(1994) 11 AHC CK 0107

Allahabad High Court

Case No: Criminal Appeal No. 2228 of 1979

Pyare (in Jail)		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Nov. 29, 1994

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 148, 149, 169, 307, 323

Citation: (1995) CriLJ 2343

Hon'ble Judges: G.S.N. Tripathi, J

Bench: Single Bench

Advocate: Bhagwati Prasad, for the Appellant; A.G.A. and Bhanu Pratap Singh, for the Respondent

Final Decision: Dismissed

Judgement

G.S.N. Tripathi, J.

Accused Churamani Singh alias Chulli Singh, Shiva Rani Singh, Raghunath, Ram Dhani and Pyare have; been convicted on a charge under Sections 307, I.P.C. read with 149, I.P.C. However, accused Churamani Singh was awarded three years'' R. I. on a charge u/s 307, I.P.C. He was further convicted u/s 148, I.P.C. and sentenced to six months'' R. I. Further he was convicted u/s 323/149, I.P.C. and sentenced to undergo six months'' R. I. The accused Shiva Ram Singh, Raghunath Singh, Ram Dhani and Pyare were sentenced to six months'' R. I. on a change u/s 147, I.P.C. and two years'' R. I. on a charge u/s 307/149, I.P.C. This order was passed by the IV Addl. Sessions Judge, Mirzapur, in S. T. No. 138 of 1978, State v. Churamani.

2. The prosecution case started on the basis of first information report, lodged by Udai Ram Tiwari (P.W. 6) at police station, Marihan, district Mirzapur on 9th October, 1976 at 10 a.m. The distance from the police station is five kilometers. The time of occurrence is alleged as 10 a.m. on the same day. It has been alleged that the

complainant had convened a Panchayat in irrigation affairs. It was held on the same day at 8 a.m. under the ''Baniyan'' tree near the road. The complainant had been called by Jai Ram son of Rammo. In the Panchayat, the accused Churamani alias Chulli Singh, Basdeo, Ram Singh, Ram Dhani and Pyare had formed a group and started abusing the complainant side. Chulli Singh wielded his Gandasa aiming at the neck of the complainant. The complainant tried to check it with the help of his hand and it resulted in the cutting away of his right thumb. Other three fingers were also cut seriously. Even on the left hand there were Gandasa injuries. On the frontal teeth there was injury.

3. Shankar (P. W. 3) had also received injuries on his left hand. Shiv Ram (accused) have lathi injury to Shanker. The complainant raised alarm, on hearing which other persons in the Panchayat also started shouting. Ram Shuchit (P.W. 5), Misri Lal (P.W. 1) and Ramji rushed towards the complainant and saved his life. Accused Churamani is a very influential and criminal type of person. The marpit had taken place around 10 a.m.

4. On the basis of this information chik was registered in the police station and persons were referred for medical examination.

5. Shanker (P.W. 3) was examined at P.H. Hospital Marihan, Mirzapur, on the same day at 5 p.m. One contusion was found on his fore-arm. Udai Ram Tiwari (P.W 6) was examined in the same evening at about 5 p.m. Three incised wounds were found on his person. His palm and fingers had been cut. The details of injuries have been noted by the learned Sessions Judge in his judgment. The investigation closely followed.

6. Sri Ram Nain Yadav (P.W. 8), Investigating Officer, proceeded to the spot and recovered blood stained and ordinary earth from the spot and prepared memo. He interrogated witnesses u/s 161, Cr. P. C. and submitted charge-sheet.

7. The prosecution examined Udai Ram Tiwari (P.W. 6) and Shankar (P.W. 3) (both injured witnesses). They have narrated the prosecution story as contained in the first information report. Misri Lal (P.W. 1), Jagannath Dubey (P.W. 2) and Shanker (P.W. 3) have also deposed about the incident. They have emphatically stated that the marpit started near the ''Baniy4an'' tree, where Panchayat had. been convened to settle the dispute between the parties. They have also come with an explanation regarding the injuries received by the accused Churarnani, Raghunath and Ram Dhani. The sum and substance of the statements are that Shankar wielded lathi in self-defence. Others evidence is formal in nature.

8. The accused in their statements have generally denied the allegations made against them. Churamani (accused) has admitted that Shanker and Udai Raj had received injuries. Additionally, he has said that Ram Narain had diverted the water from his field. Thereafter Ram Narain, Shanker (P.W. 3), Udai Ram Tiwari (P.W. 6), Jagannath (P.W. 2), Jageer, Sita Ram, Jai Ram, Phool Chand and Kalu came to his

door and abused him. They started marpit. Jai Ram set fire to his hut. Ram Dhani and Raghunath came to his rescue. They too were assaulted. Raghunath used his Gandasa and this accused, Churamani, used lathi in his defence.

