

(1990) 02 PAT CK 0017
In the Patna High Court
Case No : Criminal Appeal No. 200 of 1987

Jagdish Barhi and 4 others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 22-02-1990

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 107, 109, 144, 145, 41(2)
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 102, 147, 148, 149, 302

Citation : (1990) 2 PLJR 269

Hon'ble Judges : U.P. Singh, J;P.B. Prasad, J

Bench : Division Bench

Advocate : Tara Kant Jha, Keshaw Nath Tiwary and Binay Kant Mani Tripathi, for the Appellant; B.N.P. Gupta, for the Respondent

Judgement

U.P. Singh, J.—These three appeals arise out of a common judgment of conviction and sentence passed by the 2nd Addl. Sessions Judge, Gopaland, , in S.T. No.(101/81)/(12/85) therefore, they have been heard together and are being disposed of by this judgment. Seventeen persons were accused in this case. One accused Munshi Bhagat died and the remaining sixteen accused persons were put on trial for the offence u/s 302 read with Section 149 of the Indian Penal Code. Accused Chandradeo Pandey was further charged for the offences under sections 302 and 307 of the Indian Penal Code as also u/s 27 of the Arms Act. In Criminal Appeal No. 343 of 1987 appellant nos. 2, 3, 4, 9 and 10 were charged for the offence u/s 148 of the Indian Penal Code and appellant nos. 5 to 8 u/s 147 of the Indian Penal Code. In Criminal Appeal No. 200 of 1987 appellant nos. 1 and 2 were charged for the offence u/s 148 of the Indian Penal Code and appellant nos. 3 to 5 u/s 147 of the Indian Penal Code. In Criminal Appeal No. 340 of 1987 the sole appellant was charged u/s 148 Indian Penal Code.

2. All the appellants were acquitted of the charges under sections 147 and 148

Indian Penal Code but then all of them were convicted for the offence u/s 302/149 Indian Penal Code and sentenced to Rigorous Imprisonment for life, in so far as appellant Chandradeo Pandey (Cr.A.No. 343/87) is concerned, he was convicted and sentenced to undergo rigorous imprisonment for life for the offence u/s 302 of the Indian Penal Code and to seven years rigorous imprisonment u/s 307 Indian Penal Code and further, for three years rigorous imprisonment for the offence u/s 27 of the Arms Act. All the sentences were directed to run concurrently and no separate sentence was awarded for the offence u/s 302 read with Section 149 of the Indian Penal Code.

3. This relates to an occurrence of 2.12.1979 committed in village Bhathwa Khurd under Police Station Kateya in the district of Gopalganj, in which four persons were alleged to have been killed. The case was instituted on a written report (Ext. 4 submitted by the informant Narsingh Pandey (P.W. 10) at the Kateya Police Station at 4.00 P.M. on 2.12.1979 on that basis of which the First Information Report (Ext. II) was drawn up by the officer incharge of the police station (P.W. 16).

4. It was alleged that in the said village there is a road connecting the house of the informant with the District Board road. It was used by the informant and his family members. Appellant Chandradeo Pandey is a Pattidar of the informant. He is also a gun licensee. At about 2.00 P.M. on the said date, the appellant along with his associates, armed with a gun, was cutting the said village road and digging a ditch thereon. One Sahdeo Gorh (P.W. 4) the Manager of the informant, went there and protested. He was abused by accused Chandradeo Pandey and thereafter, he returned back to the Darwaza of the informant. At that state P.W. 6, the brother of the informant and P.Ws. 1, 2 and 3, the permanent labourers of the informant, were cutting the potato seeds to pieces. At the same time, deceased Lal Mohammad Mian, Sattan Nonia, Suresh Gorh and Benga Khatik, all ploughmen of the informant, were working in the nearby Bakla field. While the said incident was being narrated by the deceased Sahdeo Gorh at the Darwaza of the informant, the accused persons variously armed with Gun, Bhala, Farsa etc. arrived from the eastern side in the wheat field of accused Chandradeo Pandey, which is located adjacent east to the house of the informant. By this time, the informant, his labourers and his ploughmen assembled on the eastern side of the Darwaza of the informant. It is then alleged that accused Gorakh Pandey instigated and Chandradeo Pandey opened fire which bit Suresh Gorh and he dropped dead. The informant and his men started brick batting, in course of which accused Chandradeo Pandey fired eight or nine rounds, due to which Lal Mohammad Mian, Satan Nonia and Benga Khatik sustained gun shot injury. Some pellet hit on the neck of the informant (P.W. 10) Mahadeo khatik (P.W. 2) also sustained gun shot injury on his thigh and abdomen. It is further alleged that when deceased Sattan Nonia had fallen down having received gun shot injuries, accused Gorakh Pandey gave a Bhala blow below his chin. The injured persons, somehow, went to the Sahan of the Darwaza of the informant, where they succumbed to the injuries. After the occurrence, the dead body of Suresh

