemorrhage as a result of ante-mortem injuries. The doctor prepared post mortem report (Ext. Ka-15).

17. Hanshraj deceased was shifted to District Hospital, Azamgarh, but he died there on 31-1-1977 at 7.20 A.M. The inquest of his dead body was conducted by sub-Inspector Bhagirathi on 31-1-1977 who prepared inquest report (Ext. Ka-19) and other relevant papers (Ext. Ka-20 and Ka-21). He sealed the dead body and sent it for post mortem.

18. Autopsy on the dead body of Hanshraj deceased was conducted on 31-1-1977 at 4 P.M. by Dr. O.P. Khatri (P.W. 11) who found following ante-mortem injuries on his person :-

1. An stitched wound 1/2" long on the left side of chest lower part 7' from the anterior auxiliary fold in the lower coastal margin. The wound is directed downwards, back wards and inward puncturing the diaphragm and an ileum wound (1' x 1' x cavity deep).

19. On internal examination, the Doctor found walls perforated 1' x 1' x through and through in the tenth intra coastal space underneath injury No. 1. Pleura was perforated under injury No. 1. Diaphragm perforated under injury No. 1 peritoneum cavity contained faecal matter and blood about one pint. Small intestine perforated in terminal colon 1' x 1' x cavity deep. Large intestine contained faecal matter and gases.

20. The Doctor found that cause of death was due to shock and haemorrhage, as a result of ante-mortem injury. The Doctor prepared post-mortem report (Ext. Ka-16).

21. The I.O. performed other formalities and on completion of investigation submitted charge sheet (Ext. Ka-11) against the accused on 3-3-1977.

22. In their defence the accused set up a counter version that on 29-1-1977 at about 9 A.M. the deceased Ram Awadh and Hanshraj along with Ramraj (P.W. 1)

and Balli (P.W. 3) were uprooting and damaging their wheat crop standing on their field situate towards north of the house of Ram Awadh deceased. Vibhuti (P.W. 2) and Ayodhya were helping them. Tapsi accused objected to it and abuses were exchanged between the parties. Hearing altercation, Baljore accused came there. Ram Awadh and Hanshraj deceased attacked on Tapsi with spear. Baljore snatched spear of Ramraj from behind. Balli, Vibhuti and Ayodhya armed with Lathis attacked on Baljore. Ram Awadh caused spear injuries to Baljore, who plied spear in his self defence, due to which Hanshraj and Ram Awadh sustained injuries. That Baljore lodged oral report of the incident on the same day at police station, but his report was not correctly written and subsequently, he sent an application to the Superintendent of Police, Azamgarh.

23. The prosecution in support of its case examined Ramraj (P.W. 1), Vibhuti (P.W. 2), Balli (P. W. 3) and Jagdish (P.W. 4) as witnesses of fact, besides Ram Jatan Yadava (P. W. 5) Head Constable Yadu Nandan Singh (P.W. 6), Sub Inspector Sarbdeo Singh (P.W. 7), Constable Gopal Singh (P.W. 8), Suresh Prasad Singh (P.W. 9), Dr. B.P. Pandey (P.W. 10) and Dr. O.P. Khatri (P.W. 11) as formal witnesses. Head Constable Yadu Nandan Singh (C.W. 1) was examined as Court witness. The accused examined Iqbal Bahadur Singh (D.W. 1), Record Keeper, Police Office and Nasiuddin (D.W. 2), Record Keeper, Collectorate Azamgarh.

24. On considering the evidence of the prosecution as well as that of the accused, the learned sessions Judge held that the occurrence initiated and took place in front of the house of Ram Awadh deceased, at the time and in the manner alleged by the prosecution. The accused, Tapsi, armed with Lathi and others including Baljore armed with spear arrived at the door of Ram Awadh deceased well prepared to wreck vengeance on him as sequel to the morning quarrel between the children. The accused persons were necessarily aggressors. Ram Awadh and Hanshraj deceased caused hurt to Baljore and Tapsi with a view to repel aggression made by them and accused assailants had no right to inflict injuries to the victims of their aggression in exercise of right of defence of person or property. He further held that participation of Tikori and Mohar accused was doubtful and they may be accorded benefit of doubt. Accused Baljore alone caused injuries to

the deceased resulting in their death. And that presence of Jagdish (P.W. 4) on the spot has not been proved beyond doubt. Tapsi accused was injured and he did not cause injuries to the two deceased. Tapsi, under the circumstances cannot be said to have shared common intention to cause such bodily injury to the deceased so as to cause their death. He may also, therefore, be accorded benefit of doubt. With these findings the learned Sessions Judge acquitted accused Mohar, Tikori and Tapsi and convicted and sentenced Baljore alone as mentioned above.

