
(2017) 02 AHC CK 0003

ALLAHABAD HIGH COURT

Case No: Criminal Appeal No. 327 of 1986

Chutuku

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Feb. 17, 2017

Acts Referred:

- Penal Code, 1860 (IPC) - Section 147, Section 149, Section 302

Citation: (2017) 99 ACrC 214

Hon'ble Judges: Arvind Kumar Tripathi and Shailendra Kumar Agrawal, JJ.

Bench: Division Bench

Advocate: Criminal Appeal No. 327 of 1986; V.C. Tiwari, Chandra Prakash Awasthi, Advocates, for the Appellants; A.G.A, for the Respondent; Criminal Appeal No. 488 of 1986; V.C. Tiwari, Advocate, for the Appellant; A.G.A, for the Respondent

Final Decision: Allowed

Judgement

Shailendra Kumar Agrawal, J.—Both the aforesaid criminal appeals have been preferred against the judgment and order dated **24.1.1986 passed by Sessions Judge Banda in the Session Trial No. 305 of 1985 (State of U.P. v. Chhotuku Singh and five others)**, under Sections 147 I.P.C. and 302 read with Section 149 I.P.C. PS-Atarra, District-Banda, by which the appellants namely Chhotuku, Babu @ Rajendra Singh, Chandrapal Singh, Giyan Singh, Laltu Singh and Arjun Singh were convicted and sentenced to undergo two years of R.I. under Section 147 I.P.C. and sentenced to life imprisonment under Section 302/149 I.P.C. each.

2. Heard Shri Arvind Kumar Srivastav, learned counsel appearing as amicus curiae on behalf of appellants Giyan Singh and Arjun Singh, Sarvshree Mr. Rajrshi Gupta, learned Advocate, appearing on behalf of appellant Chhotuku Singh, Mr. C.P. Awasthi and Mr. S.C. Sahu, learned counsels, appearing on behalf of appellants Chhotuku Singh, Babu @ Rajendra Singh and Laltu Singh and Shri Mahendra Singh Yadav learned A.G.A. for the State and perused the record. During the pendency of the appeal, the appellant

Chandrapal died and his appeal was abated vide order dated 5.11.2015.

3. The brief facts of the case are that first informant Kallu s/o Ramdi Chamar resident of village Tera informed the police station Atarra that he is ploughman of Indrapal. Indrapal was doing the work in his field of grove. Chhotuku s/o Bhura Singh, Arjun Singh s/o Kallu Singh, Babu @ Rajendra Singh s/o Brij Lal Singh Thakur, resident of village Atarra, reached there with lathi, farsa and started abusing Indrapal by saying that he had participation and complicity in the murder of Balbeer Thakur. All these persons started beating Indrapal, then wife of Indrapal and several other persons reached there. They made noise and began to shout, then these people ran away. Indrapal got injury in his head and body, due to which he was not speaking, and he has come to the police station with Indrapal in his bullock-cart. This incident took place at about 9 a.m. on 21.8.1984.

4. The report was scribed and signed by the head constable Naeemullah and on the basis of this report dated 21.8.1984, a chick F.I.R. was lodged at 3:30 p.m., which is Ex. Ka 6 in crime no. 152/84 under Section 308,323,504 I.P.C. and a G.D. No. 17 at 3:30 p.m. Ex. Ka 5 was prepared.

5. On 21.8.1984 the injured Indrapal was brought to Attara hospital by a constable Laxmikant, who identified him. Dr. J.P. Sharma Medical Officer incharge of hospital Attara, District Banda examined him and found following injuries on the body of injured Indrapal:-

1. Incised wound on head of 7cm above to left ear of 5cm x 0.5cm x 1cm (bonny deep) with clear-cut, well defined margins and bluish black colour.

2. Incised wound on head of 9cm above to left ear 4cm x 0.5cm x 0.5cm, clean-cut, well defined margins and advised X-ray of whole head.

3. Incised wound on head of 11.5cm above to left ear of 4cm x 0.5cm x 0.5cm of bluish black colour, clean-cut, well defined margins.

4. Swelling on left hand dorsally of 6cm x 4cm and advised X-ray.

5. Patient is in unconsciousness and referred to District Hospital Banda.

6. Doctor found injuries no.1 to 3 to be caused by sharp edged weapon and rest by blunt and hard object within ■ to ■ day, and kept under observation. He had proved the injury report Ex. Ka 1. He deposed that these injuries could have been inflicted at 9 a.m. on 21.8.1984. injuries no.1 to 3 could be inflicted by Pharsa blows and other injuries were caused by blunt object like lathi.