9. At this very stage I wish to further amplify the defence version contained in Ex. Kha.4. This is the first information report lodged by Churamani on that very day in which he has arrayed Ram Narain, Phool Chand, Sita Ram, Jai Ram, Shanker, Jagannath and Golahi accused. He has alleged that his hut is situated near his house where he was present along with his brother Shiv Ram at about 9 A.M. The accused, Ram Narain, Phool Chand, Sitaram Jai Ram, Shanker, Jagannath, Golai, Ram Ujagar son of Sat Narain were going for irrigation purposes. They had diverted the water from the field of Churamani which had been re-diverted by Churamani and others. These persons alleged that they had rediverted the water to the field of Ram Narain and now they challenged Churamani and others to do whatever they chose. Thereupon Churamani asked them as to why they did so. Then these persons threatened to assault him. Churamani raised an alarm that he had been surrounded by the aforesaid persons. Thereupon Chaukidar, Raghunath (accused) and Ram Dhani (accused) came to his rescue. Thereupon Golahi alias Udai Raj, Ram Narain, Shanker, Sita Ram etc. started assaulting him and members of his party. Jai Ram set fire to the hut of the complainant. Churarnani used his lathi in his defence. He had received injury on his right hand. Raghunath and Ramdhani who were trying to save the situation also received injuries. He prayed for suitable action against the accused aforesaid.

10. Other accused have dittoed the aforesaid version of Churamani and have said that on account of enmity they have been falsely implicated.

11. On the side of the accused, Churamani had one abrasion and one contusion, Raghunath had one contusion and one abraded contusion. Ramdhani had two lacerated wounds and two contusions. The details of their injuries have also been noted by the learned Sessions Judge, therefore, I am not repeating them here.

12. The accused did not produce any evidence in their defence. However, they proved their injuries through the doctor examined by the prosecution and their first information report also. Moreover, Ram Nain Yadav (P. W. 8) I. O. has admitted that he has filed the charge-sheet against the prosecution side also a cross-case between the parties was contested in the same Court. The learned Addl. Sessions Judge has also mentioned in para 9 of the judgment that a cross-case in respect of this very incident was also pending in his Court against Jai Ram and others. The first information report lodged in that case and injuries received sustained on the side of the accused, have been proved in this case.

13. After appreciation of the entire evidence and circumstances on the record, the learned Addl. Sessions Judge found the version of the prosecution worthy of credence. He convicted the accused as noted above and sentenced them

accordingly.

14. The accused have felt aggrieved and filed this appeal.

15. I have heard the learned counsel for the parties at stretch and gone through the record. I find some substance in the argument advanced by the learned counsel for the accused.

16. The main point of the argument advanced by Mr. J. S. Sengar, learned counsel for the appellant is that the prosecution has failed to provide adequate explanation for the injuries received on the side of the prosecution, therefore, the prosecution case must fail. Before dealing with the evidence, I wish to examine the legal position on this point.

17. Now the learned counsel has urged that in this case the marpit has been admitted. The presence of virtually all the witnesses and injured persons on both the sides is also not seriously disputed. Then the question arises as to whether the accused were the aggressors and what would be the effect of non-explanation of the injuries received by the accused.

18. In this background I have to see the legal position. The learned counsel for the appellant has cited Lakshmi Singh v. State of Bihar, AIR 1976 SC 2263. In para 2 of the judgment their Lordships of the Supreme Court found that the prosecution had not come out with true version of the case. Some of the accused and the victims on the prosecution side were members of the same family but others, namely, Jagdhari Singh, Lakshmi Singh, Ram Prasad Sah and Chhathu Singh had no concern or connection with other set of accused. In fact this second set was inimical with P.Ws. 1 and 2 and it was found that the accused had been implicated at the behest of these P.Ws. who insisted for the implication of some of the accused i.e. their enemies.

19. In para 3 at page 2268 their Lordships found that the second set of accused headed by Jagdhari had absolutely no motive and had no reason and no concern with the deceased or their relations and there was absolutely no earthly reason why they should have made a common cause with the first set of accused, namely, Ram Sagar and Dashrath, over ''what was a purely domestic matter between Dashrath Singh and first set of accused. Again their Lordships found the insistence of P.Ws. against second set of accused headed by Jagdhari Singh and they must have made it a condition precedent to depose in favour of the prosecution or support the case only if Desai Singh would agree to implicate the appellant Jagdhari Singh and others and to assign them vital roles in the drama staged, so that the witnesses could get the best possible opportunity to wreak vengeance on their enemies.