25. We have heard the learned counsel for the parties and have perused the evidence on record.

26. The learned counsel for the accused submitted that the trial Court has disbelieved the presence and evidence of Jagdish (P.W. 4) but held that accused Baljore caused death of two deceased Ram Awadh and Hanshraj. That according to prosecution Jagdish (P.W.4) was attacked first and thereafter Ram Awadh and Hanshraj deceased sustained Injuries. If Jagdish (P.W. 4) was not present on spot and had not sustained injuries in the same transaction the entire fabric of prosecution story goes to the wind and Baljore accused could not be convicted. He further submitted that Baljore had right to act in self defence.

27. On the other hand learned A.G.A. submitted that presence and injuries of Jagdish (P.W. 4) was wrongly disbelieved and once it was held that accused side was aggressor, all the accused were liable for the murder of two deceased and causing hurt to Jagdish (P.W. 4). That the Trial Court had totally ignored the implication of Section 34 I.P.C. and wrongly acquitted the three accused Tikori, Mohar and Tapsi.

28. We have given anxious consideration to the above submissions made by the learned counsel for the parties.

29. Since both appeals are being disposed of simultaneously and Government appeal filed by the State of U.P. is against acquittal, the principle to be followed by the appellate Court considering an appeal against an order of acquittal is to interfere only when there are 'compelling and substantial reasons' for doing so. If the order is 'clearly unreasonable' it is a compelling reason for interference (vide

Jaswant Singh v. State of Haryana (2000) 4 JT (SC) 114 : AIR 2000 SC 1833). The principle was elucidated by Apex Court in Ramesh Babulal Doshi v. State of Gujarat (1996) 6 JT (SC) 79 : AIR 1996 SC 2035 as below :-- (at pp. 2037-38, para 7 of AIR)

The Court has repeatedly laid down that the mere fact that a view other than the one taken by the Trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the Trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the Trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then----- and then only-----reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the finding of the Trial Court are sustainable or not.

30. In the light of above principle we have to consider the evidence on record and the findings recorded by Trial Court.

31. It is disputed that Ram Awadh and Hanshraj deceased sustained spear injuries in the occurrence and died due to above injuries. It is also not disputed that accused Baljore and Tapsi had also sustained injuries in the same transaction. The case of the prosecution was that the four accused armed with spear and Lathi raided the house of Ram Awadh deceased, to take revenge of the quarrel which took place in the morning between daughter of Rani Awadh and son of Baljore and started inflicting Lathi injury on Jagdish (Jagarjit) (P.W. 4). Hanshraj also came there. Baljore and Mohar caused spear injuries to Ram Awadh and Hanshraj and the prosecution side acted in self defence by wielding Lathi and sickle, due to which Baljore and Tapsi also sustained injuries. On the other hand, the case of the

accused was that Ram Awadh, Hansharaj, Balli and Ramraj were uprooting wheat crop of Baljore on the date and time of occurrence and when Tapsi objected them, they abused him and altercation took place between them. The accused Baljore also reached there and snatched spear of Ram Raj. Ram Awadh and Hansharaj attacked on Tapsi with spears. Baljore acted in self defence and wielded spear due to which Ram Awadh and Hansharaj sustained injuries. Therefore, the question, which arises for determination in these appeals is as to which party was aggressor and which party acted in self defence.

32. The place of occurrence is relevant and material for deciding the question of aggressorship. The prosecution alleged that occurrence took place in front of the house of Ram Awadh deceased, while according to defence version it took place in wheat field of Baljore accused situated towards north of house of Ram Awadh. The ocular witnesses of the prosecution namely Ramraj (P.W.1), Vibhuti (P.W.2) and Balli (P.W.3) whose presence is admitted to accused, have categorically stated that occurrence took place in front of the house of Ram Awadh. Ram Awadh and Hansharaj admittedly, sustained injuries in the occurrence and died due to it. The specific version of the ocular witnesses was that blood had fallen on the spot. The Investigating Officer Sarbdeo Singh (P.W. 9) visited the spot and found blood in front of house of Ram Awadh. He collected blood stained and simple earth, which were sent to Chemical Examination for analysis and report. The prosecution tendered in evidence the report of Chemical Examiner and Serologist (Ext. Ka-22], according to which the blood stained earth (item No. 2) contained human blood. No blood was found by the I.O. in the wheat field of accused Baljore. The injuries of Ram Awadh and Hansharaj deceased as well as that of Baljore accused were such that in all probability blood had fallen on the spot. The I.O. also did not find any crop uprooted or damaged in the field of Baljore. It is pertinent to mention at this stage that Baljore accused also lodged written report (Ext. Ka-17) of the counter version on the date of occurrence at 6.25 P.M. of 29-1-1977 which was proved by Head constable Yadunandan Singh (C.W. 1). According to above report occurrence took place at some distance from the field of Baljore and it was not mentioned in the said report (Ext. Ka-17) that occurrence took place in the wheat field. After more than three months of the occurrence i.e. on 7-4-1977 Baljore accused set up another version by moving an application to