7. The investigation of this case was taken by S.O. Shri Banshraj Singh. On 22.8.1984, the investigating officer prepared a site-plan and recorded the statement of Kallu and constable Baratilal and Ramshankar Tiwari and he also inspected the spot on the pointing

out of Kallu. On 23rd August 1984 Brijpal handed over a written application to the investigating officer, which is Ex. Ka 2, in which, he named six accused persons to be involved in the case, including those, as already named by Kallu in Ex. Ka 4. Brijpal, the real brother of deceased Indrapal, also involved Chandrapal Singh s/o Brij Lal Singh, Giyan Singh s/o Chunbad Singh and Laltu Singh s/o Balbeer Singh as co-accused. As per Ex. Ka 2, at about 9 a.m. on 21.8.1984, Indrapal, real brother of Brijpal, was working in the fields of the grove, when these six accused persons armed with lathis and pharsas came abusing and declaring that Indrapal had participation and complicity in the murder of Balbeer and they all started beating him causing injuries on the skull, arms and body of Indrapal who had fallen down on the ground. Brijpal, Ram Narayan s/o Sita Ram, Ramakant s/o Ram Roop of his village, Subendra s/o Bhagwan Deen Gupta resident of village Pangara and his bhabhi Smt. Sukhiya, were present in the field of grove and were witnessing occurrence. They all had concealed themselves inside the grove and did not come out due to fear and then ran away from that place in a concealed manner. During this period two constables came there and on seeing them, the accused persons ran away from the spot. The constables sent his brother Indrapal in the bullock-cart with Kallu to the police station. He also came to Naraini concealing himself and inquired about his brother Indrapal and came to know that Indrapal had been referred from Atarra to Banda hospital. Then he reached Banda.

8. Indrapal, the deceased died in the night of 21.8.1984 at 12 o'clock in Banda Hospital. The autopsy was conducted at District Hospital, Banda, at 6:10 p.m. on 22.8.1984, of the dead body of Indrapal, when the sealed dead body was brought to the hospital by constables Suresh Narain and Mohd. Ishak. The doctor found the following ante-mortem injuries on the dead body of Indrapal:-

1. Incised wound 4cm x 1cm x bone deep on the left side of the scalp 6cms above from left ear.
2. Incised wound 3cm x 1cm x bone deep of the left side of the scalp 5cm behind from the injury no.1.
3. Incised wound 5cm x ■cm x bone deep on the left side of the scalp 1cm behind from the injury no.2.
4. Abraded contusion 8cm x 5cm at the top of the shoulder.
5. Abrasion 5cm x 5cm on the front of the left fore-arm, upper arm 3cms above from left elbow joint and 12cms below from left elbow joint.
6. Abrasion 6cm x 1cm over right buttock.
7. Abrasion 12cm x 4cm over left buttock 8cms below on left side from lower end of sacrum.

8. Contusion 5cm 3cm over dorsal surface of left hand 2cm below from left wrist-joint.

9. In the internal examination, he found the fracture of the left parietal bone, seen 7cm in length, in relation to injury no.1. Further, clotted blood present under injury no.1, brain not liquified, left lung was congested, heart right side full, left side empty. In the stomach he found 250 M.Grams and water present. The small intestine contained gas and large intestine contained faecal matter and gasses. Gall bladder was 1000 grams and full. Bladder was full. In his opinion the cause of death was due to shock and haemorrhage as a result of ante-mortem injuries and the genuineness of the post-mortem report was admitted U/S.294 Cr.P.C. and marked Ex. Ka 3.

10. The investigating officer Shri Banshraj Singh on 23rd March, 1984 had first of all met Brijpal, who had given his written report to him, which was entered in the case diary and had also recorded the statements of Brijpal, Ram Narayan Singh, Ramakant, Sukhiya and statement of Subendra Gupta, the eye witness, on 25.11.1984, and other witnesses. And after completing investigation submitted the charge-sheet Ex. Ka 9 under Section 147,148,149,307,302,120(B) I.P.C. The complainant Kallu s/o Ramdi Chamar was also found in the conspiracy of the murder of Indrapal and case was also converted on 25.11.1984 under Section 147,148,149,302, 120(B) I.P.C. and it was written by investigating officer that investigation will be continued against Kallu Chamar and supplementary charge-sheet will be submitted against him later on.

