
(1989) 10 AHC CK 0056

Allahabad High Court

Case No: Criminal Appeal No. 1293 of 1978

Bachchan and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Oct. 19, 1989

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313, 82, 83
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 375

Citation: (1990) 14 ACR 115

Hon'ble Judges: M.M. Lal, J; H.C. Mital, J

Bench: Division Bench

Advocate: V.C. Tewari, for the Appellant;

Final Decision: Dismissed

Judgement

H.C. Mital, J.

The abovenaraed Appellants have been convicted and sentenced under Sections 302/149 and 148 IPC to life imprisonment and three years R.I. respectively by Sri S.D.N. Singh, the then District and Sessions Judge, Mirzapur by his judgment dated 28-4-1978.

2. According to the prosecution deceased Chhedi Lal was son of Munni Lal and Smt. Maktulia and after the death of Munni Lal Smt. Maktulia remarried Kattu father of Appellants Bachchan and Bachau, Mewa, Jhuru and Makkhan were brothers. Appellant Sheo Shanker is son of Bachchan. Makkhan and Ram Nandan are sons of Jhuru. Garib is son of Mewa. Smt. Lalmani is wife of Bachchan and Smt. Kishuni is wife of Bachau. Babu Nandan is also son of Jhuru. It is alleged that Munni Lal had five Bighas of land and when Smt. Maktulia after the death of Munni Lal started living with Kattu, the latter also cultivated that land and surreptitiously got entered the name of Bachchan and Bachau. When deceased Chhedi Lal had married and started living separately in his father's house he demanded his father's land

which was not given. Thereupon he filed a case in the Revenue Court. However, subsequently at the intervention of some villagers only one Bigha of land was given by Kattu to Chhedi Lal. Since then the relations between Chhedi Lal and sons of Kattu and his other relations became very strained. After the death of Kattu, Smt. Maktulia was also turned out by Bachchan and Bachau and she lived separately alone in the city. There is a Mahuwa tree adjoining the Sehan of the house of the deceased. Towards east of that Mahuwa tree is the plot of Bachchan and Bachau which earlier belonged to Munni Lal, father of the deceased.

3. The prosecution case is that on 7-12-1976 at about 5 P.M. when the deceased along with his wife Smt. Besari PW 1 returned from his field he noted that Appellants Bachchan, Bachau and Shiv Shanker were digging the roots of the Mahuwa tree to remove it. The deceased objected, whereupon the Appellants asserted that they would remove the tree as its shade was damaging their crops, hence a wrangle ensued. Jhuru was standing there near by and he exhorted Bachchan, Bachau and Shiv Shanker to do away with the deceased. Thereupon Bachchan, Bachau and Shiv Shanker, rushed to their house which is situated at a distance of about fifty paces from the tree and returned accompanied with the rest of the accused, namely, Ram Nandan, Babu Nandan, Makkhan, Garib, Smt. Kishuni, Smt. Lalmani, of whom Bachchan, Bachau, Shiv Shanker, Makkhan and Ram Nandan had spears, Babu Nandan had a Khanti, Garib had a Gandasa, Smt. Kishuni and Smt. Lalmani had sickles. On seeing them, the deceased ran towards east to save himself and the accused chased him and succeeded in overtaking him at a distance of about one hundred paces from the Mahuwa tree in the field of Sarju across the canal. Bachchan gave a spear blow as a result of which the deceased fell down and thereafter all the accused attacked him with their respective weapons. Jhuru who was not having any weapon is alleged to have continued to exhort them. Smt. Besari, the wife of the deceased had followed the accused in a bid to save her husband, but could do nothing. PW 2 Shital and PW 4 Sankatha Prasad also arrived there and witnessed the occurrence. Chhedi Lal was immediately wrapped in a Kathari and on a cot in a rickshaw taken to the police station. He died in the way and then at the police station Ex. Ka-1 written report was submitted by Smt. Besari at 6-30 P.M. on the basis of which case was registered and investigation started. Inquest report was prepared. Dead-body in sealed condition was sent for post mortem.