Superintendent of Police, Azamgarh, that occurrence took place in his wheat field. However, accused Baljore disowned his written report lodged on the date of occurrence and contended that he had lodged oral report which was not correctly written. Head Constable Yadunandan Singh (C.W. 1) repelled the suggestion of the accused that he had changed the report of Baljore. It is evident that the defence version regarding place of occurrence set up in subsequent application dated 7-4-1977 (Ext. Ka-3) was subsequent development and was prepared to suit the story set up by the accused. The presence of human blood on the spot confirms the place of occurrence alleged by the prosecution and there being no corroboration regarding the place of occurrence suggested by the accused, the same cannot be believed.

33. Regarding origin and genesis of the occurrence, the prosecution alleged that in the morning of occurrence Km. Kamli daughter of Ram Awadh deceased and Tuphaniya son of Baljore accused were removing Akari in their respective fields, which were adjacent to each other and some altercation took place between them at about 8.00 A.M. That Balli (P.W. 3) and Ayodhya intervened the altercation and children went to their respective houses. Thereafter, on account of above incident between the children the accused persons armed with spears and Lathi raided the house of Ram Awadh deceased to wreck their vengeance and to show their might. Balli (P.W. 3) had witnessed quarrel between Km. Kamli and Tuphaniya which took place at about 7-8 A.M. at a distance of 20 paces from his house. There is no ground to discard the evidence of Balli (P.W. 3) on this point. The above version also finds place in the F.I.R. and the evidence of other ocular witnesses.

34. On the other hand the origin and genesis of the occurrence set up by the accused was that Balli (P.W. 3), Ram Raj (P.W. 1), Hanshraj and Ram Awadh deceased were uprooting wheat crop standing in the field of Baljore. Ram Awadh and Ram Raj were having spear and when Tapsi accused objected them, the above person attacked on him with spear and Lathi. Baljore also reached there in the mean time and he snatched spear of Ram Raj and acted in self defence. But in his initial cross report dated 29-1-1977 (Ext. Ka-17) Baljore had mentioned that Balli and Ram Raj were uprooting his wheat crops and his son Raghu Raj objected them. Thus, the initial version regarding origin and genesis of marpit set up by the

accused has been contradicted by subsequent version set up after three months in application (Ext. Kha-2).

35. The occurrence had taken place in the month of January when wheat crop is not ripe. There appears no occasion for the prosecution side to uproot unripe wheat crop specially when no reason for the same has been shown by the accused. As mentioned above, the I.O. had not found any up rooted or damaged wheat crop in the field of accused. Thus, the version of origin and genesis of occurrence set up by the accused side is self contradictory not supported with any evidence and is also improbable.

36. On consideration of the evidence on record we fully agree with trial Court occurrence originated as alleged by the prosecution, occurrence took place in front of house of Ram Awadh deceased, the accused side was aggressor, prosecution witnesses acted in self defence and that the accused had no right of self defence.

37. The case of the prosecution is that Jagdish (P.W. 4), S/o Ram Awadh was milching his cow in front of his house. On arrival of all the accused Tapsi attacked and started causing Lathi blows on him. When Ram Awadh and Hanshraj intervened they were given spear blows by Baljore an Mohar accused. Much controversy has been raised by the accused regarding presence of Jagdish (P.W. 4) and sustaining injuries by him in the same transaction in which Ram Awadh and Hanshraj, deceased, sustained injuries. The contention of the accused was that on the date of occurrence Jagdish (P.W. 4) was at his Nanihal and came to his village on next day. The learned Sessions Judge has also disbelieved the presence of Tapsi on the spot at the time of occurrence and injuries on his person in the same transaction on the following grounds:-

1. In the F.I.R. end in the evidence of Ramraj (P.W. 1) and Balli (P.W. 3), the presence of one Jagarjit is mentioned and name of Jagdish does not fin place in the F.I.R.