11. The learned Sessions Judge Banda framed the charges against Chhotuku Singh, Arjun Singh, Babu @ Rajendra Singh, Chandrapal Singh, Giyan Singh and Laltu Singh under Section 147 I.P.C. and 302/149 I.P.C. on 1.7.1985. The prosecution examined Dr. J.P. Sharma, medical officer-in-charge, Male Hospital, Atarra, Banda, as P.W.1; Brijpal, the real brother of deceased as P.W.2, Ramakant, the independent witness, as P.W.3, affidavit of constable Laxmikant Mishra as P.W.4, constable Ramshankar Tripathi as P.W.5, constable Chandrabhan Dubey as P.W.6 and constable Phool Singh as P.W.7. Prosecution relied on the following documentary evidence:- injury report dated 21.8.1984 Ex. Ka 1, which has been proved by P.W.1 Dr. J.P. Sharma, medical officer-in-charge, male hospital, Atarra, Banda; written report dated 23.8.1984 Ex. Ka 2 which has been proved by P.W.2 Brijpal; postmortem report Ex. Ka 3; the chick F.I.R. as Ex. Ka 4; G.D. no. 17 at 3:30 p.m. Ex. Ka 5; G.D. no.12 at 11:30 a.m. dated 30.8.1984 as Ex. Ka 6; G.D. no.21 dated 20.8.1984 at 18:45 p.m. as Ex. Ka 7; site-plan which has been proved by P.W.7 as Ex. Ka 8; charge-sheet dated 25.11.1984 proved by P.W.6 as Ex. Ka 9; Challan nash as Ex. Ka 10; Panchayatnama (inquest report) of deceased Indrapal dated 22.8.1984 as Ex. Ka 11; letter dated 21.8.1984 written to medical officer, hospital Sadar, Banda sending the dead body for postmortem as Ex. Ka 12; Ex. Ka 13 is the information letter from medical officer district hospital Banda, Kotwali; Ex. Ka 14 is the information sent to police station regarding death of injured Indrapal; Ex. Ka 15 is the photo nash.

12. The statements of accused persons were recorded under Section 313 Cr.P.C. All accused denied their complicity and stated that they all were inter se friends and had

good relations among them and also stated that witnesses are deposing against them due to enmity. The accused persons filed some documentary evidence consisting of extract of Voters' List of village Tera showing Indrapal (deceased) residing in house no.21 and in the adjoining house no.22 his brother Brijpal, Ram Narayan, Deo Narayan s/o Brijpal and others as Ex. Kha-1. Another extract of Voters' List A.D. of 1984 of village Tera, in which also, Indrapal (deceased), resided in the house no-18, separately from Brijpal (informant), who resided in house no.19 along with Ram Narayan and family members as Ex. Kha- 2. The copy of the written report lodged by Chhote Lal, dated 15 October 1980, under Section 147/302 I.P.C. as Ex. Kha-3, alleging that Indrapal s/o Raja Ram with a gun, Brijpal s/o Raja Ram with lathi, Ram Charana @ Bata with gun, Ram Roop with lathi and Satanand @ Bata with gun and Indrapal have said to shoot him, Ramcharan @ Beta fired with his gun towards the informant and the bullet struck in the skull of the Prahlad who was working and fell down on the ground. The copy of charge-sheet as Ex. Kha-4 which was against Indrapal and his brother Brijpal, Ram Charan, Satanand @ Bata, Ram Roop Brahman son of Shripal Brahman and Balbeer were mentioned as eye witnesses, and the copy of application dated 3.11.1980 moved by Raghunath Singh resident of village Tera and was father of Prahlad who was taken by Chhote Lal on 14.10.1980 for the construction of his house as Ex. Kha-5. As per this application when his son Brij Lal did not return up to 8 or 9 p.m. then he went to the house of Chhote Lal and heard the noise of two bullet rounds and he reached running and saw that his son was lying injured beneath the house of Chhote Lal and was unconscious and Balbeer Singh and other villagers had also assembled there and on the way to police station he died. The copy of the statement of Atar Veer Singh as Ex. Kha-6, the copy of the inquest report of the dead body of Balbeer Singh as Ex. Kha-7, the copy of postmortem report of Balbeer Singh as Ex. Kha-8, the copy of judgment of Hon"ble High Court as Ex. Kha-9 in which Nango @ Rama Kant had preferred a criminal appeal who was convicted under Section 302 I.P.C. and sentenced to death were also filed in defence.

