

Mir Singh and ors. Vs. State

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Court : Delhi

Decided On : Feb-09-1984

Reported in : 1984(6)DRJ351

Judge : R.N. Aggarwal and; Malik Sharief-Ud-Din, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 307, 324, 325 and 326

Appeal No. : Criminal Appeal No. 179 of 1976

Appellant : Mir Singh and ors.

Respondent : State

Advocate for Def. : G.S. Sharma and ; D.C. Mathur, Advs.

Advocate for Pet/Ap. : R.K. Naseem, Adv

Disposition : Appeal dismissed

Judgement :

Malik Sharief-Ud-Din, J.

1. Shri P.L. Singla, Additional Sessions Judge, Delhi found the appellants guilty under Section 325/34 IPC as well as under Section 325/34 IPC. The conclusions arrived at by him were that the appellants had caused grievous hurt on the right wrist of Kanhaiya Lal PW1 and had also caused hurt on Batto and Chanderwati

PWs. 3 and 4. They were also convicted under Section 325/34 IPC for causing hurt to Kanhaiya Lal and Chanderwati PWs. 1 to 4. After finding the accused guilty and convicting them for the aforesaid offences Charnel and Ajit Singh appellants who were found to be under 21 years age and first offenders were ordered to be released on probation of good conduct on their entering into a bond in the sum of Rs. 5,000/- with one surety each in the similar amount to appear and receive the sentence when called upon during the period of one year and in the meantime to keep peace and be of good behavior. Appellant Mir Singh was refused the benefit of PROBATION OF OFFENDERS ACT and was sentenced to undergo rigorous imprisonment for one year under Section 325/34, to rigorous imprisonment for six months under Section 325/34 and to rigorous imprisonment for three months under Section 325/34 IPC. All the sentences were directed to run concurrently.

2. Aggrieved by the order of conviction and sentence all the three appellants have preferred this appeal. The State has also moved an acquittal appeal No. 368/76 (State v. Mir Singh and others) on the ground that after having charged the accused under Section 307/34 IPC, the learned Additional Sessions Judge did not apply his mind as to whether the offence under Section 307/34 is made out or not. This has been treated as acquittal of the accused under Section 307/34 IPC as a result of which the State was obliged to file a counter appeal.

3. We may make a reference, though briefly, to the facts leading to the prosecution of the appellants. These have been unfolded by PW4 Chanderwati. The facts are that on 22nd September 1973, when Chanderwati was guarding the crop in her field the appellant Charan Singh alias Charnel drove his she-buffalos into the said fields. On the refusal of Charan Singh to drive them out of the field Chanderwati herself drove them out. This is said to have provoked Charan Singh who abused Chanderwati and then left the scene. Within next 15/20 minutes, while Chanderwati was returning to her house and reached near the turning of her Gali, all the three appellants armed with lathis and knife appeared on the site and at the asking of Mir Singh appellant 'ISKO MAZA CHAKHA DO' the accused Charan Singh gave a lathi blow on her leg, Mir Singh also charged her leg with lathi. Ajit Singh, who was armed with knife, gave two knife blows on the calf of her left leg. At this stage, her son PW 2 Dev Singh who was coming out of his house also

raised an alarm which attracted Chanderwati's husband, Kanhaiya, her daughter Batto and her mother-in-law Samli together with one Manohar Lal and Bhagwat who were sitting in their house. They came to rescue Chanderwati but immediately on their arrival Ajit Singh appellant, who was armed with knife, gave knife blows on the head, back and the calf of Kanhaiya. Mir Singh and Charnel appellants, who were armed with lathis charged Kanhaiya with lathis and struck him on his head, back and leg. While this was going on the appellant Mir Singh is said to have exhorted the other appellants in these words 'ISKO KHATAM KAR DO'. As a result of this beating, Kanhaiya Weeded and fell unconscious. Batto, another victim, raised alarm and Mir Singh appellant again exhorted the other appellants saying 'IS SALI KO BHI MAZA CHAKHA DO' and simultaneously he inflicted lathi blows on her leg. Charnel appellant also charged her with lathi while Ajit Singh appellant gave knife blow on the abdomen of Batto. Thereafter, the accused are said to have escaped from the scene of occurrence. At the time of incident Batto was carrying a baby in her womb.