2. Vibhtui (P.W. 2) tried to explain that Jagdish had his alias as Jagarjit, but this was denied by Ramraj (P.W. 1).

3. Ramraj (P.W. 1) Balli (P.W.3) and Jagdish (P.W.4) gave different colours of cow, which Jagdish (P.W. 4) was allegedly milching at the time of occurrence.

4. Jagdish (P.W.4) stated that he saved himself and his father and uncle by plying sickle, but this fact is not mentioned in the F.I.R. and Punctured wounds of Baljore and Tapsi accused could not be caused by sickle.

5. The injuries of Jagdish (P.W. 4) were not examined on the date of occurrence, but on subsequent date and the Doctor opined that his injury could be self suffered.

38. We have carefully gone through the evidence of prosecution witnesses in this regard and given anxious consideration regarding presence of Jagdish (P.W. 4) on the spot and injuries on his person in the same transaction.

39. No doubt, in the F.I.R. (Ext. Ka-1) it is mentioned by Ramraj (P.W. 1), the informant, that at the time of occurrence he and his brother Ram Awadh were at their houses. His nephew Jagarjit was milching cow in front of the house. It is also mentioned that Jagarjit sustained Lathi injuries in the same transaction. In his evidence, Ramraj (P.W.1) again stated that Jagarjit was also with him and was milching cow. In his cross examination, he clarified that his brother Ram Awadh had three sons; (1) Jagdish, (2) Jagarnath and (3) Suresh. At several places in his cross examination he had mentioned name of Jagdish (P.W. 4) as Jagjit. It is true that he has stated that Jagarjit had only one name. Vibhuti (P.W. 2) stated that at the time of occurrence, the son of Ram Awadh namely Jagjit @ Jagarjit was milching cow and he was also called as Jagdish. Balli (P.W. 3) named him as Jagjit and Jagdish (P. W.4) has given his name as Jagdish. His injury report also shows that he gave his name as Jagdish. No doubt, the witnesses have given different names of Jagdish as Jagarjit, Jagjit and Jagdish, but it is not disputed that he is son of Ram Awadh, deceased. It has been clarified by Ramraj (P.W. 1) that Ram Awadh had three sons namely Jagdish, Jagarnath and Suresh, The initial case of the prosecution, from the very beginning, was that son of Ram Awadh and nephew of Ramraj (P.W. 1) was milching cow at the time of occurrence. The other two sons of Ram Awadh were Jagarnath and Suresh. Thus, the presence of son of Ram Awadh named Jagarjit or Jagjit or Jagdish had been

alleged by the prosecution from the very beginning. It is not the case of the accused that Jagdish (P. W.4) had some other parentage and was not son of Ram Awadh. The witnesses of this case are illiterate villagers. They generally do not pronounce correct name of a person. If the different villagers pronounce name of a person differently, it cannot be said that person itself has been changed. Therefore, different pronunciation of name of Jagdish (P.W.4) given by Ramraj, Balli and Vibhuti does not indicate that Jagdish (P.W. 4) was not the son of Ram Awadh and some other son of Ram Awadh was milching cow at the time of occurrence.

40. Much importance has been given by defence as well as the learned Sessions Judge on the colour of cow which Jagdish (P.W.4) was milching at the time of occurrence. No doubt Ram Raj (P.W. 1) stated that colour of cow was 'white', Vibhuti (P.W.2) stated that colour of cow was 'dhawar' and Balli (P.W.3) had given its colour as 'sokan'. Dhawar and sokan have not been got explained by the learned counsel for the defence in the cross examination of the witnesses. The difference in the colour given by the witnesses is not very much material to rule out the presence of cow, which Jagdish (P.W.4) was milching. Therefore, on the above ground the factum of milching cow by Jagdish (P.W.4) at the time of occurrence cannot be disbelieved.