13. Learned counsel for the appellants raised some points to be considered for the right conclusion. It is to be seen whether P.W.2 and P.W.3 actually witnessed the occurrence; whether they were present nearby; whether this incident took place in the field of grove of Indrapal as the prosecution version is; whether F.I.R. is ante-timed; what will be the value of Ex. Ka 2, the second F.I.R.; medical evidence does not tally with ocular evidence. Learned A.G.A argued that there is a clear-cut case of motive on the part of accused to kill Indrapal and the witnesses are trustworthy

14. After perusing the entire evidence on record firstly this Court has to analyse that who were the witnesses who actually witnessed the occurrence and whether deposition of those witnesses in the Court is believable and trustworthy. As per Chik F.I.R. Ex. Ka 4, Kallu s/o Ramdi was the sole witness of the whole occurrence but he was not examined in the trial Court and prosecution had failed to give any explanation that why this sole witness of the occurrence was not examined rather he had been arrayed as one of the

co-accused but no charge-sheet has been filed. As per Chik F.I.R. and statement recorded of Kallu under Section 161 Cr.P.C., it is clear that at the time of incident only Kallu was present in the field of grove where Indrapal was doing work and where the whole incident took place. As per Ex. Ka 4, after the incident the wife of deceased Indrapal and many other people came on the spot but no one was examined. Although it is nowhere on record that except Kallu anyone had seen the occurrence and also no one had been named as the witness in Ex. Ka 4, the F.I.R. As per this Ex. Ka-4, when Kallu took Indrapal to police station, till that time no witness had reached on the spot but as per second theory as mentioned in Ex. Ka-2, Indrapal was doing work in the fields of grove where the accused came and the whole incident happened. These P.W.2 Brijpal, Ram Narayan, P.W.3 Ramakant, Subendra and Sukhiya saw the occurrence but due to fear they could not come forward and then by hiding themselves they ran away. During that period two constables of the police station reached there and on seeing them accused ran away. Constables sent Indrapal with Kallu on the bullock-cart. P.W.2 Brijpal stated in his examination in-chief that during the course of altercation no one came on the spot and he, Ram Narayan, Rama Kant, Suvendra and Sukhiya only saw the incident and two constables reached after that, and at that time Kallu s/o Ramdi, Halwaha of Giyan Singh reached there. The version given in examination in-chief does not tally with the Ex. Ka 4 and also with the Ex. Ka 2 which was given by Brijpal. As per Ex. Ka 2, during this incident, two constables reached there and seeing them, accused ran away. This shows that incident had been seen by the two constables and Kallu. But as per statement given in examination in-chief of P.W.2, neither Kallu nor the two constables saw the occurrence. Thus the whole story of the prosecution shatters because the prosecution version is fully dependent on Ex. Ka 4 and as per Ex. Ka 4, Kallu is ploughman of deceased Indrapal, while as per statement of P.W.2, Kallu is ploughman of Giyan Singh, accused. In his cross-examination also, P.W.2 admitted this fact that till his brother was murdered, police persons did not reach to village Sumat ka Purva, where this incident occurred. P.W.2 specifically stated in his cross-examination that Kallu had written wrongly in his report Ex. Ka 4 that he was the servant of Indrapal or he was working in the field of Indrapal at the time of the incident. As regards presence of P.W.2, Rama Kant, Ram Narayan, Subendra Gupata, and Sukhiya is concerned, Ram Narayan, Subendra Gupta and Sukhiya have not been examined. No explanation has been given by the prosecution that why these eye witnesses were not examined.

15. As regards the credibility of the P.W.2 is concerned, he is the real brother of the deceased. Naturally he will be an interested witness. In such circumstances, it is the duty of the Court to analyse the evidence of this witness minutely and cautiously. P.W.2 Brijpal stated in his examination in-chief that he knew the accused Chandrapal, Laltu, Giyan Singh, Babu, Arjun, Chhotuku present in the court. About 6 months ago at 9 a.m., his real brother Indrapal was working in his field of the grove. At that time he, Ramakant, Ram Narayan, Smt. Sukhiya, Subendra Gupta were sitting and talking in their grove, these six accused persons came from the northern side of the Canal Patri armed with lathi and farsas. Farsas were carried by Chandrapal, Laltu and Giyan Singh and Babu, Arjun and