4. The report in this regard was transmitted to police by Dev Singh P.W.2 on telephone and on the arrival of police they found Kanhaiya, Chanderwati and Batto lying injured. The statement of Dev Singh PW2 marked as Ext. PW2/A was recorded and the injured were removed to Willingdon hospital. The report, Ext. PW13/A came to be recorded by Head Constable Sat Parkash who in pursuance of the statement of Dev Singh PW2 recorded a formal F. I. R. No. 753, Police Station, Tilak Nagar, dated 22-9-73 at 1.45 PM now marked as Ext. PW13/C. S.I. Sampuran Singh who had reached the scene of occurrence removed the injured to the hospital and investigated this case. On arrival in the hospital, Dr. V. P. Vasudeva PW10 examined the injured and recorded medico-legal certificates of Batto, Kanhaiya Lal and Chanderwati which are marked as PW8/B, PW 8/D and PVV10/B. On the same day S.I. Sampuran Singh, who was investigating the case, records the statements of the victims Batto and Chanderwati. Kanhaiya, who was not fit to make a statement on 22-9-73 was examined by the police on 2-10-73.

5. We have heard the learned counsel for the parties at length and given our anxious thought to the facts and evidence. The prosecution has examined as many as 13 witnesses, while the defense has also examined one witness, namely,

Chandgi Ram. Before consideration of the points raised during the course of arguments, we may take notice of the stand taken by the accused in their statements under Section 313 Cr. P.C. Accused Charan Singh and Mir., Singh have pleaded alibi. Accused Charan Singh has said that at the time of incident he was present in the school while accused Mir Singh has said that he reached the place of occurrence artery 2/4 minutes of the incident when between 20 to 30 people had already assembled and it were they who told him about the incident. In respect of the fact as to how the incident took place the stand of accused Mir Singh is similar to the one taken by Ajit Singh appellant. Ajit Singh appellant has said that on the day of incident some gravel belonging to them was lying near the wall of their Chakki and on finding Chanderwati and Batto stealing the same and filling their 'taslas' with gravel he snatched it from them; that while snatching Tasla from Batto there was a quarrel. In this scuffle he gave a push to Batto resulting in her fall on the ground; that Chanderwati then threw stones at him and in retaliation he inflicted an injury with a stone on her; that at that stage Kanhaiya Lal also appeared on the scene and started beating him and then there was a free exchange of brick bats between them. According to him, his rather reached on the spot within one or two minutes after he had pushed Batto and that between 20 to 30 people assembled on the spot; that his father went to lodge a report and police removed Kanhaiya Lal, Batto and Chanderwati to the hospital.

6. This would show that the fact of the incident having taken place on that day between the parties is undisputed. All that the accused want the court to believe is that the genesis and sequences of the occurrence was different than what is suggested by the prosecution and that the occurrence took place in the premises of the accused in a different context than the one put forward by the prosecution. It is also suggested that the occurrence took place only between Ajit Singh and the three victims Chanderwati, Kanhaiya and Batto. it is also suggested by the accused that no use of lathis or knife was made and the injuries sustained by the victims were as a result of brick-batting. Accused Ajit Singh has not indicated as to how incised wounds were inflicted on the person of Kanhaiya Lal and Batto. The other two accused Mir Singh and Charan Singh have attempted to keep themselves out of the incident by raising the plea of alibi.

7. In this case prosecution has led evidence of three sets of witnesses. The first set consists of the statements of eye-witnesses namely, PW1 Kanhaiya Lal, PW2 Dev Singh, PW3 Batto, PW4 Chanderwati, PW5 Samli, PW6 Bhagwat Singh and PW7 Manohar Singh. The next set of witnesses consists of statements of PW8 Charan Das Chauhan, PW9 Dr. B. B. Kathuria Radiologist, PW10 Dr. V. P. Vasudeva, and PW11 Dr. M. Sarkar. The third set consists of PW12 Subhash Chand S.I. and PW13 Sampuran, Singh S.I.