41. It is true that in the F.I.R. it is simply mentioned that injured and deceased caused injuries to accused in their self defence. In their evidence Ram Raj (P.W.I), Vibhuti (P.W.2) and Balli (P.W.3) stated that Jagarjit (Jagdish) (P.W.4) plied sickle in his defence. Accused Baljore and Tapsi admittedly sustained injuries in the same transaction in which deceased Ram Awadh, Hansraj and injured Jagdish (P.W. 4) sustained injuries. The injuries of Baljore and Tapsi accused were examined on the date of occurrence by Dr. B.P. Pandey (P.W. 10) which were as below :-

Injuries of Baljore

1. Punctured wound 2 /10' x 1 /10' x 1 / 10' at the back of left little finger 1W below the top of the same finger.

2. Contusion with swelling 2 1/2" x 2' x 8' below the left elbow on the left forearm Lateral aspect.
3. Contusion with swelling 2 1/2" x 1 1/2 on the right upper and outer surface 2 1/2' above the right elbow joint.
4. Complain of pain on the right knee joint.
5. Punctured wound 2/10' x 1/10' x 2/ 10' on the right side of the back of chest. 6 1/2" from right nipple. Wound was not bleeding.

42. The Doctor opined that all injuries were simple. Injuries No. 1 and 5 were caused by pointed sharp edged weapon and rest by blunt weapon. Duration about 1/3 days.

Injuries of Tapsi

1. Punctured wound 2' x 1/10' x 3/10' over the chest (left side), 3-2/10' from the left nipple and 7' from the umbilicus. Wound was not bleeding.
2. Contusion with swelling 2 1/2' x 1/2' over the right forearm. 6V2' from the tip of the thumb of the same side.

43. The Doctor opined that both injuries were simple caused by No. 1 pointed sharp edged weapon No. 2 blunt weapon. Duration was 1/3 days.

44. Dr. B.P. Pandey (P.W. 10) has stated in his cross examination that injuries Nos. 1 and 5 of Baljore could be caused sickle. The injury No. 1 of Tapsi could also be caused by sickle but it will depend on the shape and size of sickle. In case, the front portion of sickle was pointed and having edge on one side, the above injuries of Baljore and Tapsi could be caused by such sickle. In case, the sickle was pointed, in that case also the above injuries of above accused could be caused. However, he stated that if the blade of sickle was about 2 'Angul' wide, then in that case, the above injuries could not be caused by sickle. He also opined that above injuries of Baljore and Tapsi could also be caused by spear. Vibhuti (P.W.2) stated that sickle of Jagjit was straight edged. Balli (P.W.3) stated that sickle of Jagdish was curved and had sharp edge on one side. However, he stated

that blade of Hasuwa was about 2 'Angul wide. Jagdish (P. W. 4) stated that blade of sickle was curved on front side. It has sharp edge on inner side and no edge on outer side. Its blade was about 2 'Angul' side. It is true that I.O. had not taken into possession the sickle, which was used by Jagdish (P. W. 4). Sickle is a weapon, which is meant for cutting grass and crop. Generally it has curved shape, but some sickle have semi curved shape. Its blade has different width and generally pointed edge in the end. Thus, it is a weapon, which is pointed as well as sharp edged. The statement of Balli (P. W. 3) and Jagdish (P. W. 4) that blade of sickle was 2' wide does not mean that its blade was 2 'Angul' wide from beginning to end. The above dimension is regarding blade of the sickle in the beginning and middle. Therefore, in view of the evidence of Dr. B. P. Pandey (P. W. 10), the punctured wound of Baljore and Tapsi, in all probabilities could also be caused by sickle, which has pointed and sharp edge. Therefore, the injuries of Baljore and Tapsi accused supported the prosecution version that the Jagdish (P. W. 4) plied sickle.

45. It is true that injuries of Jagdish (P. W. 4) was examined on 30-1-1977 and not on 29-1-1977 on which date, the occurrence took place. On perusal of injuries of Jagdish (P. W. 4) it shows that he had sustained two contusion and had complain of pain. His injuries were not of serious nature as that of Ram Awadh and Hansraj deceased. It is in the evidence of Ramraj (P. W. 1) that Jagdish had not gone to the police station and hospital on the date of occurrence. The I.O. interrogated Jagdish (P. W. 4) on the next day and sent him for medical examination. Ram Awadh and Hansraj were taken to hospital by Ramraj and other persons of the village. In these circumstances the possibility that Jagdish (P. W. 4) who had not sustained serious injury, was left at the house for protection of ladies and children, cannot be easily ruled out. Therefore, the examination of injuries of Jagdish (P. W. 4) on the next day of occurrence does not rule out his presence on the spot and sustaining injuries in the same transaction specially when the duration of his injuries tallies with the duration of injuries of two deceased and two accused.