20. Accused Dasrath Singh was examined on the same day by Dr. S. P. Jaiswal, who had examined Brahmdeo deceased. One bruise and punctured wound were found. According to doctor injury No. 1 was grievous in nature as it resulted in compound

fracture of the fibula bone. The other injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. The Hon''ble Court further found that the origin and genesis of the occurrence had been deliberately suppressed, which lead to the irresistible conclusion that the prosecution had not come out with a true version of the occurrence.

21. Accused Mohar Rai sustained as many as 13 injuries and Bharat Rai had 14 injuries. Reference was made to the case of State of Gujarat Vs. Bai Fatima and Another, and in this context the following observations were made :

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow :-

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of right of self-defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased, the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case."

It seems to us that in a murder case the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which

competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries, which have not been explained by the prosecution, then ,it will be difficult for the Court to rely on the evidence of P.Ws. 1 to 4 and 6. More particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat Vs. Bai Fatima and Another, , there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error brushing aside this serious infirmity in the prosecution case on unconvincing premises."

22. Apart from it in para 12 of the said ruling it was found that the accused Dasrath had come out with the definite case that prosecution party had entered the plantain orchards of Ramsagar Singh and Dasrath Singh and were trying to pluck plantain leaves and plants on which he protested and was assaulted and consequently the deceased too were assaulted in self-defence. The I. O. also found 100 plantain trees in the Orchard of Dasarath Singh and further found that leaves of the plaitain plants had been cut out of six plants of the western side and four plants of the eastern side probabilities the defence version."

23. Another important circumstance was the omission on the part of the prosecution to send the blood stained earth found at the place of occurrence for chemical examination which could have fixed the situs of the assault.

24. In para 14 it was found that there was only one solitary injury on the person of the deceased Chulhai Singh and the lathi injury was totally absent on his person which made the prosecution case doubtful, because the prosecution could not explain affirmatively as to how no lathi injuries were caused to this deceased although allegations were profusely made against the accused. It was further found in para 14 that so far as the deceased Chulhai Singh was concerned, the ocular evidence was totally inconsistent with the medical evidence with respect to the assault by Chhathu Singh arid Ram Prasad Sah. The Hon''ble Court concluded that if this matter is false, there is no guarantee that the other assault deposed to by the eye-witnesses was also not false.

25. In para16 the Hon''ble Court gave a categorical finding that the genesis and the origin of the present occurrence appears to be shrouded in deep mystery. Not only this, it was also found that the justification for the start of marpit as given by the

prosecution was not reliable. Taking all these factors into consideration the Hon''ble Court found that the entire prosecution case had collapsed and the fundamental part of it had to be disbelieved. It was not possible to disengage the truth from falsehood, to sift the grain from the chaff and the case against the appellants was not proved beyond reasonable doubt.

26. A narration of these facts will lead me to conclude that the prosecution case was as faulty as a sieve with multiple wholes therein. Accordingly the same could not be believed. It will be unfair to say that the case had resulted in acquittal simply because the injuries of the accused had not been properly explained. The other conclusion is equally emphatic that simply because the injuries of the accused are not adequately explained, the prosecution is bound to fail. It depends upon the facts of each case concerned.

27. In Mitter Sen and Others Vs. The State of U.P., , apart from the failure to explain the injuries of the accused the controversy between the parties was as to where the incident took place, whether in front of the house of Raghubar Dayal or Shyam Lal or in Jawahar Chauk or in what manner.

28. In para 4 it was found that the participation of Chiranji Lal, Hazari Lal and Prem Shanker appeared to be doubtful. A very important fact that was found in para 6 was that the appellants had come to the Chabutra of Raghubar Dayal and Shyam Lal empty handed. Even according to the prosecution they did not carry with them any weapons, not even lathis or dandas. Chandra Prakash accused had undoubtedly a knife but he was not brandishing it. This way it was established in that case that the genesis of marpit as well as place of occurrence had not been proved beyond doubt. The presence of some of the accused empty handed also added force to the argument on their behalf that the accused had no aggressive designs so this ruling also does not help the accused.

29. As against in Purshottam Lal Ji Baghela v. State of Gujarat 1972 Cri LJ 2221 , it was found that there was communal tension and stone pelting was done by both the sides. In this way the accused fired gun shot causing death to the deceased. There was no evidence to show that before firing the first gun shot anybody on the side of the accused had sustained any injury as a result of pelting of stone by the other group. The Hon''ble Court found that the accused had no reasonable apprehension of death or grievance put to him or to those protecting. Consequently his plea of right of self-defence was rejected by Hon''ble Court.

30. In Onkarnath Singh and Others Vs. The State of U.P., , the Hon''ble Court observed that:

"The entire prosecution case cannot be thrown over board simply because the prosecution witnesses do not explain the injuries on the person of the accused. The question as to what is the effect of non-explanation is a question of fact and not a question of law.