Gorh was taken away towards the Bathan of Chandradeo Pandey.

5. On completion of the investigation, chargesheet was submitted, cognizance was taken and the case was committed to the Sessions court for trial. In defence, the appellants pleaded not guilty to the charges and denied to have committed the alleged occurrence. They claimed false implication on account of previous enmity. Their specific plea of defence, as it appears from the various suggestions put to the prosecution witnesses and to the informant as also from the written statement filed on their behalf in the trial court, is that, on the alleged date, the informant (P.W. 10) had invited the gang of criminals to cut the private road of accused Chandradeo Pandey which passed through his own plot nos. 459 and 460. The informant (P.W. 10) and his associates wanted forcible possession of 11 dhors of land, which the informant claimed as his own but encroached upon by the Barhi accused of this case. The informant party was fully armed with lethal and dangerous weapons such as Gun, Bhala, Farsa and Lathi and were cutting the private road of accused Chandradeo Pandey. As such, it was protested by accused Chandradeo Pandey and his associates. Upon this, the informant and his associate gangs of criminals chased accused Chandradeo Pandey up to his wheat field and attempted to snatch away his gun. Accused Ram Chandra Khatik also sustained injuries at the hands of the informant party. Heavy pelting of brick bats were used by the informant and his associates and during this exercise, some one from the village, in order to prevent the criminals, used his gun, in order to save the life of Chandradeo Pandey. According to the suggestions put to the prosecution witnesses, their cross-examination and statement of prosecution witnesses in examination in Chief as also on the basis of the documents, exhibits F and C, that right of private defence of body and property was pleaded and it was asserted that the prosecution party were aggressors. The prosecution party did not present the true version of the occurrence and in regard to the origin, the place of occurrence and the manner of occurrence prosecution party presented a false story. Further, accused Gorakh Pandey pleaded that he was not a member of the unlawful assembly and did not commit any overt act. He had enmity with accused Chandradeo Pandey and the village road of the informant, which is alleged to have been cut, was also being used by this accused. Thus, it was absurd for him to have gone and joined accused Chandradeo Pandey in either cutting the village road or assaulting the informant party. Three defence witnesses were examined in support of the defence case. D.W. 1 is a formal witness, who has proved the petition (Ext. F) dated 11.9.197(sic). This petition had been written by accused Chandradeo Pandey to the Officer incharge of Kateya Police Station against the informant and his associates. D.W. 2 is a Medical Officer. Kateya, who examined the injuries of accused Ram Chandra Khatik. D.W. 3 is a Sub-Inspector of Police, who held an enquiry on the petition filed by accused Chandradeo Pandey (Ext. F) and submitted his report contained in Ext. C. Further, Exts. A to O have been filed in order to prove the long standing enmity between the parties as also between the accused and the prosecution witnesses. The exhibits further show that the

prosecution witnesses had a criminal history. Ext. A is the seizure list of the brick bats.