Chhotuku were armed with lathi. These assailants came abusing and declaring that Indrapal had complicity in the commission of the murder of Balbeer Singh and they should go and commit his murder. Then these assailants came down from the Canal Patri towards East and his brother Indrapal ran towards South from his field but he was surrounded by all six accused persons on the northern end of the field of Ram Sewak, where he was beaten with lathi blows and farsa. During the commission of beating, none of the person came there and later on two constables reached on the spot and seeing the constables these accused persons ran away towards South. This witness also further stated that they had been witnessing the occurrence from behind the wall of the grove. By analysing these statements of this witness, it is clear that total number of accused are six and this witness is also present with another four persons. In spite of this, he did not make any noise, any alarm to indicate his brother to run away from the place and did not try to save his brother. This is impossible from the point of the view of a normal human conduct and behaviour. There is no enmity or bad relations between this witness and his real brother, deceased Indrapal. In spite of reaching of the constables on the spot, he did not reach on the spot rather he, along with other four companions, is only continuously witnessing the incident from behind the wall of the grove. Both constables are sending the body of his brother with Kallu but he is not reaching there and further this witness has said that he went to Naraini by hiding himself from there and when he came to know that the condition of his brother is very serious, he reached to Banda hospital. All this shows that this witness was not present on the spot and he has cooked the entire story. We fully agree with the argument of the learned counsel for the appellant that statements of this witness is fully untrustworthy, as this is beyond imagination and common behaviour of a common and reasonable man that a real brother will not reach to that place where his real brother is being beaten in a cruel manner.

16. The conduct of P.W.2 regarding his presence on the spot is fully suspicious on this ground also when he stated that when two constables reached on the spot even then he did not send Subendra Gupta, Smt. Sukhiya or Ram Narayan Shukla to tell to the constables the name of real assailants or in what manner the incident took place. If he is stating that one day before this incident, Balbeer Singh was murdered, due to that fear, he did not go on the spot, then in that position at least, he could have sent these Subendra Gupta etc. on the spot to tell the whole incident to those constables. Besides this, when assailants were escaping on seeing the constables, this witness, the real brother, is not coming out. It is unbelievable that due to fear he could not come out. He admitted that he knew many advocates in Banda. Shri Ramnath Dubey had been his counsel in earlier incidents who had been M.P. He could have contacted any of the advocates to inform the police or to help him. When, for the first time in his examination in-chief, this P.W.2 is stating that these accused persons came abusing that Indrapal had complicity in the murder of Balbeer Singh, then these people came to east side and Indrapal ran towards south of his field. But it was not possible for this witness or his companions to hear the conversation of accused persons from such distance and why the statement was not given to the I.O. in this regard. All this shows the falsity of the

prosecution case.

17. P.W.2 are four brothers Jagannath, Shripal, Indrapal and Brijpal. Ram Roop is son of Shripal and Rama Kant P.W.3 is son of Ram Roop. It is also noteworthy that Brijpal Rama Kant, Ram Narayan, Sukhiya all are close relatives to each other. Witness Sukhiya is the wife of Shripal, who is the real brother of deceased Indrapal and P.W.2 Brijpal. She has also not been examined. Regarding Rama Kant, this P.W.2 is stating that Rama Kant ran to his house from the field of grove and he did not go with this witness either to Naraini or from Naraini to Banda. Rama Kant is grandson of deceased Indrapal. This is beyond the imagination of common behaviour of a common man that his grandfather is beaten up and he is not going to see the condition of his grandfather. This conduct also creates doubt regarding presence of P.W.2 and P.W.3.

18. As it is proved from the statement of P.W.2 that during this incident these two constables were not present and that is why they could not see the occurrence. But this witness P.W.3 Rama Kant is stating in his examination in-chief that when all accused were beating Indrapal with lathi and farsa and when Indrapal fell down unconsciously, during that period two constables and Kallu, Halwaha of accused Giyan Singh, reached there. Hence, there is a major contradiction between the statements of P.W.2 and P.W.3 regarding the presence of these two constables at the time of incident. One of the constables, regarding whose presence these two witnesses P.W.2 and P.W.3 have stated that they were present, Ram Shankar Tripathi P.W.5 is stating in his examination in-chief that on 20th August 1984, Balbeer Singh, resident of village Tera, was murdered and he as well as constable Baratilal were deputed there for maintaining law and peace, and on 21.8.1984 both constables were present in village Tera and at 9 a.m. they got information that some people were beating Indrapal in the house. He and constable reached there running. After reaching there, they saw that these people were running towards Barauni from the side of canal and Kallu Chamar was present there. It shows that before reaching of these constables, Kallu was already present there while P.W.2 is stating that when they were present and witnessing from the field hiding themselves, then two constables reached and after that Kallu reached there, while P.W.5 constable himself is saying that Kallu was already there. It means there are major contradictions regarding the presence of Kallu and the two constables. This P.W.3 is admitting that he had seen which accused was armed with which arm but investigating officer did not ask regarding this and he himself did not tell. All this creates doubt about the presence of this witness also on the spot. In a very simple manner this P.W.3 is stating that when these accused began to beat Indrapal, he fell down and when two constables sent Indrapal through Kallu by bullock-cart to police station, he came to his house. This conduct of P.W.3 does not inspire confidence that after such a great incident when his grandfather was being beaten, he was not taking any notice and simply came to his house and is not telling to anyone, all this shows that he was also not present on the spot. But in cross-examination, he is stating that he came to his house at village Sumat ka Purva. Many people assembled in his house and he told them about the incident. The distance between Tera