8. At this stage we may take notice of the testimony of these eyewitnesses on whom reliance was placed by the learned Additional Sessions Judge. PW1 Kanhaiya Lal, one of the victims, has said that while his wife was returning from the field, all the three appellants had garaged her and had started an assault on her. On hearing alarm he along with his daughter Batto rushed towards the scene where Mir Singh and Charan Singh appellants were found giving lathi blows to his wife while two knife blows on her calf and right leg were inflicted by appellant Ajit Singh; that when he together with his daughter Batto went to rescue Chanderwati, Ajit Singh accused attacked him with knife and inflicted injuries on the right side of his fore-head, on his right thumb and on his back. As a result of lathi blow his little finger was fractured and another knife injury was caused above the ankle of his left leg. Charan Singh and Mir Singh gave lathi blows as a result of which his left leg was fractured. Ajit Singh gave a knife blow on the right side of abdomen of his daughter Batto who was carrying a child of five months in her womb; that PW Samli, Bhagat Singh and Manohar witnesses also saw the occurrence. Further says that this Was done by the accused in pursuance of exhortation by Mir Singh appellant to the effect 'IN KO KHATAM KARDO, INKO MAZA CHAKHADO, MEIN DEKH LOONGA.' Further says that he regained consciousness next day and was discharged after 17 days from the hospital; that his daughter was discharged from the hospital after 21 days; that he had received 4/5 lathi blows. He has also said that about 5 to 7 months before this incident Mir Singh appellant while under the influence of liquor had abused his wife who in turn also abused him; and that Mir Singh had then threatened to avenge her.

9. PW2, Dev Singh has started that on seeing his mother being assaulted, he raised an alarm as a result of which his father and sister came to spot. He saw

appellant Mir Singh and Charan Singh wielding lathis and Ajit Singh appellant armed with knife chasing his mother. Further says that his mother was given lathi blows by Mir Singh and Charan Singh and was given knife blows by Ajit Singh. On the intervention of his father Kanhaiya and his sister, Batto, Kanhaiya was hit with lathis by Mir Singh and Charan Singh while Ajit Singh accused inflicted knife blows on the fore-head and back of his father and also inflicted a knife blow on the abdomen of his sister Batto, who was pregnant at that time. That lathi blows were inflicted on the right thumb, left little finger and the leg of his father. Further says that his grand mother Samli, Bhagwat Singh and one or two neighbours were present. He rang up the police station and on the arrival of police his statement, Ext. PW2/A was reduced into writing. He was confronted with the statement, Ext. PW2/A made before the police in respect of the absence of certain minor details, but from our point of view these are not material for the decision of this case. He says that the statement of his mother was recorded in the hospital at about 1.15PM on the same day. He has also testified that at the time of occurrence accused Mir Singh exhorted the other accused to do away with them.

10. PW3, Batto, daughter of Kanhaiya, one of the victims, has made a similar statement as has been made by PW1 Kanhaiya. According to her she remained in door in the hospital for about 25/26 days and thereafter was also under treatment as an out-door patient. Suggestion that while removing the Bajri of appellants they had a quarrel with appellant Ajit Singh in which they sustained injuries was repelled by her.

11. PW4 Chanderwati, after giving a background of what transpired between her and Charan Singh appellant in the field when he pushed his she-buffaloes into the field, has said that while she was returning from the field, all the three accused came on the turning of her Gali; that Mir Singh and Charan Singh were armed with lathis while Ajit Singh appellant was armed with knife; that after exhortation by Mir Singh, they charged her with lathis and Ajit Singh caused an injury with knife on the calf of her left leg; that her son was coming out of his house and when she raised an alarm, her husband Kanhaiya and daughter Batto and her mother-in-law, Samli, together with Manohar Lal and Bhagwat Singh came to rescue her; that the accused Ajit Singh inflicted a number of knife blows on her husband and the other

two accused charged him with lathis; that her daughter Batto on the exhortations of Mir Singh was first assaulted by Mir Singh and Charan Singh with lathis and was also given a knife blow on the abdomen by accused Ajit Singh. According to her she was discharged from the hospital on 4th day, her husband was discharged on 16th day while her daughter Batto was discharged after 25/26 days; that at the time when injury was caused Batto was carrying a child of five months in her womb.