6. In order to appreciate the evidence of the prosecution witnesses, it is necessary to notice a few relevant facts of this case. Appellant no. 1 Chandradeo Pandey is an old man of 65 years of age. He is an Ayurvedacharya and was the Head Physician of the District Board Ayurvedic Hospital at Jamuna Bazar in the district of Gopalganj. He is issueless. In September, 1970, his full brother Manu Pandey had been murdered by Sachidanand Pandey, the brother of the present informant (P.W. 10). The evidence of P.W. 4 in paragraph 10 and P.W. 6 in paragraphs 8 & 11 as also Ext. G/3 proves this fact. At the time of occurrence of this case no. 2.12.1979, Sachidanand Pandey, the brother of P.Ws. 10 and 6, their father Bhuneshwar Pandey and uncle Kanu Pandey were serving life imprisonment in jail having been convicted for the said murder of the brother of the appellant Chandradeo Pandey. It is relevant to notice that as per the age of P.Ws. 10 and 6 recorded in their deposition, these two witnesses P.Ws. 10 and 6 were minors aged 11 years and 13 years respectively on the date when the brother of appellant Chandradeo Pandey was murdered in September, 1970. According to his own statement recorded in paragraph 12 of his deposition, P.W. 6 admitted that between September, 1970 and December, 1979 no occurrence took place during these nine years. On account of the conviction and sentence of life imprisonment awarded to the brother, the father and the uncle of P.Ws. 10 and 6, who were serving life imprisonment even on the date of occurrence of this case, the informant and his brothers were seriously aggrieved with appellant Chandradeo Pandey. Ext. K indicates that when P.Ws 10 and 6 became major, they started forming the gang of criminals right from the year 1977 and indulged in criminal activities along with the other gangmen in differed villages of the locality which resulted in institution of several cases. They started participating and helping other criminals of the locality with a view to barter help from them in order to kill appellant Chandradeo Pandey, who was a solitary male member of his family working in the District Board Dispensary as Head Ayurvedic Medical Officer. The only son of late-Manu Pandey is Vidyanand Pandey, who is posted as Senior Planning Engineer in Bokaro Steel Plant and resides in Bokaro Steel City.

7. The informant P.W. 10 and his two brothers P.W. 6 and 4 resided in the village and having formed a group of gangsters, their criminal activities were noticed by the police and several criminal proceedings were initiated by the police against the informant, the prosecution witnesses and the deceased persons of this case. This is so evident from Exts. K.L.L./1, D.L/2.E.C/1, C and F. Ext. K shows that a case u/s 307 of the Indian Penal Code had been lodged against P.Ws. 1 and 3 and also against one Jhakar Ahir, a seizure witness of Exts. 10 A & 10/1. He has, however, not been examined in court. In paragraph 11 of his deposition, P.W. 3 has admitted that he was an accused in a case u/s 396 of the Indian Penal Code. Ext. L shows that they have been committed to the court of Sessions. Ext. I./1 shows that in August, 1979 deceased Banga Khatik of this case was arrested and forwarded to the court for the offence u/s 41(2) and 109 of the Code of Criminal

Procedure. Ext. D further shows that the said deceased Banga Khatik was also an accused in a case under 396 of the Indian Penal Code. Ext. L/2 proves that in August 1979 the Court had issued custody warrant u/s 396 of the Indian Penal Code. Ext. E indicates that the three prosecution witnesses, namely, P.Ws. 1, 4 and 6 as also the other deceased Sattan Nonia were members of an unlawful assembly and created breach of peace in village Baherwa in March, 1979. Ext. C/1 shows that in February, 1979 P.Ws. 1, 6 and 10 as also the other deceased Lal Mohammad formed an unlawful assembly with the gang of criminals for creating breach of peace in village Baidauli.

8. Ext. F dated 11.9.1979 is an application which had been filed by appellant Chandradeo Pandey before the Officer incharge of Kateya Police Station requesting him to take action against 26 persons, whose names were given in the said application, and this included all the alleged eye-witnesses of this case, namely, P. Ws. 1 to 7 and 10. The said appellant Chandradeo Pandey had emphatically urged that the informant and his brothers alongwith the alleged eye witnesses and 18 other gangsters wanted to cut down the private road of the appellant. It was further urged that they wanted to kill him so that none else would then be surviving in his house to look after his property and they could thus safely capture and forcibly occupy his properties. These gangsters started coming since 8.9.1979 armed with dangerous and lethal weapons like gun, Bhala and lathi etc in order to cut the private road of the appellant as also to obstruct his path. Unfortunately, no timely action was taken by the Kateya Police on the said application dated 11.9.1979 contained in Ext. since the Police was in collusion with the informant. In pursuance of the said application Ext. F., a report u/s 107 of the Code of Criminal Procedure was submitted but only after three months and the proceeding was started on 4.12.1979 i.e. only two days before the present occurrence which took place on 2.12.1979. A sub-Inspector of Police, Sri Gopi Krishna Bihari Prasad of Kateya Police Station has admitted in paragraph 2 of his evidence that an enquiry on the said application (Ext. F) was held and the same is contained in Ext. C.P.W. 16 in paragraph 3 of his evidence admits the receipt of the said application (Ext. F) on 25.9.1979 and has also accepted that he endorsed the same to the said Sub-Inspector (P.W. 3) for enquiry and report. On account of inaction of the police in not taking proper steps, on the application of appellant Chandradeo Pandey, the Superintendent of Police, Gopalganj suspended the said Sub-Inspector (Ext. J) and also started a departmental proceeding against the officer Incharge of Kateya Police Station.