village and village Sumat Ka Purva is less than one km but no one said to go to the police station to inform about the incident and he remained in his house till the evening of 21st August 1984 and in the evening he came to Atarra and I.O. recorded his statement on 23rd August 1984. Question arises why he is not complaining to the police station. He is also admitting that his grandfather Brijpal was separated from him from the time of the occurrence and he did not know where he had gone. Question arises that the real brother of Brijpal is beaten and he is going somewhere without telling anything to his grandson P.W.3 and just returning on 23.8.1984. All this shows that these witnesses are not coming with clean hands and their presence is fully doubtful.

19. P.W.2 is stating in his examination in-chief that Indrapal was surrounded by all six accused persons on the northern end of the field of Ram Sewak where he was beaten with lathi and farsa blows. P.W.3 Rama Kant also supported this fact and in his cross-examination also P.W.3 stated that all the six accused had surrounded Indrapal from all four sides and everybody beat one hand each from four sides. All assaulted altogether. After that his grandfather fell down due to injuries. After that no one beat him. Medical report does not support these facts. As per the statement of Dr. J.P. Sharma P.W.1 who found incised wound on head, of 7cm, above the left ear, another incised wound on head of 9cm above to left ear, another incised wound on head of 11.5cms above to left ear and swelling on left hand. The nature of injuries and manner in which those wounds were caused would come only when such person is beaten from left side. There was no such injury which may be caused from right side. Hence, the statements of P.W.2 and P.W.3 that all accused had beaten Indrapal from four sides by surrounding him is not proved. P.W.3 stated that all six accused persons surrounded Indrapal from all sides and caused one blow each simultaneously, in that situation more injury must have been caused to Indrapal. This fact also shows that these witnesses were not present on the spot and they did not see the occurrence and they are not reliable witnesses and in such circumstances the accused cannot be convicted on the evidence of these two witnesses of fact.

20. It has been argued on behalf of the appellants that F.I.R. is anti-timed. As per the statement of P.W.6 constable Chandra Bhan Dubey who was posted as constable moharrir at PS-Atarra in the month of August 1984, that first information of this case was given by Kallu on 21.8.1984 and Naemullah head constable was posted with him at PS-Atarra and Chick report dated 21.8.1984 is in the writing and signature of H.C. On the basis of this information the case was registered against accused persons at 3:30 p.m. vide G.D. no.17 and when the case was registered, investigation was handed over to S.O. Banshraj Singh. Now as per Ex. Ka 4 and statements of P.W.2 and P.W.3 both constables sent Indrapal through Kallu by a bullock-cart to police station Atarra, and Indrapal, the injured, was sent from police station to medical hospital Atarra through constable Laxmi Kant Mishra with a request letter for medical examination, then why the crime no. and Sections were not written on Ex. Ka. 1, postmortem report, in the inquest report and in Challan Nash Ex. Ka 10, Ex. Ka 12, Ex. Ka 13 etc. It is also noteworthy that

in the inquest report date and time of reporting in police station is mentioned at page 1 as 22.8.1984 at 7:45 a.m. while report in the police station was registered on 21.8.1984. All this shows that till the postmortem was completed, case was not registered at the police station, because inquest report is of dated 22.8.1984 and postmortem report is also of date 22.8.1984. All this shows that this case was registered after the whole incident and hence F.I.R. was antitimed and anti-dated. Failure to send the copy of the F.I.R. to the medical officer along with the dead body for post mortem examination in the absence of its reference in the inquest report can give rise to an inference that the F.I.R. had been ante-timed and had not been recorded till the inquest proceedings were over at the spot by the I.O. as has been held in **Maharaj Singh v. State of U.P. (1994) SCC 188**.