31. In Harvendra Singh v. State of U.P., 1979 Cri LJ 1494, it was observed that the failure of the prosecution to explain the injuries on the person of the mother of the accused was not necessarily a fatal circumstance.

32. In Bhaba Nanda Sarma and Others Vs. State of Assam, , the Hon''ble Supreme Court observed : the prosecution is not obliged to explain the injuries on the person of the accused in all cases and in all circumstances. This is not the law.

33. This way it is clear that it is simply a question of fact as to whether the injuries of the accused had been explained or not by the prosecution and the conscience of the same will depend on this fact and differ from case to case.

34. In this view of the legal position I find that in the present case the place of occurrence has been fixed as the statement of I. O. has not been challenged. The manner or genesis of the marpit has been fully proved from the prosecution evidence.

35. The main points for considerations on this case are two-fold:

(i) the place of occurrence,

(ii) the panchayat.

From which may be determined the genesis of the incident.

36. According to the site-plan the Panchayat was held near the ''Baniyan'' tree (shown by circle) to the south of the Kachcha road. The Investigating Officer recovered blood from places Ka and Kha which are near the place where the marpit took place according to the prosecution; whereas according to the accused the incident started near the cottage of Chulli Singh, which has been indicated as ''burned cottage'' of Chulli Singh. From this place the blood was not recovered at all.

37. Sri Ram Nain Yadav (P.W. 8) has deposed that he recovered blood from the spot and kept the blood stained and ordinary earth in separate containers and prepared memo for the same. The place of occurrence is to the west of the Baniyan tree, from where he recovered blood. He recovered blood from the road also (shown by letter Kha in the site plan). He was cross-examined on various points but he was not put even a single question that he in fact did not recover blood from these places indicated by him. There was no hitch in putting a specific question as to whether he recovered blood from there or he even saw blood near the cottage of Chulli Singh. This was not an un-intentional omission on the part of the learned counsel, cross-examining the witnesses, rather it was a calculated act of not putting a question, so that an adverse reply might not be given by the witness in the cross-examination. Therefore, from the statement of Investigating Officer the place of occurrence is established.

38. In the first information report there is a clear mention that the Panchayat had been held under the ''Baniyan'' tree, near the road. Thus this is a corroborative

factor available to the prosecution,

39. Apart from it there is the statement of Misri Lal (P.W. 1), who says that the Panchayat was held under the Baniyan tree. In the cross-examination he was also not challenged on this point. So is the case with Jagannath (P.W. 2), who says in the first paragraph that the Panchayat was held near the road under the Baniyan tree to the south of the road and the marpit also took place near that place.

40. Shankar (P.W. 3), an injured witness, Jai Ram (P.W. 4) and Ram Suchit Dubey (P.W. 5) (Sarpanch) have also uniformly stated about the place, where the Panchayat took place and where the marpit started. Despite very lengthy cross-examination on this point, the witnesses have remained unscathed. Therefore, I agree with the learned lower Court that the place of occurrence is established from the prosecution evidence in this case and it is near the road under the Baniyan tree as indicated in the site-plan.

41. Now another point in connection with the Panchayat is that the aggrieved party was the prosecution side. The names of the Panchas given by all the witnesses are practically the same. Further there is no background of any serious enmity with the Panchas, namely, Shankar (P.W. 3), Jagannath Dubey (P.W. 2), Ram Suchit Dubey (P.W. 5) and others. In the first information report it has been alleged that the Panchayat had been convened in connection with irrigation. This is the genesis of the prosecution case that there was some dispute between the complainant side and the accused side. The water channel passed through the field of the accused. Therefore, the accused were in a position to divert the water of the channel to their own fields and thus they deprived the other side of this privilege to irrigate which was in fact the right to take water from the main channel through the field of Churamani. Thus in the first information report it is the genesis of the case i.e. water dispute and for the settlement of the same, the Panchayat has been called, to it cannot be said that this theory was an after-thought and product of some brain washing or as a result of tutoring by some legal brains. There may be differences and contradictions amongst the witnesses testimonies on other details of the Panchayat but there is absolutely no contradiction on these two points that there was dispute regarding the water and for that a Panchayat had been convened on that date. So on this point also there is almost complete uniformity in the prosecution witnesses testimonies.

42. The learned lower Court had rightly observed that in village people convene Panchayat to settle their disputes. There cannot be any dispute on this point. I have to see whether actually a Panchayat was convened and for that the witnesses testimony is there. They have not been challenged seriously on the point that there was no Panchayat at all.