9. In this back ground of the case, as enumerated above, one has to examine and scrutinise the evidence with all due care and caution keeping in mind the serious admitted enmity between the alleged eye-witnesses and the accused appellant. It has already been enumerated above that in the application dated 11.9.1979, nearly three months before the present occurrence, the appellant Chandradeo Pandey had categorically stated about the evil design and the assemblance of the gangsters collected by the informant party which included the alleged eye witnesses and 18 others, who were all determined to forcibly

occupy 11 dhoores of land and were determined to cut the private road of the appellant and were bent upon to cause harm to appellant Chandradeo Pandey. All the eyewitnesses had animus and were carrying serious grudge since the brother, the father and the uncle of P.S. 10 and 6 had been sentenced to life imprisonment and were serving the sentence on the date of occurrence of this case for killing the full brother of accused Chandradeo Pandey. Ext. O proves that P.W. 1 had deposed on behalf of the Nana of the informant against appellant Chandradeo Pandey. Ext. C/2 reveals that P.W. 1 and his brother had deposed against this appellant. In paragraph 13 of the deposition of P.W. 1, his attention has been drawn to this effect. In Ext. F.P.W. 2 and 3 have been named, who were determined to cut the private road of the appellant. P.W. 4 was an accused in the said murder case in which the brother or appellant Chandradeo Pandey was murdered. In paragraph 10 of his deposition P.W. 4 has accepted that appellant Chandradeo Pandey, Bideshi Teli and Tilakdhari Teli had deposed against him. Ext. D/3 also proves this fact. P.W. 5 has admitted in paragraph 20 of his deposition that a proceeding u/s 107 of the Code Criminal Procedure had been drawn up against him and appellant Chandradeo Pandey and Bhagwan Pandey father of appellant Gorakh Pandey. In paragraph 11 of his deposition he accepts that he and his family members had sold the land of Chandradeo Pandey to the Bhagina of Bhuneshwar Pandey, the father of the informant. P.W. 6 was also one of the accused in the Manu Pandey's murder case, in which the brother of appellant Chandradeo Pandey had been murdered. In paragraph II of his deposition P.W. 6 has admitted that appellant Chandradeo Pandey, Bideshi Teli and Tilakdhari Teli had deposed against the brother and father of P.W. 6 as a prosecution witness. This is also supported by Ext. G/3. Ext. G/2 shows that appellant Jagtanand Mishra had a land dispute with the Nana of P. Ws. 6 and 10. P.W. 6 had been convicted in Manu Pandey's murder case but since he was a minor, he was sentenced to execute a probation Bond. P.W. 7 is the full brother of P.W. 4, the Manager of P.W. 10. He was inimical to the appellants since his full brother Sahdeo was an accused against whom appellant Chandradeo Pandey, Bideshi and Tilakdhari had deposed, which is evident from Ext. G/3. Appellant Ganesh Teli is the son of Bideshi Teli and he had deposed against appellant Chandradeo Pandey which he admits in paragraph 15 of his deposition. P.W. 10 is the brother of P.W. 6. His elder brother Sachidanand Pandey was convicted and sentenced for life in the murder case of Manu Pandey, the brother of appellant Chandradeo Pandey. They were carrying serious grudge against the appellants since their brother and father were still in jail at the time of the alleged occurrence on 2.12.1979. P.W. 10 admits in paragraph 43 of his evidence that appellants Bideshi and Tilakdhari had deposed as witness in Manu Pandey's murder case. In paragraph 39 of his deposition it has been suggested that Khatik accused are Pattidars of P.W. 2 and it has been further suggested in paragraph 40 that there was litigation between the father of P.W. Jhakar (not examined) and appellant Nagendra Lal's father. In paragraph 41 the suggestion is that there was litigation between the Purohit of the informant and the father of appellant Nagendra Lal. Likewise, the suggestion was made in paragraph 42 of his