21. It has been argued by the learned counsel on behalf of the appellants that a chik F.I.R. was registered on 21.8.1984 and on 23.8.1984 Brijpal moved another Tahrir as Ex. Ka 2, now whether Ex. Ka 2 has any force or can be treated as F.I.R. The learned lower Court passed his judgment on the basis of Ex. Ka 2. The prosecution case cannot be based on Ex. Ka 2 as learned trial Court did. Question arises what is the value of Ex. Ka 2. If two independent reports are being given and second report is being given during the pendency of investigation then second report cannot be treated as F.I.R. and it attracts bar of Section 162 Cr.P.C. as has been held in **Ramlal Singh v. State AIR 1958 M.P. 380**. In **Ramveer Yadav v. State of Bihar 1995 Criminal Law General 2665(SC)** it has been held that where report of the incident lodged by prosecution witness on the next day morning after starting of investigation by the police, cannot be treated as F.I.R, but the confidence of the witness before the court is admissible in evidence. In **K.M. Nanavati v. State of Maharashtra AIR 1962, Supreme Court 605** it was held that such second report is not admissible in view of Section 162 Cr.P.C. In this case the report has been lodged on the information given by the Kallu who reached the police station with the injured Indrapal on 21.8.1984 this will be treated as F.I.R. and written information regarding the whole incident which was given by Brijpal cannot be treated as F.I.R because it will be hit by Section 162 Cr.P.C.

22. As regards the evidence of P.W.4 constable Laxmi Kant Mishra who was posted at PS-Atarra on 21.8.1984, took away Indrapal (the injured) for medical examination to primary health centre Atarra, from where injured was referred to District Hospital Banda, is concerned, he has not been examined in the court, rather his affidavit has been filed. Though the evidence of P.W.4 is not very material at any point and it does not affect the merit of the case anyway, learned trial Court has wrongly applied the procedure, because in a criminal trial, affidavit of a witness cannot be filed and cannot be relied upon. That person must have been examined in the court and opportunity must have been given to the accused appellants for cross-examination.

23. The scribe of this Ex. Ka 2 is Anant Ram Tiwari. He has not been examined, so this fact also could not come on the record that when he wrote this Ex. Ka 2. The doctor conducting postmortem has also not been examined, the investigating officer has not been examined. Why these important witnesses were not produced by the prosecution,

there is no explanation on the record.

24. As per F.I.R. Ex. Ka 4 and written report Ex. Ka 2 when Indrapal was doing work in his field, the incident took place, accused came there and caused injury to him while as per Ex. Ka 8 site-plan the field of Indrapal is on the northern side of the place of occurrence. Thus it has been argued on behalf of the appellants that there are two places of occurrence on the record and the story of the prosecution cannot be relied upon. We fully agree with the argument of the learned counsel for the appellants. P.W.2 in his statement stated that at the time of incident at 9 a.m. when Indrapal was doing work in his field, all accused came with lathi and farsa from northern side and went to eastern side of canal and Indrapal ran away towards south and on the northern side of the field of Ram Sewak, he was beaten by the accused persons. Now the place of occurrence has been shifted from the field of Indrapal to field of Ram Sewak. In the same way P.W.3 Rama Kant also stated in his examination in-chief that Indrapal was doing work in his field when these accused persons came from the northern side and said to Indrapal that he had complicity in the murder of Balbeer, then Indrapal ran, accused persons surrounded him and beat him with farsa and lathi but did not tell the exact place of occurrence. But in cross-examination, P.W.3 is stating that he had told the investigating officer that when his grandfather Indrapal was working in his field and on seeing the accused persons he ran towards south about 70-80 steps from his field where he was beaten. There is no such version regarding running of Indrapal towards south about 70-80 steps in the field, in F.I.R. of Kallu Ex. Ka 4 or second written report Ex. Ka 2 or in the statements of these two witnesses P.W.2 or P.W.3 recorded under Section 161 Cr.P.C. P.W. 7 who has been examined in place of I.O. admitted in his cross-examination that there is no such type of version in statement of these two witnesses-Brijpal and Ramakant under section 161 Cr.P.C. We fully agree with the argument of learned counsel for the appellants that there is clear-cut improvement in the statement of these two witnesses regarding place of occurrence. P.W. 5 constable Ram Shankar Tripathi also stated in his examination in-chief that when he got information at 9 a.m. that some people are beating Indrapal in his house, going there, they saw that these people are running towards the side of canal. Thus as per statement of P.W.5, the place of occurrence is house of Indrapal. All this shows that prosecution is not coming with clean hands and exact place of incident could not be determined. The question also arises that why I.O. had shown a different spot. All this creates doubt on the version of the prosecution.