43. Misri Lal (P.W. 1) states that there was no writing maintained in the panchayat. It was an oral transaction. In the fifth paragraph he states that the Panchayat had

been called by Jai Ram and Churamani. Jai Ram is on the side of the prosecution and Churamani is on the accused side. Later on he said that in fact the Panchayat had been called by Jai Ram and not Churamani. The Panchayat was not called by Raghunath and Kallu. A day earlier to the date of incident, Jai Ram had told him that Churamani was not permitting him to take water to his field so a Panchayat was being called for that very purpose. In fact one party cannot convene a Panchayat. It has to be a two way affair and for that at least tacit consent of the other party is a must. So it makes no difference when the witness says that the invitation was thrown by Jai Ram. It is quite likely that Churamani might not have approached this witness for Panchayat but it does not mean that the Panchayat had not been called by both the parties.

44. Jagannatha Dubey (P.W. 2) states that there was a dispute between Jai Ram and Churamani on the point of irrigation. Churamani did not permit Jai Ram to irrigate his fields and for settlement of this dispute Jai Ram had called the Panchayat. It was held at about 9 a.m. under the Baniyan tree. Amongst the panchas apart from Jagannatha (P.W. 2), Sita Ram, Raja Ram etc. were also present. In the Panchayat Jai Ram disclosed that his crops were drying, then the panchas told Churamani that he was doing injustice and he was requested to allow Jai Ram to irrigate his fields. On this point the exchange of words took place between Kallu and Raghunath. Kallu stated that powerful persons took water forcibly and were not allowing the poor persons to get the water for their fields. A similar incident was stated that Raghunath (accused) had also diverted his water. When Raghunath was specifically named, he became angry and thereafter marpit started. One of the Panchas, namely, Jagannath (P.W. 2) intentionally asked the accused side as to why they were quarrelling and abusing and brandishing Gandasa, thereupon Churamani felt angry and the marpit started. So there was a specific allegation against Churamani decrying his high handedness in not permitting Jai Ram and others (Harijans) to irrigate their fields from public water channel. On this point the statement of this witness Jagannath (P.W. 2) is totally credible. Further he says in the third paragraph of the cross-examination that he had no dispute with Churamani about this incident. It was later on that Churamani launched a cross-case in which he implicated him. Therefore his statement that the marpit was started by Churamani and his party is equally reliable. So there is no reason why he would depose otherwise and implicate the accused falsely.

45. Shankar (P.W. 3) states that the Panchayat was just started at 9 a.m. It had been convened by Jai Rain on the ground that Churamani was not permitting him to take water to his fields. The water channel passed through the fields of Churamani and then it went ahead to the field of Jai Ram, so Churamani was in a position to utilise the water of the channel for his irrigation purposes and not allow water to flow ahead in the field of Jai Ram, i.e. Jai Ram was in genuine difficulty and in a really dire state.

46. Ram Shuchit Dubey (P.W. 5) was the panch. He describes that in the Panchayat Jai Ram repeated his grievance and then the marpit was started by Churamani and others. On these points I do not find any relevant question in the cross-examination.

47. Jai Ram (P.W. 4) states that the water channel passed through the field of Churamani. Churamani had prevented the water from going to his field, therefore, he had convened a panchayat. He is a Harijan. Churamani is a Thakur. The Panchayat was held under a Baniyan tree near the road. It was presided over by Ram Shuchit Dubey (P.W. 5). In the Panchayat he repeated before the Panchayat that Churamani was not allowing the water to flow to his field. Even Kalu repeated this allegation against Churamani. There was exchange of words between Raghunath and Kallu. Raghunath accused took side with Churamani and started abusing on his behalf and thus the marpit started. The fact that the water channel flows through the field of Churamani is not disputed in the cross-examination. Therefore, there was a grievance in the mind of Jai Ram against Churamani. He had a genuine complaint against Churamani and for redressal of the same he convened a Panchayat. In the cross-examination he specifically says that Panchayat was presided over by Ram Shuchit Dubey (P.W. 5) and he had called the Panchayat further he says that in the Panchayat nobody abused Churamani rather in fact Churamani abused the Panchas. Thereupon Panchas asked him not to abuse because they were not siding with any person. Therefore on this point also the statement of this witness goes unchallenged.

48. Ram Suchit Dubey (P.W. 5), Pradhan and Sarpanch of the Panchayat, says that the Panchayat was held under the Baniyan tree. Jai Ram and Shiv Ram (accused) had called him for the Panchayat and both the parties elected him as a Sarpanch of the Panchayat. He names other persons also who had been appointed as panchas. In the Panchayat the verbal duel started. Churamani was there. Raghunath accused said some unparliamentary words towards the Panchas; that was not relished by Udai Ram Tiwari (P.W. 6) and he asked him not to abuse the Panchas. Thereupon Churamani took the cudgel and challenged all those persons present there to settle the score then and there. Then he assaulted Udai Ram with Pharsa.