12. P.W. 5 Samli has corroborated the testimony of PW Kanhaiya Lal and Batto in all material details.

13. We do not propose to reproduce the testimony of PW 6, PW 7, who are also supposed to be the eyewitnesses to the occurrence. We do so for the reason that from our point of view the learned Additional Sessions Judge has given complete justification for not relying on their testimony. We may further add that their presence at the scene of occurrence is really doubtful.

14. This brings us to the testimony of third set of witnesses, first of which is PW 8 Charan Dass Chauhan, a record clerk of the Willingdon hospital. It would appear that Dr. R.K. Gupta, FRCS, who was working as a surgeon and Dr. R.K. Jaiswal who was working as radiologist in the hospital had since gone abroad as a result of which prosecution felt it necessary to examine PW 8 to testify in respect of the writings and signatures of both these doctors. He is conversant with the writing and signatures of both the doctors. He identified endorsement Ext. PW 8/A on M.L.C, Ext. PW 8/B to be in the hand-writing of Dr. R.K. Gupta. The opinion in respect of nature of injuries on M L.C. Ext. PW 8/B has been identified by him as in the hand-writing of Dr. V.P. Vasudeva, endorsement Ext. PW 8/C on the M.L.C. Ext. PW 8/D as that of Dr. R.K. Gupta and he has also said that M.L.C. Ext. PW 8/D is in the hand-writing and under the signatures of Dr. V.P. Vasudeva. The opinion Ext. PW 8/E has been identified by him in the hand-writing of and under the signatures of Dr. R.K. Jaiswal. He further says that the present address of those doctors who have gone abroad is not available with them.

15. PW 9 Dr. B.B. Kathuria, Radiologist, with an experience since 1942 in this field was shown skiagram bearing No. 26056 dated 22-9-73 pertaining to Kanhaiya

coming from X-ray department of Willingdon hospital. He has opined that this skiagram shows fracture in the proximal phalanx of his fifth finger of right hand and the symbol at point 'A' as given in report Ext. PW 8/E denotes a fracture.

16. PW 10 Dr. V.P. Vasudeva has deposed that on 29th September 1973 he was working as Casualty Medical Officer in Willingdon hospital; that after Sampuran Singh S.I. brought the injured to the hospital, he examined them and found the following injuries on their persons respectively :-

IN respect of the victim Batto he found :

1. One clean incised wound 1.5 cm. left subcostal region,

He was of the opinion that this injury was caused by sharp edged weapon which could be knife and he referred the patient to Surgery. M.L.C. report Ext. PW 8/B is written by him. In respect of Kanhaiya Lal victim he found :

1. contused lacerated wound 2'x1/2'x1/2' on the scalp.

2. contused lacerated wound on the left leg 1/2' x 1/2'.

3. contused lacerated wound 1/2' x 1/4' on the upper portion of the back.

4. Injury on the right thumb.

This patient was also referred to surgical ward and was found semi-conscious M.L.C. Ext. PW 8/D of Kanhaiya has been proved by him. He suspected fracture of the skull, thigh, leg and wrist and as such the patient was referred for X-ray examination for which he issued requisition slip Ext. PW 10/A. On X-ray examination it was revealed that his right hand wrist was fractured. He has further testified that Dr R.K. Jaiswal Radiologist has since left the service and his whereabouts are not known; that he is conversant with his hand-writing. In respect of Chanderwati he found :-

1. Clean incised wound 1 1/2' x 1/2' x 1/2' on left leg.

2. Blunt injury on right calf.

3. Abrasion on left wrist 1/2' x 1/2'.

Injury No. 1 on left leg could be caused by sharp edged weapon like knife. The patient was referred to the fracture clinic under requisition slip Ext, PW 10/C and the MLC Ext. PW 10/B of Chanderwati is in his hand-writing. He further says that injury on the person of Batto could be caused by a fall against a sharp edged object like a glass piece; that injuries on the person of Kanhaiya and injury No. 3 on the person of Chanderwati were also possible by brickbat.

17. PW 11, Dr. M. Sarkar, has examined Ajit Singh appellant on the same day i.e. 22nd September 1973 in the same hospital. He was brought there by Sampuran Singh S.I. and he found one contused lacerated wound (2'x1/2') on the right parietal bone. He advised X-ray and referred the case to surgery side for further line of treatment. He has proved the MLC Ext. PW 11/A and requisition slip Ext. PW 11/B in respect of this patient to be in bids hand-writing.