deposition that there was a land dispute between the Nana of P. Ws. 10 and 6 on one hand and appellant Jagtanand Mishra on the other and the uncle of appellant Jagtanand Mishra had deposed against him. A similar suggestion has been made in paragraph 44 of the evidence of P.W. 10 regarding the land dispute between him and the Barhi appellants Jokhan and his son Jagdish. This is also evident from paragraph 3 of Ext. G/2. P.W. 16 has also stated about this statement recorded in paragraphs 44, 48 and 60 of the deposition. It is also found mentioned in paragraph 3 of Ext. G/2 that there was a land dispute over the bamboo clumps between appellant Chanderma Kuer and the Mausi of Bhuneshwar Pandey, the father of the informant (P.W. 10).

10. According to the evidence of P.W. 5 in paragraph 23 and P.W. 7 in paragraph 60, several independent persons were available at the time of occurrence and they were present at the place of occurrence, but even then not a single independent person has been examined to corroborate the evidence of the alleged eye witnesses. As discussed above, it has been shown now these eye-witnesses were interested and partisan. It has also been shown above that these alleged eye witnesses were persons of bad antecedents and poor moral fiber and they were highly inimical to the appellants. The present is not a case where enmity has only been suggested but in this case all these witnesses have been found to have direct enmity with the appellants and they were carrying serious grudge against them. This is the reason why not a single independent person of neighbouring places, who were present at the place of occurrence at the time when the occurrence took place, were not chosen to be examined by the prosecution. The occurrence took place during the day time and there could be no reason why reliable and independent sources would not have corroborated and supported the alleged eye-witnesses. It is true, that the evidence is not to be discarded merely on the ground of enmity but this is a case of different kind where all the, chosen eye witnesses are directly inimical to the appellants. Further all the eye witnesses are interested and partisan not merely because they have deposed for the prosecution but because of their bad antecedents and belonging to the gang of the informant. It has also been shown above that some of them are permanent Labourers of the informant's family, some of them are related to the deceased persons some of them were accused in Manu Pandey's murder case wherein the full brother of the appellant Chandradeo Pandey had been killed by the informant party. In this peculiar situation and circumstances appearing in this case, the evidence has to be weighed and not to be counted. The evidence has to be considered with due care and caution and the evidence of such prosecution witnesses having had antecedents and poor moral fiber will not be safely reliable unless corroborated by independent sources.

11. Considering the case as a whole, in this perspective, it will appear that on each vital and material aspect of the prosecution case either in regard to the place of occurrence, the genesis or the manner of occurrence, the evidence of the so called eye-witnesses have not been supported by any independent source. The objective finding of the Investigating Officer and the circumstances are all

indicative of the fact that the prosecution party have suppressed the truth from the court and the story put forward by them is not reliable. It is settled law that if the prosecution does not come out with the true version regarding the genesis, the manner and the place of occurrence it cannot blame the court, if the entire version presented by it is rejected by the court. It is also an established principle of law that if all the witnesses examined in a criminal case are hostile, interested and partisan and if there is no independent corroboration of their version, then it would be deemed in the eye of law that the prosecution has failed to prove its case beyond all shadow of reasonable doubt, it is also settled principle of law that it is hazardous to accept the testimony of witnesses who have a heavy load of bad antecedents to their credit and who have a poor moral fater (sic) without their being corroboration, on crucial points, emerging from the independent sources. It has already been discussed above in the foregoing paragraphs as to how the so called eye-witnesses are of criminal character indicating criminal family history. It has also been shown above that the four deceased persons were the hardened criminals having link with the other criminals of even Uttar Pradesh.

12. As regards the genesis, the manner and the place of occurrence, the prosecution case is that on the date of the alleged occurrence the deceased and the prosecution witnesses had been engaged by the informant in cutting the potato seeds to pieces for its sowing. They had also been engagerd by the informant for weeding out the wild grasses from his field known as Bakla field. It was alleged that seventeen accused persons were cutting the road passing through plot no. 480 and on the northern and southern end of Plot no. 447, when P.W. 4 Sahdeo Gorh went there and protested, then he was chased by the 17 accused persons up to the house of the informant. While chasing P.W. 4, the 17 accused persons came in the wheat field which lies infront of the Darwaza of the informant, and soon after the arrival, appellat Chandradeo Pandey fired.