49. In the cross-examination he says that Shiv Ram accused had gone to call him and not Chulli Singh, but Chulli Singh was there in the Panchayat. He was not challenged on this point that he was elected as a Surpanch by both the parties. Further he says that since Churamani abused all those persons present there, everybody, took ill and asked him not to misbehave in the Panchayat. This infuriated Churamani and marpit was started by him.

50. This way after a critical analysis of the evidence on the record, I conclude that there was a Panchayat held under the Baniyan tree under the presidentship of Ram Shuchit Dubey (P.W. 5). The dispute to be settled was in relation to the water in the Channel and its clogging by Churamani. So the prosecution has proved the genesis of the dispute by proving that a Panchayat was held in which independent persons,

including Udai Ram, Ram Shuchit Dubey and others participated. As observed earlier these are the persons who commanded respect on account of their good position, so their testimony must carry weight. The learned lower Court had the opportunity to watch the demeanour of the witnesses a privilege not available to this Court. In absence of any misdirection on the part of the trial Court, there is no justification to disturb the findings recorded by him. In fact I myself concur with the conclusion drawn by the learned lower Court.

51. Now the question remains as to whether the injuries of the accused have been explained. Now there is no secrecy even amongst the prosecution witnesses to disclose that the accused Churamani, Raghunath and Ram Dhani had received injuries. I have already observed as the learned trial Court had done that the injuries received by these persons were quite insignificant and superficial and they do not deserve to be explained even. All the same the prosecution has come out with an explanation that Shanker wielded lathi after snatching it from Shiv Ram and caused injuries to the accused persons. It appears that they did not give such explanation even u/s 161, Cr. P. C. but when they came to the Court some brain washing must have been done and a reply was sought to be offered by the witness. I do agree with the counsel for the appellant that this is a delayed explanation. But all the same, I hold that since marpit-was started by the accused, they were the aggressors hence they had no right of private defence, so the minor injuries caused to them do not deserve to be explained and the prosecution case does not suffer from the vice of non-explanation of the injuries of the accused from the initial stage.

52. My attention was drawn to the various statements coming in the shape of explanation for the injuries of the accused by the learned counsel for the defence, as to how many blows were caused to Churamani and others by Shanker, the manner in which he wielded his lathi, the number of lathi injuries caused by Shankar etc. These are the questions which had been put to the witnesses and very fairly contradictory answers have been obtained.

53. Misri Lal (P.W.1) states that Shiv Ram, caused lathi injury to Shanker, then Shanker snatched his lathi and wielded it three or four times causing injury to Shiv Ram, when Shiv Ram was being -assaulted, Churamani did not wield his pharsa but before that he had used it. It means he had done his aggressive job earlier, and it will not be proper to say that Churamani assaulted with pharsa only after receiving injuries at the hands of the prosecution witnesses including Shanker. This witness says further that he could not notice the point of time when Churamani received lathi injuries. He could not see as to who caused lathi injury to Raghunath (accused). Similarly he could not see as to how Ram Dhani had received injury. On this ground the learned counsel for the appellant says that the explanation given by this witness is not acceptable. I do not agree. In the marpit everybody cannot notice every item of the incident. He could not concentrate on every thing, hence chronometic and photographic description cannot be expected from these witnesses, who are

virtually illiterate. Moreover, their examination was held after more than two years. Human memory becomes weaker with the passage of time. Capacity to retain the happenings also fades. But the important things are retained for long, may be for life. So the Courts should not adopt an imaginary standard of test for coming to a conclusion that since the witnesses had not given a photographical description of every thing they must be discarded. The law has undergone vital changes.

54. Jagannath Dubey (P.W.2) says that the first victim of Gandasa was Udai Ram (P.W.6). His finger was cut and fell on the ground. He also received three Gandasa injuries. On both of his hands there are injuries of Gandasa, so the documentary evidence supports the statement of Jagannath regarding the sequence of incident and the sequence of weapons used. It cannot escape notice of the court.

55. Shankar (P.W.3) says that he received injuries first at the hands of Shiv Ram. He snatched his lathi and tried to assault him but Shiv Ram ran away. In order to save Udai Ram from Churamani, he assaulted Churamani with lathi. He further used lathi, causing injuries to Raghunath and Ram Dhani. He caused three or four lathi blows to Raghunath. It was argued by the learned counsel for the defence that Shanker could not show such a bravery in the teeth of superior weapon possessed by Churamani. I do not agree. Expertise and battle tricks at many times prevail.

56. Jai Ram (P.W.4) has also described the manner in which Shanker caused, injuries to the persons on the accused side, so is the case with Ram Shuchit Dubey (P.W.5). He is very honest in admitting that he did not see injuries being caused to Raghunath and Ram Dhani. Raghunath is the Chaukidar. He does not carry Ganoda or Ballam all the times, rather he carries Danda normally. Three or four Gandasa blows were attempted. Shiv Ram had wielded one or two lathi blows. So even this witness supports the prosecution case in a substantial manner.