4. PW 3 Dr. V.P. Gupta did the autopsy on the dead-body on 8-12-76 at about 12 in the noon. He prepared the post-mortem report (Ex. Ka-2) and noted in all thirty nine ante-mortem injuries of which eight were incised wounds, seventeen were punctured wounds and the rest were abrasions and contusions. On internal examination pleura and lungs of both sides were found punctured. In the stomach semi-digested food was found. In the opinion of Dr. Gupta death was caused due to ante-mortem injuries and could have taken place on 7-12-1976 in between 5 and 6 PM.

5. After completion of the investigation, submission of charge-sheet etc. they were tried under Sections 147, 148 and 302 read with Section 149 IPC to which they pleaded not guilty.
6. To prove its case the prosecution in all examined nine witnesses. The prosecution also filed affidavits of PW 6 constable Panna Nath Giri, who had taken the dead-body for post-mortem, PW 8 constable clerk Sewa Lal who had received the sealed bundles of the case, PW 11 constable Imteyaz Ahmad who had taken the sealed bundles of the case and PW 13 constable Kailash Pati Ram who had also taken the sealed bundles of blood-stained articles etc. PW 1 Smt. Besari, PW 2 Shital and PW 4 Sankatha Prasad are the eye witnesses of the occurrence, PW 12 S.I. Sheo Prasad Singh is the Investigating Officer. The others are formal witnesses.
7. The prosecution also tendered in evidence report of the Chemical Examiner (Ex. Ka-40) according to which clothes of the deceased and bloodstained earth was found having human blood.
8. In defence Appellants Bachchan and Bachau took the plea of alibi and examined DW 1 Mohammad Anis, Nazir in Tehsil Chunar ; DW 2 Basant Lal, Ahelmad of S. D M. Chunar ; DW 3 Ram Sagar Singh, Pradhan and DW 4 Chhavi Nath Singh, another Pradhan of another village.
9. The learned Sessions Judge believed the prosecution evidence, hence convicted and sentenced the present Appellants as above. However, he granted benefit of doubt to four of the accused, namely, Jhuru, Babu Nandan, Smt. Kishuni and Smt. Lalmani, hence acquitted them. A Government Appeal against their acquittal had not been admitted and rejected.
10. On behalf of the Appellants it was urged that the evidence of the eye witnesses was highly unreliable as it was against the medical evidence on record and presence of two witnesses, namely Shital PW 2 and Sankatha Prasad PW 4 stood self-contradictory. That the relations of the Appellants with the deceased were very hostile and, therefore, PW 1, Smt. Besari's testimony was highly tainted. It was also urged that the FIR was ante-timed and investigation highly suspicious.
11. The fact that the death of Chhedi Lal was homicidal and had taken place sometime in the evening of 7th December, 1976 as deposed by Dr. V.P. Gupta PW 3 has been fully established and the same has not been challenged except that the possibility that the death of the deceased might have taken place late in the evening or in the night was also probable.
12. The main question involved in this appeal is, whether or not these Appellants were responsible for the murder of Chhedi Lal. There is eye witnesses testimony of PW 1 Smt. Besari, PW 2 Shital and PW 4 Sankatha Prasad about the occurrence. The fact that the deceased was son of Smt. Maktulia, who after the death of the father of the deceased had remarried Kattu, father of the Appellants Bachchan and Bachau is