18. The testimony of S.I. Sampuran Singh and S.I. Subash Chand, another set of witnesses is not in controversy.

19. We may at this stage also take notice of DW 1 Chandgi Ram who has been examined in defense. This gentleman has testified in support to the defense version. He has also testified that Mir Singh and Charan Singh accused were not present on spot. He admits that Mir Singh is his collateral and that he made no statement before the police when it had visited the scene of occurrence.

20. We may at once say that the scope of enquiry in this falls within a very narrow compass. The success of this case depends upon the fact as to whether the eye-witness account is credit-worthy or not. Together with this, we are required to examine as to how these found guilty should be dealt with. In this case we find that the fact of the incident having taken place between the parties on that day is not in dispute. In fact, we are faced' with two divergent versions of the incident. But since the prosecution has to prove the case it cannot depend upon the weakness of the defense. We, therefore, propose to deal with the prosecution evidence to discover as to how far it has succeeded in establishing the guilt of the accused. On the strength of evidence of Kanhaiya PW 1 we find that a few months prior to the

incident Mir Singh accused had abused Chanderwati PW 4 in a drunken state and on her hurling counter-abuses Mir Singh had issued a warning to her. This is not to suggest that this was the immediate cause but it does provide a background regarding the state of mind of the accused. Immediate cause of occurrence is that on the day of incident Charan Singh appellant had abused Chanderwati PW 4 when she resisted his attempt to drive his she-buffaloes into her field. We do not have any evidence as to how Chanderwati ire-acted to the abuses of Charan Singh but in all probability, keeping in view how Chanderwati had earlier behaved with Mir Singh, it seems that she must also have given counter-abuses to Charan Singh. Charan Singh then goes to his home and within the next 20 minutes the incident takes place. Obviously, Charan Singh must have informed his father Mir Singh and his brother Ajit Singh co-accused and it is only thereafter that all the three came out with arms. While the first two, Mir Singh and Charan Singh arm themselves with lathis Ajit Singh conies with knife. By the time they come out Chanderwati PW was returning and on their coming face to face at the scene of occurrence near her Gali the accused immediately attacked her. It will be seen that all the three appellants have attacked simultaneously. She raises alarm. Her son Dev Singh PW on seeing this also raises an alarm attracting other two victims Kanhaiya her husband, and Batto her daughter, followed by Samli and others. On their arrival Kanhaiya and Batto victims PWs. 1 and 3 are also attacked in succession and a number of injuries are inflicted upon all the three victims.

21. Mr. Naseem while arguing on behalf of the appellants says that the learned Addl. Sessions Judge has not believed the presence of the two eye-witnesses, namely, Bhagwat and Manohar and they have been declared false and when such is the state of affairs it does impair the veracity of prosecution case. Keeping in view the peculiar facts and circumstances of this case we see no reason to discredit the testimony of other eye-witnesses who are mostly the victims of this crime. It may be recalled that the occurrence did not last long. In fact, after PW 4 Chanderwati was attacked in the Gali of her house her shouts naturally attracted her family members and that is how Kanhaiya and Batto PWs came there, never knowing that they are also going to be dealt with in the same manner. The presence of Kanhaiya and Batto PWs is evidenced by the grievous injuries sustained by them.

22. We have every reason to believe that Samli and Dev Singh PWs also saw the occurrence. The doubtful presence of Bhagwat and Manohar PWs at the scene of occurrence to our mind does not provide a basis for discrediting the other eye-witnesses particularly the victims whose presence cannot be doubted. Their presence is not denied by the appellants. In fact, they are the most natural witnesses to the incident. PWs Chanderwati, Kanhaiya and Batto are, in fact, the real aggrieved persons and they would always want revenge from their assailants. They would neither screen the real culprit nor name wrong persons. Moreover, we find sufficient reason for our belief that the incident took place in the manner as suggested by the prosecution and not in the manner the defense wants us to believe. It will be seen that three of the complainant party have received a number of -injuries. The injuries sustained by them are caused both by blunt and sharp edged weapons. The number and nature of injuries clearly goes to show that more than one person have caused these with more than one weapon. Batto has sustained grievous incised wounds which called for immediate surgery. Kanhaiya is also referred for surgical treatment. How could these incised wounds be received by pelting of brick-bats as the defense has attempted to show The fact that Dev Singh saw the occurrence cannot be doubted. We are, therefore, of the view that the prosecution has sufficiently connected all the three appellants with the commission of this crime, and the testimony of eye witness is trustworthy and is corroborated by the medical evidence,