13. As against that, according to the defence version, it has been submitted that the prosecution deliberately suppressed the genesis, the manner and the place of occurrence. According to the defence version, the informant had invited his gang of criminals for forcibly recovering the possession of 11 dhoors of land, which the informant was claiming as a part and parcel of his land and according to the informant the said land had been encroached upon by appellant Jokhan Barhi and others, in other words, it had been encroached upon by the Barhi accused of this case. According to the defence version the informant party had a premeditated plan to cut the private road of accused Chandradeo Pandey which passes through his own plot nos. 459 and 460. In fact, in the morning of the date of occurrence, the field of accused Jokhan Barhi containing patato and maize crops had been reploughed by those gang of criminals. Thereafter, they further started cutting the private road of accused Chandradeo Pandey in the afternoon. Seeing this act of mischief, accused Chandradeo Pandey came near plot no. 459, where his private road was being cut and protested. The gang of criminals chased him and started showering heavy brickbats and stones. They

were determined to over power and kill him and with this, determination the informant and his gangmen chased him up to a considerable distance and he was persuaded very close to his bethan in plot no. 480. Fortunately, hundreds of people from the neighbouring village had gathered and some one of them fired saving the life of appellant Chandradeo Pandey Thus the right of private defence of life and property has been pleaded and sufficient evidence has been laid to show that there was serious apprehension and danger of life and that the prosecution party were aggressors.

14. Suggestions have been made to all the prosecution witnesses that they were cutting the private road of appellant Chandradeo Pandey and when protested, the prosecution party armed with deadly weapons such as gun, Bhala, Farsa and Kanta menacingly chased the accused persons and there was heavy brick batting from their side and the appellants ran away. Even then, the prosecution partly menacingly chased to kill and snatch the gun of appellant Chandradeo Pandey when some one amongst the villagers opened fire in order to save the life and property of appellant Chandradeo Pandey. According to the statement contained in paragraph 10 of P.W. 15 which is further supported by Exts. A and 10/1, one to two cart loads of brick bats were found scattered. It is settled law that, whereas, as the prosecution is required to prove its case beyond all shadow of reasonable doubts, the defence is only required to show that the defence version appears to be highly probable by establishing preponderance of probabilities.

15. The objective finding of the Investigating Officer who arrived at the place of occurrence without any delay demolishes the prosecution case in respect of the genesis, the manner and the place of occurrence. According to the statement of the informant (P.W. 10) in paragraph 21 of his deposition, he had kept one quintal of potatoes for cutting them to pieces for the purposes of seedling. But, when the Investigating Officer soon arrived at the place of occurrence, he did not find a piece of potato at the darwaza. The Investigating Officer (P.W. 16) has stated in paragraph 13 of his deposition that he found 15 big ditches cut on the southern boundary line of plot no. 480 and 2 ditches on the northern and southern end of plot no. 477. According to him these ditches did not appear to have been freshly cut. On the other hand, his evidence in paragraph 40 is that he found the private road of appellant Chandradeo Pandey freshly cut at two places in front of a well situated in the sahan land or the informant. According to the statement of P.W. 10 in paragraph 11 it appears that the Sarso crop was standing in plot no. 4(sic)7 which had been amalgamated with plot no. 475. Therefore, the probability cannot be ruled out that the ditches in plot no. 40 and at both ends of plot no. 477 must have been dug on the date showing of the Sarso crop with a view to obstruct the passage through the Sarso field either from the northern side or from the southern side with a view to protect the crop and as stated by the prosecution these ditches could not have been dug on the alleged date of occurrence. Such large ditches could not have been possibly completed on the alleged date of occurrence since the fang of criminals remained, standing at the informant's house from the very morning. As alleged, if a mob of 17

accused persons were cutting the road on the northern and southern end of plot no. 477, then there would have been sufficient trampling marks visible in plot no. 477. The said plot was containing tendered Sarso plants. But the Investigating Officer did not find any such trampling marks anywhere in the said Sarso field. On the other, Ext. 5 indicates cutting of the private toad appellant Chandradeo Pandey.