admitted and not disputed. It is also admitted that Shiv Shanker Appellant is son of Bachchan. Makkhan and Ram Nandan are sons of Jhuru. Garib is son of Mewa. Smt. Lalmani is wife of Bachchan and Smt. Kishuni is wife of Bachau and that Kattu, Mewa and Jhuru were real brothers. Kattu has died, while Mewa and Jhuru are alive. According to the prosecution after the death of Munni Lal father of the deceased when Smt. Maktulia married Kattu, the deceased also started living with Kattu. There is evidence of Smt. Besari PW 1 that about 4-5 Bighas of land of Munni Lal was also, after his death, cultivated by Kattu, who surreptitiously got it entered in the names of Bachchan and Bachau. That when Chhedi Lal deceased became major and got married and started living separately in his father's house then he demanded back the land of his father, but Kattu refused. Thereupon a revenue case was instituted and subsequently at the intervention of some villagers Kattu had given one Bigha of land. This part of the testimony of Smt. Besari stands uncontroverted. That apart, PW 2 Shital has also corroborated it and deposed that 4-5 Bighas of land of Munni Lal was obtained by Kattu from Smt. Maktulia and subsequently when Chhedi Lal filed a case he gave one Bigha of land to him and executed a sale-deed. Testimony of this witness on this point also stands uncontroverted. Hence though in the statement u/s 313 Code of Criminal Procedure the Appellants did not admit the facts regarding 4-5 Bighas of land unlawfully taken by Kattu, but admitted that one Bigha of land was given by Kattu to Chhedi Lal.

13. It is in evidence of both PW 1 Smt. Besari and PW 2 Shital that Mahuwa tree opposite the Sehan of the deceased was of the deceased. PW 2 Shital has further stated that upto the Mahuwa tree Bachchan and Bachau had increased their field. He has further stated that Chhedi Lal and his mother always picked the fruits of the tree. In their statement u/s 313 Code of Criminal Procedure the Appellants have no doubt denied and alleged that they used to pick the fruits, however, the statements of the witnesses on this point stands uncontroverted. Hence the prosecution succeeded in establishing that the Mahuwa tree was in possession of the deceased at the time of the incident.

14. Smt. Besari PW 1 has further deposed that on the date of the incident, i.e. 7th December, 1976 in the evening when at about 5 P.M. she and her husband Chhedi Lal returned from the field they found that the Mahuwa tree was being cut from its roots by Appellants Bachchan, Bachau and Shiv Shanker. Thereupon Chhedi Lal objected, but the Appellants asserted that they would remove the tree as its shade was damaging their crops. Hence a wrangle had ensued. Jhuru was also standing nearby and he exhorted Bachchan, Bachau and Shiv Shanker to do away with Chhedi Lal. Thereupon they rushed to their house and returned accompanied with all the remaining accused of whom Bachchan, Bachau, Shiv Shanker, Makkhan and Ram Nandan had spears, Babu Nandan had a Khanti, Garib had a Gandasa, Smt. Kishuni and Smt. Lalmani had sickles. She has further stated that on seeing the Appellants armed with weapons apprehending danger to his life Chhedi Lal ran towards east to save himself, but the assailants chased and at a distance of about

100 paces Bachchan gave a spear blow as a result of which Chhedi Lal fell down in the field of Sarju lying beyond the canal and then the remaining assailants attacked him with their respective weapons. She has further stated that she followed her husband and raised hue and cry to save him, but could do nothing. That the witnesses including PW 2 Shital and PW 4 Sankatha Prasad had also arrived and then the assailants made good their escape. In her cross-examination she has further stated that at that time Shital and his son were in the field while Sankatha Prasad was irrigating his field with a machine (pumping set). She has further stated that when the roots of the tree was being dug Bachchan and Bachau were having spades and did not have any other weapon. She has denied that her husband was killed at some time during the night and she was not present when he was attacked.

15. PW 2 Shital has also corroborated that when he heard in his field about the incident he rushed to that place and saw Bachchan, Bachau and Shiv Shanker digging the roots of the tree, while Chhedi was restraining them. Thereupon Jhuru exhorted Bachchan, Bachau to kill and they came along with other assailants armed with weapons. That Chhedi Lal then ran towards east for safety. He was chased by the Appellants; that Bachchan gave a spear blow as a result of which Chhedi Lal fell down in the field of Sarju and thereafter all the other accused attacked him with their respective weapons.