57. Udai Ram Tiwari (P.W.6) was assaulted by Churamani and received Gafidasa injuries. His both the hands were damaged. One of his fingers was slashed and this way he was rewarded for being an honest panch. He has described the manner of assault. His description of incident is quite inconsonance with the story given by other witnesses. He has also said that Shanker snatched lathi of Shiv Ram. Regarding the panchayat he says that initially Chullii did not abuse him directly. When he intervened, he pounced with Gandasa upon him. The entire crux of the cross-examination was that he did not state before the Investgating Officer that Shanker used lathi in defence by snatching it from Shiv Ram. He specifically denies that he and others had gone armed with lathi and Raghunath in fact used Gandasa and not accused Churamani.

58. I find that the learned lower Court has drawn a correct conclusion that the marpit was started by the accused and they took the lead. They were the aggressors and, therefore, they had no right of private defence available to them.

59. Now I have to see as to what offence has been committed by the accused because I am of the opinion that absence of proper explanation for the flimsy injuries received by, the accused does not make any dent in the prosecution story. It is a human weakness to conceal the injuries of the other side and the prosecution witnesses also suffer from the same. It seems that the cross-case launched at the behest of the accused Churamani has resulted in acquittal of the accused, as the learned counsel for the accused did not press on this point.

60. The whimsicality of the defence case is quite palpable. In the first information report (Ex. Kha.4) lodged by the accused, Churamani, it has been alleged by him that the accused (now prosecution side) led by Ram Narain came to his hut to tell him that the water channel which had been diverted by Churamani had been rediverted by them i.e. Ram Narain and others. They further told him to do whatever he liked.

61. The learned lower Court had rightly observed that there was no necessity for the accused to have gone to the house of Churamani to inform him about their alleged misdeeds and further to throw a challenge to Churamani at his house. After-all they had been vindicated their honour by rediverting the water channel to their fields. It was for Churamani to have objected to it and that too either at the house of the accused or at the place where the channel had been diverted or at any place they could meet the accused (Ram Narain and others). They chose or rather got the opportunity to see each other in the panchayat. Churamani and others utilised that opportunity in a proper manner they chose. There was absolutely no rationale behind the accused side doing so, i.e. to have gone to the hut of Churamani to inform him and others that they had done some criminal act directly impinging upon his rights of property or at least telling him that he had been humiliated in his field and further humiliation was in store for him. I do not think any reasonable person will do it. The purpose of the accused Ram Narain and others had been served. The moment they rediverted their water channel to their fields, they need not go to do a useless job by informing Churamani and others and that too at his hut, that they had done such an act. This way the very genesis of the story set up by Churamani becomes false.

62. There is another aspect of the case. Allegedly the accused burnt the cottage of Churamani which is about fifty paces away from the Baniyan tree under which the Panchayat was held. Misri Lal (P.W.1) states in the cross-examination that the cottage of Churamani was not used either by human-beings or even by his cattle. This statement of this witness has not been Challenged. Further Jai Ram (P.W.4) states in the cross-examination that the thatch of Churamani was basedona wall. Nobody resided therein. He had no house of his own near that cottage. Ram Shuchit Dubey (P.W.5) Sarpanch also states in the examination-in-chief that nobody resided in that hut of Churamani, even on the date of his statement i.e. 5-5-79. The family members of Churamani resided in the village. The result is that this cottage was virtually a useless place for Churamani. By putting this hut to fire the accused was

not going to gain anything. This again shows that this theory of burning the cottage by the accused (now P.Ws.) is false. The prosecution witnesses have tried to explain that this was done by Churamani himself to implicate the P.Ws. in a false case or at least to put a counter blast to the prosecution story. The mind behind this action is not difficult to find.

63. Ram Shuchit Dubey (P.W.5) has said in the cross-examination that Raghunath accused is the Chaukidar of the village. So this probability cannot be ruled out that either at his instance or at least on his advice a false defence case was set up after knowing fully well that it was without any substance. The first information report was lodged by the accused after the first information report had been lodged by the prosecution side in this case. So. through the medium of Raghunath accused the Chaukidar of the village the party led by Churamani had fully known about the contents of the first information report lodged by Udai Ram Tiwari (P.W.6). Hence a defence case was set up which does not stand scrutiny.