16. According to the statement contained in paragraphs 45 to 62 of the Investigating Officer (P.W. 16) it is clearly stated that all the prosecution witnesses stated before him that on seeing the accused appellants in the wheat field of Chandradeo Pandey, they started pelting bricks and stones and chased them to long distance in the field of Chandradeo Pandey. When the prosecution party was about to overcome the appellant Chandradeo Pandey, he fired from his licenced gun which resulted in the injuries to Benga, Lal Mohammad, Sattan, Suresh as also to Mahadeo (P.W. 2) and P.W. 10 in the north east corner of plot no. 460 of appellant Chandradeo Pandey. The attention of all the P. Ws have been drawn to their statements made before P.W. 16 and the blood and the brick bats were collected from the siad plot of land but later when they were examined in court all the P.Ws. have made improvements in the case regarding the manner of occurrence. According to the written report (Ext. 4), the entire prosecution party, seeing the accussed persons, moved from their respective places, in other words, the prosecution party remained present in the Sahan land and the accused persons remained present in the wheat field of Chandradeo Pandey on the eastern side of the Sahan. According to it all the firing took place there. In the written report (Ext. 4) it has been stated that the prosecution party proceeded forward to take the body of the deceased Suresh Gorh and then the second round of firing was resorted to by Chandradeo Pandey from his field. According to the statement of P.W. 2 in paragraph 20 of his evidence deceased Benga Khatik, Lal Mohammad and Sattan received gun shot injuries while they had reached the wheat field in the process of pelting stones and brick bats. According to the statement of P.W. 3 in paragraph 4 the prosecution party started pelting stones and brick bats in order to snatch the body of deceased Suresh Gorh and in the process when they had proceeded to certain distance in the wheat field then appellant Chandradeo Pandey started firing. In paragraph 5 of his evidence P.W. 3 has stated that he received a lathi blow from one of the accused appellants. This proves that while chasing and brick batting the appellants, the prosecution party had come to a close distance of nearly 6 ft. Which may approximately be the lathi distance, and they also assaulted appellant Ram Chandra Khatik. This is supported by the evidence of P.W. 2 and 16 as also from Ext. 1, According to the statement of P.W. 5 in paragraph 5 of his evidence, the persons assembled at the Darwaza of Narsingh Pandey ran towards the east in the process of pelting stones and brick bats and then appellant Chandradeo Pandey fired from his gun. In paragraph 4 of his evidence P.W. 6 has stated that the prosecution party chased the accused persons in their field and started pelting stones. P.W. 7 has also stated in paragraph 5 of his evidence that in the process of pelting stones

and brick bats the prosecution party proceeded and arrived up to the field of Chandradeo Pandey and then Chandradeo Pandey opened the fire. From the evidence of P.W. 10 it appears that before the arrival of the Investigating Officer (P.W. 16) at the place of occurrence, all the potato seeds (about one quintal) had been kept inside the house but then the Investigating officer was not shown any such potato seeds nor the so called story of weeding of the Bankla field was shown to the Investigating Officer. All these facts do indicate that P.W. 1 to 3 and the deceased persons were not engaged for any agricultural purposes but had been called for cutting of the private road of accused Chandradeo Pandey and also to kill him.

17. The prosecution story of chasing of Sahdeo Gorh by the accused persons appears to be highly improbable and a doubtful story. It is preposterous to believe that accused persons being 17 in number said to have been variously armed would have failed to over take P.W. 4 Sahdeo Gorh, an old man of 60 years, in a race covering the distance of 1-11/2 Furlong. If Sahdeo Gorh (P.W. 4) had come to protest as alleged by the prosecution, he was well within the grip of the accused and would not have been spared and the entire occurrence would have taken place not in plot no. 460 but in plot no. 480 and 477. Therefore, the prosecution story of chasing of Sahdeo Gorh by accused persons appears to be a doubtful story. Further, the medical evidence about the gun shot injury upon deceased Suresh does not corroborate the oral evidence of the witnesses regarding only one shot caused by appellant Chandradeo Pandey on the front portion of the deceased Suresh Gorh. As stated by P.W. 14, the Doctor who conducted the post mortem on the body of Suresh Gorh, six injuries were found on his person. Injury no. 1 was a severe injury Lacerated wound circular about 3/8" diameter x brain cavity deep and brain matter oozing out from it over the forehead 1/4" to the left of the midline of the hair line. Injury no. 2 is a circular lacerated wound about 1/4" diameter x brain deep over the front of right shoulder and injury no. 6 is lacerated wound 1/4" skin deep just below the tip of nose. According to Doctor (P.W. 14) all the above injuries could not be possible by a single shot. If the shot is fired from some distance, it is not possible that periferial pellets will cause only skin deep injury and that too on the soft portion like nose. As stated by P.W. 14 Dr. Janak Prasad, skin deep injury can be caused only when a gun is fired from a distance of 30 ft. Further, the distance between injury nos. 1 and 3 of Suresh Gorh would be about 12". It is settled law that the prosecution has to establish, by expert evidence, that injuries have been caused by the weapon and also in the manner as alleged by the prosecution. Here, all the alleged eye-witnesses have stated that only one shot was fired by Chandradeo Pandey upon Suresh Gorh. Now, according to the aforesaid discussion of the medical evidence, the prosecution version of a single shot on Suresh Gorh is not established. This also makes the manner of occurrence doubtful.