16. PW 4 Sankatha Prasad has also corroborated the testimony of Smt. Besari PW 1 and has stated that he had also reached there when Bachchan and Bachau were digging the tree to cut it and then saw that they all came armed with weapons and when Chhedi Lal ran for safety he was chased and attacked by Bachchan with spear as a result of which he fell down in the field of Sarju and then all the accused attacked him with their respective weapons.

17. On behalf of the Appellants testimony of both these witnesses was challenged, firstly, on the ground that they were highly interested witnesses, as PW 2 Shital has admitted in his cross-examination that about 10-15 years ago a quarrel had taken place about his Khalihan in which he had received injuries at the hands of Bachchan and Bachau in which they were acquitted. He has further admitted that he was a witness in a case u/s 375 IPC against Bachchan and Bachau launched by Chhedi Lal about six months prior to the occurrence of this case. PW 4 Sankatha Prasad also admitted in his cross-examination that a quarrel had taken place with Jhuru, Bachchan and Bachau with him. He has further stated that Chhedi Lal was also accused in that case. He denied that he had ever given evidence in favour of Chhedi Lal. He, however, could not say in how many criminal cases he was convicted and prosecuted. He has further admitted that he was falsely implicated in an Excise Case regarding recovery of Liquor by Bahadur, brother of Bachchan and Bachau about two months prior to the occurrence of this case. He further stated that Bahadur was also co-accused. From the statement of Sankatha it cannot be said that he was also an interested witness. No document has been filed showing that he had ever given

evidence against the Appellants. That apart, merely because the witnesses happened to be close to the deceased can be no reason to discard their testimony if their presence at the scene of occurrence is believed. Both of them have got their fields nearby and it was quite possible for them to have reached there on hearing the wrangle. Presence of these witnesses at their fields was also natural. The fact that their fields are only about 100 or 150 paces away is also not denied.

18. Regarding the testimony of Sankatha it was pointed out that in his examination-in-chief he has stated that he was irrigating his field from the canal, but in his cross-examination he corrected himself, that he was irrigating the field with the pumping set of Shobha. Merely because the witness had earlier made a wrong statement which he subsequently corrected can be no reason to doubt his presence particularly when Smt. Besari PW 1 has also deposed that Sankatha was irrigating his field with the machine when he heard the noise and came to the spot. Hence because of these minor discrepancies, the statement of Sankatha Prasad is not to be discarded. The discrepancy in the statement of the witnesses were natural as their statements were recorded after a year of the occurrence. There is another significant factor to make the witnesses available at the scene of occurrence, that before the actual ♦Mar Pit♦ a wrangle had ensued near the Mahuwa tree. Hence within that time till the actual incident took place the witnesses must have reached there. It was also pointed out that PW 4 Sankatha Prasad has further admitted in his cross-examination that after irrigating his field he had reached his shop where he had heard the noise. The witness has further stated that from that very shop on the following day he was called by the Darogha for interrogation. We agree with the observation of the learned Sessions Judge that inspite of these minor discrepancies in view of the fact that the witnesses belonged to the same locality even if they were not exactly at their fields where they deposed to have been, the fact remains that on hearing the noise they must have been necessarily attracted to the scene of occurrence. That apart, presence of Smt. Besari, wife of the deceased at the scene of occurrence cannot be doubted. It is true that there has been long standing litigation between the deceased and the Appellants, but that could also be motive for the Appellants to do away with the deceased and the evidence of Smt. Besari regarding the dispute over the Mahuwa tree appears to have a ring of truth as on the following day the Investigating Officer found cut marks on the roots of the tree and that part of his statement stands uncontroverted.

19. There is another important circumstance that . it was not a case of hit and run. The deceased had received in all as many as 39 injuries. He had run for safety from his Mahuwa tree and was chased for full 100 paces when he was over-powered and speared by Bachchan as a result of which he fell down and then the other assailants attacked him with their respective weapons. Hence there was sufficient time to attract the presence of the witnesses to the scene of occurrence.

20. The fact that the deceased was attacked at that place, i.e. in the field of Sarju stands proved to the hilt by the presence of the blood collected by the Investigating Officer on the following day. On Chemical Examination said sample of earth recovered was found stained with human blood by the Chemical Examiner, U.P. vide his report Ex. Ka-40.