46. No doubt Dr. B. P. Pandey (P. W. 10) has stated that injuries of Jagdish (P. W. 4) could be self suffered, but there was no occasion for the prosecution to manufacture injuries on Jagdish (P. W. 4). His presence and sustaining Lathi injury

by him are mentioned in the F. I. R. and the occurrence took place in front of his house. If, the prosecution had to manufacture injuries on Jagdish (P. W. 4) it could have manufactured some injuries on Ramraj (P. W. 1) also. Therefore, there is nothing on the record to infer that injuries of Jagdish (P. W. 4) were manufactured or self suffered.

47. The suggestion given by the defence was that on the date of occurrence Jagdish (P. W. 4) was at his Nanihal. The above suggestion was repelled by the prosecution witnesses and there is no evidence to prove the same. Therefore, the above bald suggestion without any evidence cannot be accepted.

48. In view of above facts and circumstance of the case and the evidence referred to above, no other view than to believe the presence of Jagdish (P. W. 4) on the spot can be formed. The learned sessions Judge ignoring the evidence on record wrongly held that presence of Jagdish (P. W. 4) at the time of incident and using sickle in self defence is suspicious. Therefore, we are of the irresistible conclusion that Jagdish (P. W. 4) son of Ram Awadh is the same person, who was called Jagarjit or Jagjit by the prosecution witnesses. He was present on the spot and sustained injuries in the same transaction in which Ram Awadh and Hansraj sustained injuries.

49. The occurrence, admittedly, took place at 9.00 a.m. The report of the occurrence was lodged by Ramraj (P. W. 1) at 8.50 p.m. The distance of police station is 5 miles. Two persons had sustained severe injuries and one person non serious injuries. Ram Awadh and Hansraj, who were alive at that time, were also taken to police station. Some time must have been consumed in making arrangements to take the above two persons to the police station. The date, time and place of occurrence as well as participation of two accused in the said occurrence is admitted to the accused and therefore, the delay, if any, in lodging the report becomes insignificant.

50. Now it is to be considered whether the occurrence took place in the manner alleged by the prosecution or as suggested by the accused. On the manner of occurrence and complicity of accused, the prosecution relied on ocular testimonies of Ramraj (P. W. 1), Vibhuti (P. W. 2), Balli (P. W. 3) and Jagdish (P. W. 4). As

held above occurrence had taken place in front of the house of Ramraj (P. W. 1) and his brother Ram Awadh deceased. The presence of Ramraj (P. W. 1) was therefore, natural and probable. The presence of Ramraj (P. W. 1) on the spot was not disputed as admitted by the Baljore accused in his earlier report (Ext. Ka. 17) and subsequent application moved to Superintendent of Police (Ext. Kha-3). The witness is also informant and had lodged the report. The other eye witnesses of the occurrence are Vibhuti (P. W. 2) and Balli (P. W. 3). According to Vibhuti (P. W. 2) at the time of occurrence he was present under pakad tree in front of house of Balli and was talking with Balli (P. W. 3) and Ayodhya. The door of Ram Awadh was at a distance of 10 paces towards east and was visible from there. According to Balli (P. W. 3) at the time of occurrence he was in front of his house, which is at a distance of 10 paces from the house of Ram Awadh. The accused have also admitted the presence of Vibhuti (P. W. 2) and Balli (P. W. 3). The presence of Jagdish (P. W. 4) on the spot is also proved as held above. Jagdish (P. W. 4) had also sustained injuries in the same transaction and therefore, the presence of all ocular witnesses namely Ramraj (P. W. 1), Vibhuti (P. W. 2), Balli (P. W. 3) and Jagdish (P. W. 4) is proved. Ramraj (P. W. 1) is no doubt real brother of Ram Awadh, deceased and Jagdish (P. W. 4) is the son of said Ram Awadh, deceased, but their above relationship is no ground to discard their testimony. Vibhuti (P. W. 2) and Balli (P. W. 3) are residents of the same village and no specific enmity, ill will or grudge has been proved against them. In these circumstances, they are natural and independent witnesses.