23. Next we take up for consideration as to how the appellants found guilty should be dealt with. This also calls for an examination of the merits of the acquittal appeal preferred by the State. It would appear that the learned Addl. Sessions Judge had charged all the three appellants under Section 307/34 IPC. On a perusal of the judgment we are amazed to find that he has not dealt with this aspect of the case. He has neither found the charge under Section 307/34 IPC proved nor does he say it is not proved. In fact, no finding in this regard has been recorded and the State has treated it to be a case of acquittal under Section 307/34 IPC.

24. At this stage we may, therefore, narrate some of the relevant facts. It is proved by the prosecution that during the commission of crime, Mir Singh and

Charan Singh appellants were armed with lathis and Ajit Singh appellant was armed with knife and they inflicted injuries on the person of their victims in succession and in one and the same transaction. All the appellants have appeared on the scene of occurrence together and in a state of preparedness. This goes to show that they had the common intention to commit offence. What exactly will be their individual responsibility is a question which will be dealt with separately. In this case we have a document Ext. PW 8/A, authored by Dr. R.K. Gupta about the surgical findings in respect of injuries on the person of Batto one of the victims proved by P.W. 8 Mr. Chauhan. The necessity for getting it proved by PW 8 Charan Dass arose because Dr. R.K. Gupta had proceeded abroad and his whereabouts were not known. In this document Ext. PW 8/A Dr. Gupta has made reference to three injuries detected on operation.

(1) 1' x 1/6' clean cut left sub costal region.

(2) Perforation of stomach 1/2 cm. x 1/2 close to greater curvature,

(3) Injury pancreas Retro-peritoneal haematoma surrounding Pancreas.

The opinion given is that Injury No. 1 is simple while Injuries Nos, 1 and 3 are grievous. Similarly, in Ext. PW 8/C Dr. Gupta has opined that Injury No. 3 on the person of Kanhaiya was grievous in nature and this injury has been described by him as injury right thumb (fracture proximal phalanx 5th finger). At the strength of the testimony of PW 10, Dr. V.P. Vasudeava, we know that the injuries on the person of Batto was caused by knife while the fracture injury on the person of Kanhaiya Lal had been caused by blunt weapon.

25. It was argued on behalf of the prosecution that the learned Addl. Sessions Judge has failed to take notice of this evidence which unambiguously goes to show that this grievous injury, on the person of Batto was caused by Ajit Singh with an instrument for stabbing (knife) and this brings the offences squarely under Section 326 IPC if not under Section 307 IPC. It was, however, fairly conceded that under the circumstances of this case Section 307 IPC is not attracted.'

26. Mr. Naseem arguing for the appellants, however, insisted that there is no evidence on record to show that any grievous injury with a stabbing instrument has been caused on the person of Batto. He contends that the opinion of Dr. R.K. Gupta about the grievous nature of injury on the person of Batto is based upon operational notes which have not been proved. That Dr. R.K. Gupta himself has not come into the witness box for reasons stated by the prosecution and in this situation court has to depend wholly upon the testimony of PW 8 Charan Dass Chauhan who has proved the record maintained by Dr. R.K. Gupta, surgeon. It is argued that PW 8 Charan Dass Chauhan is not the person who alias operated upon and there is no evidence to the effect that operation was, in fact, performed and thereforee the court has no material before it to conclude that the operation was in fact performed. We, however, do not agree. These notes have been made by Dr. Gupta only after he conducted the operation and these have duly been proved by PW 8 who due to his long association with Dr. R.K. Gupta PWs is conversant with his writings and signature. The nature of discovery made by Dr. Gupta PW clearly shows that the injury on the person of Batto was grievous and this is a matter of public record.