21. On behalf of the Appellants it was urged that the incident in fact had not taken place at 5 P.M. as alleged and the FIR was ante timed and, therefore, the entire prosecution case would collapse once it was proved that the FIR was not lodged at the time as alleged, but subsequently. In support of its contention much reliance was placed on the fact that even though the distance from the police station to the mortuary was about one km. still the dead-body had reached there on the following day at 11.50 A.M. as noted by the Doctor on Ex. Ka-20. It is true that the Doctor has noted that the dead-body was received along with papers at 11.50 A.M. but it is clear from the letter of the R.I. to the Medical Officer-in-charge of the Hospital for postmortem that it was sent on 7-12-1976 and in Ex. Ka-20 it is further mentioned that the dead-body was despatched to the Head Quarter, at 7.45 P.M. along with the papers to the Doctor even a copy of the FIR was sent and that copy bears the signatures of the Doctor also.

22. There is also evidence of PW 5 Head constable Zileadar Singh (who had registered the case on the basis of the FIR Ex.Ka-1 submitted by Smt. Besari) that on 7-12-1976 at 6.30 P.M. the said FIR was submitted by Smt. Besari on the basis of which he prepared Chick report (Ex. Ka-3) and registered the case in the G.D. at Report No. 24. He filed Ex.Ka-4 and its true copy and has further stated that Special report of the case was sent immediately thereafter at 7 P.M. through constable Luxmi Narain to the higher authority and there was entry in the G.D. to the effect at Report No. 25. He also filed Ex. Ka-5 copy of the same. In his cross-examination he has further stated that constable Luxmi Narain had taken the special report and had returned by 9.15 P M on the same night and there was an entry in the G.D. at report No. 34. That entry was in the hand-writing of his Assistant Muharrir Ram Murti Singh, whose hand-writing he recognized and he also filed Ex.K.a-8 copy of the same. He, however, admitted that on the entry there should have been also signatures of Luxmi Narain, but the same was not there by mistake. He denied that the entry was fictitious. On behalf of the Appellants it was urged that constable Luxmi Narain should have been examined by the prosecution to give them an opportunity to cross-examine him We do not find any substance in this contention as it was in the cross- examination of the Head constable Zileadar Singh the fact came out that constable Luxmi Narian had returned at 9.15 P.M. on the same night. Hence if the defence disputed that part of the statement in cross-examination, it could move the court to examine Luxmi Narain as a court witness if not as a defence witness when the same was not examined by the prosecution. Even any application was not moved to the court that constable Luxmi Narain be also examined. That apart, there is a presumption that official entries have been kept in the regular course of

business unless it is found that the same have not been so kept.

23. It was next urged that Smt. Besari PW 1, had taken the deceased in a rickshaw on a cot when he was alive and died in the way and she herself was on the same rickshaw, she must have received some blood mark on her Sari, but no such mark was noted at the police station when it was noted that the cot on which the dead-body was brought had blood marks thereon. The contention that the cot on which the dead-body was taken was examined and it was noted that it had blood marks thereon. It is not corroborated by the entries in the G.D. (Ex. Ka-4) regarding registration of the case. Therein it is, however, noted that the dead-body was brought on a Charpai on a rickshaw and it was at the gate of the police station, but it was not noted that there were blood marks either on the cot or on the rickshaw or on the clothes of informant Smt. Besari. Hence this contention is prima facie not very material as it is apparent that the Head Muharrir did not care to note blood on any thing.