51. It was contended that there is material contradiction in the statement or ocular witnesses and F. I. R. version. It was pointed out that in the F. I. R. it is not mentioned, which weapons were used in self defence. That Ramraj (P. W. 1) stated that Jagdish (P. W. 4) plied sickle in his self defence, but in his cross examination he stated that Ram Awadh was plying Lathi. Vibhuti (P. W. 2) stated that Ram Awadh plied Lathi and Jagdish (P. W. 4) sickle in their self defence. In his cross examination he stated that none had caused injuries to Baljore. That Balli (P. W. 3) also stated that Ram Awadh plied Lathi and Jagdish (P. W. 4) sickle in their self defence. Jagdish (P. W. 4) stated that he plied sickle in his self defence and his father Ram Awadh was having a small stick and that Baljore and Tapsi sustained injuries by sickle plied by him. As mentioned above punctured wounds

sustained by Baljore and Tapsi accused could be caused by sickle. It is also in the evidence of prosecution witnesses that Ram Awadh deceased also plied Lathi. Both the accused sustained punctured wounds and contusions which could be caused by sickle and Lathi. Minor discrepancies in the evidence of ocular witnesses pointed out above are not very much material. As minor discrepancy or variance in evidence will not make the prosecution's case doubtful. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement.

52. The Trial Court on the basis of evidence on record has concluded as below:-

To sum up the following conclusion follow on an appraisal of the evidence on record and the circumstances of the case (1) The occurrence initiated and took place on the place and at the time in the manner alleged by the prosecution. (2) Accused Tapsi armed with Lathi and other including Baljore armed with spear arrived at the door of the deceased Ram Awadh well prepared to wreck vengeance on him as sequel to the morning quarrel between the children. The accused were necessarily aggressors. (3) The deceased Ram Awadh and Hansraj caused hurt to Baljore and Tapsi with a view to repeal aggression made by them and (4) The accused assailants had no right to inflict injuries to the victims of their aggression in exercise of right of defence of person and property. At the time of the incident they cannot claim clothed with any such right.

53. By adopting date, time, place and manner of occurrence as alleged by the prosecution and rejecting defence version treating the same as 'improbable and untrue' the Trial Court wrongly held that Jagdish (P. W. 4) was not present on the spot, did not sustain injury in the same transaction and did not act in self defence, by making out a third case. Therefore, we are of the view that above later findings of the Trial Court is 'clearly unreasonable' and against the evidence on record which cannot be sustained.

54. The Trial Court while dealing with participation of all or some one among the accused in the commission of the crime held as below:-

It is not in dispute that the accused Baljore and Tapsi were present during the incident. Baljore had admitted to have inflicted injury. Tapsi himself was injured during the incident. Mohar and Tikori have denied their participation. Ramraj (P. W. 1) has named on Kishore among the assailants. As regards Tikori it is alleged and evidenced that spear blow given by him missed. On the evidence offered in the case the presence of Tikori is rendered doubtful and it can also not be safely held which one among Kishore, Mohar and Tikori was the actual assailant. On a closer scrutiny of the prosecution evidence and participation of said accused in commission of crime is not found to be established beyond doubt. They may be accorded benefit of doubt. On the prosecution allegation Tapsi was armed with lathi. He hit Jagdish (P. W. 4). However, presence of Jagdish (P. W. 4) has not been proved beyond doubt. Tapsi himself was injured. He admittedly did not cause injury to the deceased. Tapsi under the circumstances cannot be held to have shared his intention to cause such bodily injury to the deceased so as to cause their death. He may also, therefore, be accorded benefit of doubt.

55. The above finding besides being against the evidence on record is also against the application of Section 34, I.P.C. with the aid of which all the accused were charged with. The nature of participation under Section 34, I.P.C. has been considered by Hon'ble Supreme Court in the case of Ramaswami Ayyangar v. State of Tamil Nadu (1976) 3 SCC 779 at page 783 : AIR 1976 SC 2027 at p. 2031 as below :-

Section 34 is to be read along with the proceeding Section 33 which makes it clear that the 'act' spoken of in Section 34 includes a series of acts as a single act. It follows that the words 'when a criminal act is done by several person' in Section 34, may be construed to mean 'when criminal acts are done by several persons'. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an 'act' as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person

who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act. The essence of Section 34 is simultaneous consensus of the minds of the persons participating in of the criminal action to bring about a particular result.

56. The principle laid down in the above case was also relied on by the Hon'ble Supreme Court in the case of *Jaswant Singh v. State of Haryana* (2000) 4 JT (SC) 114 : AIR 2000 SC 1833 and it was held that the emphasis is on physical presence and promotion or facilitation of the crime. In the instant case we find in the evidence on record that all the four accused armed with spears and lathi, in order to wreck vengeance as sequel to the morning quarrel between children, raided the house of Ram Awadh deceased. This shows that all the accused had premeeting of their mind and had common intention to commit the offence complained and all were present on the spot at the time of commission of the offence. Therefore, the above presence of all the accused who in one way or the other facilitated the execution of the common design, is itself tantamount to actual participation in the criminal act. Thus the approach of the trial Court in ignoring the liability of all the accused persons specially Mohar, Tikori and Tapsi on the ground that they had not actually participated in causing injuries to the deceased and injured was demonstrable perversity.