27. That apart, in this case we have evidence of PW 1 Kanhaiya, PW 3 Batto and PW 4 Chanderwati to the effect that Batto was discharged from the hospital after more than 21 days which clearly brings the case within the definition of grievous hurt as defined in Section 320 eighthly, IPC. We find no reason to disbelieve the testimony of P.W's. 1. 3 and 4 Kanhaiya, Batto and Chanderwati. We are thereforee of the view that even though it cannot be said that an offence u/s. 307 IPC has been made out, there is sufficient evidence to hold that an offence under Section 326 IPC has been committed.

28. The next contention of Mr. Naseem, learned counsel for the appellants is that an offence under Section 326 IPC is not a minor offence vis-a-vis an offence under Section 307 IPC because the punishment provided for an offence under Section 326 is also life imprisonment and thereforee the appellants cannot be held guilty of having committed an offence under Section 326 as they have not been initially charged for this offence. We do not subscribe to this view-point. Mr. Naseem seems to be under an impression that the only measure to judge whether an

offence is a lesser offence or not would be to take into consideration the punishment provided for the offence. We find that offence under Section 326 IPC in the first place is an offence altogether different category and is triable by a Magistrate of the First Class while an offence under Section 307 IPC can only be tried by a Sessions Court. To our mind it appears that an accused can be punished for an offence under Section 32 IPC where he is charged under Section 307 IPC.

29. At this stage we may also take up for consideration the plea of alibi set up by appellants Mir Singh and Charan Singh. We may hasten to say that on the re-appraisal of eye-witness account we find it trust-worthy and it has also been corroborated by the medical evidence. Thus, viewing the case independently of the defense version the presence of Mir Singh and Charan Singh appellants at the scene of incident and their active participation in the commission of crime is established beyond any shadow of doubt. In a case where plea of alibi is set up, the burden of proving his absence from the scene of incident is on the accused. The reason is that it relates to something which is within the exclusive knowledge of the accused and it is the accused who wants the court to believe in the existence of such fact. In the present case, both Mir Singh and Charan Singh appellants have failed to discharge this onus.

30. However, on consideration of the facts and circumstances of this case we are of the view that only Ajit Singh is to be held guilty of the offence under Section 326 IPC. The facts of this case clearly go to show that even though all the accused came armed, Mir Singh and Charan Singh appellants cannot be said to be possessed of either intention to cause grievous hurt with knife or of knowledge that Ajit Singh appellant was going to do so. It will be seen that during this incident Batto was the last person to be stabbed by Ajit Singh. Prior to it, use of knife was made by Ajit Singh in respect of other two victims namely, Kanhaiya Lal and Chanderwati but no such grievous injury was inflicted. We are, therefore, of the view that appellants Mir Singh and Charan Singh cannot be held responsible for this individual act of Ajit Singh appellant. To this extent we accept, the appeal against acquittal preferred by the State and hold Ajit Singh appellant guilty of the offence under Section 326 IPC. Ajit Singh appellant is accordingly convicted under

Section 326 IPC. In view of his young age, we take a lenient view and sentence him to undergo rigorous imprisonment for two years and to payment of fine of Rs. 2,000/-, in default of which he shall undergo further simple imprisonment for four months. Ajit Singh appellant, who has also been found guilty by the Addl. Sessions Judge under Sections 325/34, 324/34 and 323/34 IPC, is further sentenced to undergo one year's rigorous imprisonment under Section 325/34 IPC, to six months' rigorous imprisonment under Section 324/34 IPC and to three months' rigorous imprisonment under Section 323/34 IPC. All the sentences shall, however, run concurrently.

31. The appeal shall stand dismissed and the conviction and sentences passed by the learned Addl. Sessions Judge, in respect of Mir Singh appellant is confirmed.

32. In respect of the appellant Charan Singh, the order of the learned Addl. Sessions Judge, giving him the benefit of the PROBATION OF OFFENDERS ACT is maintained. In view of the fact that offence under Section 326 IPC is punishable with imprisonment for life, we are unable to give the benefit of PROBATION OF OFFENDERS ACT to Ajit Singh appellant. The fine, when realised, shall go to the victims. The convicted appellants shall surrender before the learned Additional Sessions Judge within a week's time to undergo the sentences failing which learned Additional Sessions Judge may take appropriate steps under law .