24. It was also pointed out that when the Appellants Bachchan, Bachau and Shiv Shanker were already armed when they were cutting the tree, there was no necessity for them to have gone to their house to collect defence. It is wrong that they were armed at that time, but it is in cross-examination of PW 1 Smt. Besari that at that time they were having spades and did not have any other weapons. That statements also appear to be plausible as one would not try to dig or cut the Mahuwa tree with spears or Gandasa. Lastly it was urged that the medical evidence, i.e. the injuries received by the deceased did not corroborate the prosecution version, as the deceased had received as many as thirteen injuries caused by some blunt weapon like Lathi, while according to all the three prosecution witnesses neither of the assailants had a Lathi. It is true that out of thirty nine injuries there are about thirteen contusions and abrasions including one lacerated abrasion and the question is whether the same could be caused with spears and Farsas or not. It has come in the cross-examination of PW 4 Sankatha Prasad that Bachchan and Bachau had also subsequently used their Ballams as Lathis. It was also urged that though there is evidence that both the three men, namely, accused Smt. Lalmani and Smt. Kishuni had wielded sickles and caused injuries but no sickle injury was found. It is true that no sickle injury was noted and, therefore, the learned Trial Judge also gave them benefit of doubt. It is nothing unusual that in such a large gathering of assailants injury of each and every assailant be received by the victim though each and every assailant appear to be wielded his arm within a vision of the witnesses, particularly when the witnesses stand at some distance away and do not dare to go very close to the victim. There are consistent decisions of the Hon^{ble} Supreme Court that if the presence of the eye witnesses is free from doubt, then the fact that some of the injuries appear to have been caused by some blunt object when the victims were armed with pointed or sharp edged weapons would not be sufficient to discard their testimony as it is not unusual that many a times while wielding Farsas, the blunt side of the same hits the victim and it all depends on the

exigencies of the situation at the time of the assault how a particular weapon is used by a particular assailant. In the case of State of U.P. v. Hari Ram 1983 CriLJ 1639, an appeal against acquittal passed by this court the facts were that there was some sort of chronic dispute in between the deceased and the assailant which culminated in the occurrence and according to the prosecution four assailants of whom two were armed with knives and two with spears assaulted the deceased with their respective weapons. In the, FIR it was not mentioned that the accused had assaulted with the Lathi portion of the spear. On the person of the deceased lacerated wounds and abrasions were also found. The learned Sessions Judge had convicted the accused while this court acquitted them on the ground that the ocular evidence adduced in the court by the prosecution was wholly inconsistent with the medical evidence and the FIR appeared to have been lodged early in the morning and not at 11.15 P.M. earlier in the night immediately after the occurrence as alleged by the prosecution and, therefore, there was sufficient time for the prosecution to bolster up a case against the accused in view of the previous enmity. Their Lordships of the Hon"ble Supreme Court found that after the lodging of the report special report was sent to the police station immediately thereafter clinched the point in favour of the prosecution that it was not ante-timed.

25. As regards the ground that ocular evidence adduced in the court was inconsistent with the medical evidence and that the oral testimony that spears were used as Lathis was against the contents mentioned in the FIR as it was not so mentioned therein. Hence the evidence adduced in the court was after thought. Once the presence of the witnesses was believed and the injuries were also explained even though the same fact was not mentioned in the FIR and there did not not appear to be any dishonesty on the part of the investigation there was no reason to discard the testimony of the eye witnesses whose presence at the scene of occurrence was natural. In the present case also though no explanation was sought to be given by the prosecution nor any attempt was made by the Investigating Officer to record in the statements of the witnesses u/s 161 Code of Criminal Procedure that the assailants had also wielded Ballams as Lathis further goes to show that the investigation was not at all tainted and no effort was made to improve upon the version as given in the FIR or whatever the witnesses stated before him. However, when this question was pressed in the cross-examination of PW 4 Sankatha he explained that two of the assailants, namely, Bachchan, and Bachau had wielded their Ballams as Lathis. No such explanation of these injuries was sought from Smt. Besari PW 1 nor from PW 2 Shital. That apart, PW 3 Dr. V.P. Gupta also stated in his cross-examination that the contusions could also be caused due to fall. He has also stated that if the point of the sickles was thin, penetrated wounds could be caused by the same though he could not say which of the penetrated wound could be caused by sickle. In his examination-in-chief he had also stated that with the Lathi portion of the spear, Gandasa and Khanti all the contusions and abrasions could be caused.