57. No doubt Tikori and Mohar accused have pleaded that they were not present on the spot and were falsely implicated. But the prosecution witnesses categorically stated that they were present armed with spears. The accused had not led any evidence either oral or documentary to show that they were elsewhere at the time of the occurrence. Their presence having been proved by the evidence of ocular witnesses and F. I. R. clearly shows that they shared common intention and participated in the crime.

58. The Trial Court has observed that Ramraj (P. W. 1) has not named Tikori and in place of him he has named one Kishori. It is true that in his examination in chief

of Ramraj (P. W. 1) gave the name of Kishori. But it appears a clerical mistake as it is clear from his subsequent cross examination dated 22-1-1979 when he stated that it is wrong to say that he had not mentioned the name of Tikori in the F. I. R. and he also denied the suggestion that the name of Tikori was subsequently added. The witness was not cross examined on the point as to how he stated the name of Kishori in his examination in chief. The other ocular witnesses Vibhuti (P. W. 2), Balli (P. W. 3) and Jagdish (P. W. 4) have specifically stated the name of Tikori accused and they have not named any Kishori. Therefore, it cannot be said that Ramraj (P. W. 1) had not mentioned the name of Tikori and the Trial Court wrongly gave much weight to the clerical mistake occurring in the examination-in-chief of Ramraj (P. W. 1).

59. The Trial Court itself has admitted the presence of Tapsi accused and from the evidence on record it is proved that Tapsi accused had caused lathi injuries to Jagdish (P. W. 4) and thus actively participated in the offence and also shared common intention. The Trial Court, thus, wrongly accorded benefit of doubt to Mohar, Tikori and Tapsi accused, as benefit of doubt is not a legal dose to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the judge conscientiously and reasonably entertains doubt regarding the guilt of the accused. As mentioned above accused Tikori and Mohar would not establish their plea of alibi and the ocular witnesses have categorically stated about their presence with arms on the spot and participation of Mohar in causing spear injury to Hans Raj. Therefore, the concession of benefit of doubt to the accused Tikori, Mohar and Tapsi could not be reasonably entertained.

60. Thus, we find that each of the reason given by the Trial Court for disbelieving the presence of Jagdish (P. W. 4) and participation of all the accused is either legally unsustainable or factually incorrect. On comprehensive view of the materials on record we are fully satisfied that the prosecution has been able to prove beyond reasonable doubts that accused Mohar, Tikori, Tapsi along with Baljore were among the assailants and their guilt for the offences punishable under Section 320 read with Section 34, I.P.C. and Section 323 read with Section 34, I.P.C. has been established. They have also been charged with the offence

punishable under Section 324 read with Section 34, I.P.C. for voluntarily causing hurt to Hansraj and Ram Awadh by means of spear in furtherance of their common intention. But for this purpose they have been held liable for the offence punishable under Section 302 read with Section 34, I.P.C. and therefore, they need not be convicted under Section 324 read with Section 34, I.P.C. Thus, the appeal preferred by Baljore accused is liable to be dismissed and the appeal preferred by the State of U. P. is to be allowed.

61. We, accordingly, dismiss the Criminal Appeal No. 1659 of 1979 preferred by Baljore accused and confirm his conviction and sentence of imprisonment for life under Section 302 read with Section 34, I.P.C. instead of Section 302, I.P.C. simpliciter. We, accordingly, allow the Government Appeal No. 2819 of 1979 preferred by the State of U. P., set aside the acquittal of accused Tikori, Mohar and Tapsi and convict each of them under Section 302 read with Section 34, I.P.C. and Section 323 read with Section 34, I.P.C. and sentence each of them to undergo imprisonment for life under Section 302 read with Section 34, I.P.C. and to undergo R. I. for a period of one year under Section 323 read with Section 34, I.P.C. It is made clear that both the sentences shall run concurrently. The accused Baljore, Tikori, Tapsi and Mohar are on bail granted by this Court. They shall surrender before the Chief Judicial Magistrate, Azamgarh to serve out their above sentences.

62. Office is directed to send a copy of this order within a week to Chief Judicial Magistrate, Azamgarh for securing arrest of accused and sending them to jail who shall submit compliance report within a month. Order accordingly.

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