64. The learned lower Court has rightly observed. "Thus, there was absolutely no sense in Ram Narain and his associates going to the hut of Churamani Singh. But certainly Churamani Singh had a purpose in introducing this theory and thus shifting the venue of the incident. As would appear, Churamani Singh''s report was lodged after the report of Udai Ram. It appears to me that Churamani must have been aware of the contents of the report of Udai Ram. Accordingly, in a very dexterous manner he invented this story and shifted the place of occurrence to his door according to his convenience. There is a tinge of artificiality in the story narrated in the first information report of Churamani and an attempt to meet situation previously created is obvious therein."

65. Accordingly the defence theory is artificial and imaginary, hence no reliance can be placed upon it. The learned lower Court has rightly rejected it.

66. Mr.J.S. Sengar vehemently argued that the defence is not bound to prove its case to the hilt. Its job is over, the moment it is established by preponderance of probabilities that is a reasonable doubt is created. There is no dispute with this legal proposition advanced by Mr. Sengar. But the question is as to whether setting up of any flimsy case will create a reasonable doubt in the mind of the Court, or will it be called sufficient to establish preponderance of probabilities. I think the reply to this question will be an emphatic-No. I find that there has been a calculatedly well drafted attempt to come out with a false defence case just to get rid of the consequences of the criminal acts perpetrated by the accused as aggressors.

67. They tried to demolish a well established institution of Panchayat. The people have been using this forum since centuries and resolving the disputes without recourse to law Courts and lawyers. But here the panchas honourably invited were dishonoured, humiliated and awefully assaulted. This is a clear misuse of the opportunity available to the parties to solve their disputes. Whereas the panchayat

had been convened for resolving a dispute but Churamani''s party took it as a God gifted opportunity to teach a lesson to the P.Ws. including the panchas who had absolutely no animus against the party of Churamani, since they were espousing the cause of truth and justice and were discharging the sacrosanct duties as panchas to solve the dispute, they should not have been even misbehaved, with.

68. As regards the commission of offence, it appears that the party of Churamani had reached the spot with advance preparation to teach a lesson to the P.Ws., so there was already a meeting of their minds to commit an unlawful act possession of pharsa and lathi is eloquent. Learned lower Court has thus taken adequate note of this conduct of the accused and has drawn a correct conclusion. The act of exhortation by some of the accused was adding fuel to the fire. Instead of advising Churamani and others not to assault, at least the Panchas, the remaining accused were stoking the fire by asking the accused to assault, hence their crime is in no way less serious than that of Churamani, Shiv Ram and others.

69. Misri Lal (P.W. 1) has stated that Raghunath, Pyare and Ram Dhani were exhorting the accused Shiv Ram and Churamani to further assault the P.Ws. including the panchas. In the cross-examination he has further said that Raghunath, Rarndhani and Pyare had lathis in their hands but they did not take part in the actual assault. Jagannath (P.W.2) also states in the examination-in-chief that these accused were telling that even the panchas should be assaulted and taught a lesson. Subsequently he states that Udai Ram (P.W.6) had simply told Churamani that he was doing injustice, He had no prior enmity with him but even this sound advice was taken ill by Churamani and he abused him. There upon Udai Ram told Churamani that he was doing an unjust act but Churamani went on abusing and assaulted him. This was possible only because he had active support of Ram Dhani, Pyare and Raghunath Chaukidar, otherwise he would not have mustered adequate courage to have picked up for assaulting some persons even from amongst the panchas in broad day light.

70. Jai Ram (P.W.4) has also deposed that Raghunath, Ram Dhani and Pyare were having lathis and they were exhorting Churamani and others. They were also abusing. In the cross-examination also he repeats the same thing. Similarly, Ram Suchit Dubey (P.W.5) states that these three accused were abusing and exhorting. Therefore I agree with the learned lower Court that their presence with lathis coupled with exhortation to other accused amounted to their active participation in the marpit. It is also important to note that in the Panchayat there was no use of having lathis by these accused. But their possession of lathis and similarly the possession of phars by Churamani are glaring illustrations of the advance defence preparation and programme of the accused to commit an unlawful act. So it will be wrong to suggest that this unlawful assembly was formed on spur of the moment. In fact this assault was a consequence of contrived and well chalked out planning by the accused. Even then the learned lower Court has shown undeserved concession

to Raghunath, Shiv Ram, Rarndhani and Pyare by awarding only two years'' R.I. to these accused u/s 307/169, IPC. I think no more concession is deserved by the accused.

71. The sum total of the critical analysis made above leads me to conclude that the prosecution has established its case beyond reasonable doubt against the accused. There is no fault in the appreciation of the evidence made by the learned lower Court, so the appeal deserves to be dismissed.

72. In the result, both the appeals are dismissed. The judgment and order passed by the learned lower Court is made absolute. The accused are on bail. Their bail bonds and surety bonds are cancelled. They shall be taken into custody forthwith by the CJM, Mirzapur, by issuing a non-bailable warrant against the accused. The CJM concerned shall submit a compliance report within a month.