26. In view of the above discussion of the evidence on record it is clear that the various points raised by the Learned Counsel for the Appellants have not sufficient force to create any reasonable doubt in the mind of the court that the occurrence had not taken place in the manner as set up by the prosecution and that these eye witnesses were not present at that time, though on behalf of the Appellants our attention was not brought to the fact that there was sufficient evidence to prove alibi on behalf of the two Appellants, namely, Bachchan and Bachau, but we have very carefully perused the evidence of DW 1 Mohammad Anis, Nayab Nazir of Tehsil Chunar who deposed after seeing the attendance register of Tehsil Chunar that Bachau Appellant, a process-server in the Tehsil at Chunar on 7th December, 1976 was present during office hours from U) A.M. to 5 P.M. The learned Sessions Judge disbelieved his testimony very rightly as Mohammad Anis himself had not maintained that register, but it was maintained by another process-server Sidha Nath who was not examined and Mohammad Anis could not recollect about any particular peon whether he had left the office on any particular date. It has appeared from the perusal of the register that there was over-writing against the name of Appellant Bachau and his attendance was not marked only on 7th, but also on 8th, 9th and 10th of December, 1976 when according to the Investigating Officer he was absconding. Mohammad Anis admitted that he came to know about the involvement of Bachau on 8-12-1976, but even then he did not inform the police which he ought to have done. If Bachau was present there and even if he had not informed, the Investigating Officer must have obtained his address, if he was there and would not have taken steps under Sections 82, 83 Code of Criminal Procedure .

27. In respect of Bachchan Appellant evidence was adduced that he was handed over fifteen summons and notices for service on 6-12-1976 and returned after effecting service on 11-12-1976. Records of Court of S.D.M. (Sadar) and Tehsil Chunar were shown to show that Bachchan had effected the service of summons on 7-12-1976. DW 2 Basant Lal, Ahelmad of court of Tehsil Chunar, DW 3 Ram Sagar Singh, Pradhan of Kharka Newada and DW 4 Chhavinath, another Pradhan of Mauza Ranipur were examined. The learned Sessions Judge after closely scrutinising their testimony had come to the conclusion that the testimony was wholly unreliable that the Pradhans could not recollect about the particular summons pertaining to Bachchan at the date, while they have no recollection of any other summons. We do not see any reason to dis-agree with it. Thus, there is no force in the plea of Appellants Bachchan and Bachau that they were not present at that time.

28. However, we find that Appellant Shiv Shanker s/o Bachan was aged only 13 years when his statement u/s 313 Code of Criminal Procedure was recorded on 23-2-1978, that means on the date of the incident he was less than 12 years of age. This fact appears to have gone unnoticed by the learned Sessions Judge as there was no mention of it, even though he has individually discussed participation of the accused. If this fact had been noticed by him he would have also been given benefit of doubt when the same was given to Jhuru aged about 17 years and have alleged

to have incited the assailants to do away with Chhedi Lal. We, therefore, think it proper to extend benefit of doubt to Appellant Shiv Shanker as participation of such a young lad at the time of the assault appears highly doubtful though he might be present along with his father Bachchan and uncle Bachau when the Mahuwa tree was being dug.

29. The result is that the appeal of Appellant Shiv Shanker is allowed. He is given benefit of doubt. His conviction and sentence u/s 148 and 302 read with Section 149 IPC are set aside and is acquitted of these charges. He is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged.

30. The appeal of the remaining Appellants, namely, Bachchan, Bachau, Makkhan, Ram Nandan and Garib is dismissed. The conviction of Bachchan, Bachau, Makkhan, Ram Nandan and Garib u/s 302 read with Section 149 IPC and u/s 148 IPC to life imprisonment and three years R.I. respectively against each of them are hereby confirmed as passed by the learned Sessions Judgs. Their sentences shall run concurrently. They are on bail. Their bail is cancelled. They shall be taken into custody forthwith to serve out the sentences passed against them.