25. P.W.2 in his examination in-chief is stating that Chandrapal, Laltu and Giyan Singh were armed with farsa, Babu, Arjun and Chhotuku were armed with lathi but this fact is neither in Ex. Ka 4 or Ka 2 itself nor came in statements of witnesses recorded under Section 161 Cr.P.C. P.W.7 C/ 400 Phool Singh is specifically stating that those witnesses did not tell to the I.O. that which accused was holding which arm. Learned counsel for the appellants argued that now there is a clear case of improvement in court and such witness cannot be relied upon. We fully agree with this argument.

26. The learned trial Court on the one hand based its judgment on Ex. Ka 2 which is basically not F.I.R. which is hit by Section 162 Cr.P.C., on the other hand at page 8 of the judgment, learned trial Court gave its finding that the omission of the names of the 3 co-accused persons in the written report Ex. Ka 4 lodged by Kallu would not damage or disprove the complicity of other 3 accused persons for the simple reason that "Kallu might not be present on the spot, and was not proper person to lodge the F.I.R.". If it was the opinion of the learned trial Court that Kallu might not be present on the spot then how he could lodge the F.I.R., and how the prosecution could base its case on Ex. Ka 4, then how it can be said that Kallu was the proper person to lodge the F.I.R. Two constables are themselves stating, one of whom has been produced in the court, that when they reached the spot, Kallu was already there and he sent Indrapal, the injured, through Kallu in a bullock-cart to the police station. Hence, Kallu's presence on the spot is not questionable and finding of the learned trial Court is incorrect. It is noteworthy that Kallu himself had been added in the list of co-accused and I.O. has written in C.D. that supplementary charge-sheet will be filed against Kallu, then what happened regarding Kallu, nothing has been told by the prosecution till now or in what circumstances Kallu was found to be one of the co-accused.

27. The Learned A.G.A. has argued that these accused persons had motive to commit the murder of Indrapal as there was previous enmity between both the parties. Balbeer Singh was murdered a day before and due to that fear Brijpal Singh and other persons did not go on the spot and these accused persons understood and had a doubt in mind that Indrapal was involved in the commission of murder of Balbeer Singh and earlier Prahalad was murdered on 15.10.1980 in which accused were acquitted just five months ago of this incident and Balbeer was the eye-witness in that case and due to all these reasons Balbeer was murdered and one accused Laltu Singh is the son of the deceased Balbeer Singh. Due to all this, accused persons have a motive and they killed Indrapal to take revenge. If this was the motive to commit the murder of Indrapal, then it might have been in the knowledge of Brijpal who gave this Ex. Ka 2 to be treated as F.I.R. on 23.8.1984. Why this fact was not mentioned in Ex. Ka 2 or why P.W.2 did not tell about these facts in his examination in-chief before the trial court and P.W.3 also did not say anything more in his examination in-chief except that accused persons came with the theme that Indrapal is involved in the murder of Balbeer. No other evidence has been given by the prosecution side in this regard and it was the prime duty of the prosecution to prove this fact. Because prosecution has to prove its case beyond reasonable doubt, hence it cannot take the benefit of weaknesses of the defence. It has to stand on its own legs, but prosecution has failed to prove all this. It is noteworthy that accused appellants have filed so many documentary evidence in their defence, though there is no need to discuss elaborately because prosecution has itself failed to prove its case beyond reasonable doubt. Enmity is a double edged weapon. If accused could commit murder of Indrapal due to enmity, then accused persons could also be falsely implicated by the complainant.

28. Thus after analysing the entire evidence on record we find that the witnesses of fact are not reliable, F.I.R. is ante-timed, prosecution has failed to ascertain the place of occurrence, F.I.R. was not in existence at the time of conducting the inquest etc, prosecution has failed to prove its case beyond reasonable doubt. Hence, the appeal is liable to be allowed regarding appellants Chhotuku, Babu alias Rajendra Singh, Giyan Singh, Laltu Singh and Arjun Singh. Hence, impugned judgment and order dated 24.1.1986 passed by Sessions Judge Banda in **S.T. No 305 of 1985, (State of U.P. v. Chhotuku Singh and others)** under Section 147, 302 read with Section 149 I.P.C. PS-Atarra, District-Banda is hereby set-aside. Accordingly, the appeals are allowed. The appellants are on bail, their bail bonds are cancelled and sureties are discharged provided that they furnish bail bonds and sureties complying Section 437 A Cr.P.C. within a period of one month from the date of this judgment in the court of C.J.M. Banda.

29. Let a copy of this order be sent to the lower court for intimation and compliance.