18. Further, it appears that the alleged injury on P.W. 10 Narsingh Pandey is not a gun shot injury. The injury is circular lacerated wound skin deep with margins

blackmen. Blackening of margins occur only if the gun is fired from a distance of 3 ft. Even according to P.W. 13, blackening will be caused if a fire arm is discharged from a distance of 10 feet but then he has further stated in paragraph 9 of his evidence that skin deep injury is caused if fire arm is opened from 30 feet distance. Then how blackening and skin deep circular wound could be possible upon P.W. 10 in one single injury upon his body. The injury on the person of P.W. 2 Mahadeo Khatik having blackening of margins shows that he had gone as near as within 3ft. near the gun while chasing. This also demolishes the manner of occurrence as alleged by the prosecution.

19. According to the statement made in the written report (Ext. 4) and the statement of the eye-witnesses, the 17 accused persons arrived in the wheat field, which lies in front of the Sahan of the house of the informant. According to Ext. 3, the house of the informant is located in plot no. 462. Ext. 3 and Ext. N, which are the R.S. maps of the P.O. village, both indicate that revisional survey plot no. 461 and not 460 lies in front of the Darwaza and Sahan of the house of the informant. According to the evidence of P.W. 16 in paragraphs 9, 12 & 16 of the deposition, the Investigating Officer did not find any trampling marks anywhere in plot no. 461. Not a single brick bat was found in plot no. 461. No dragging mark and/or blood mark was found anywhere in plot no. 461. On the other hand, blood mark was found in the north eastern corner of plot no. 460. According to the statement of P.W. 16 in paragraph 12 of his deposition the trampling mark was also found in plot no. 460. According to P.W. 6 he has clearly stated in paragraph 9 of his deposition that large quantity of brick bats were found in plot no. 460 as also in the adjoining land of Bhagwan Pandey which is located to the north of the private road of accused Chandradeo Pandey. This is also supported by the evidence of P.W. 16 in paragraph 11 of his deposition and P.W. 15 in paragraph 8 of his deposition, as also from the seizure list contained in Exts. A & 10/1. The map (Ext. 3) shows that the private road of appellant Chandradeo Pandey passes through R.S. plot no 460 and 459 and according to the defence version the real place of occurrence is plot nos. 459 and 460. Thus, the prosecution attempted to charge the place of occurrence in order to prove that the defence side was the aggressor. According to the statement of P.W. 16 in paragraph 55 of his deposition it is clearly stated that the blood stained spot in the north eastern corner of plot no. 460 was at a distance of 209 feet east of the house of the informant.

20. During the course of investigation, P.Ws. 3, 5 & 6 stated that accused Chandradeo Pandey fired from near the Sisham tree. It has been so recorded by P.W. 16 in paragraphs 47, 49 & 50 of the case diary. The location of distance of this Sisham tree is recorded by P.W. 16 in paragraph 61 as adjoining the private road of appellant Chandradeo Pandey and is at a distance of 124 feet, east of the blood stained spot in plot no. 460. Thus, the statement of the eye witnesses that soon after the arrival appellant Chandradeo Pandey fired at Suresh Gorh who was standing in the Sahan land of (sic) the house of the informant and Suresh Gorh fell down there and died is demolished by the fact that blood was found at a

distance of 209 feet east of the house of the informant.

21. In view of the facts discussed above and the material circumstances appearing on the record of this case the prosecution case regarding the genesis, the manner and the place of occurrence has not been established by cogent and reliable evidence and appears to be a false and concocted story.

22. The defence version regarding the genesis, the manner and the place of occurrence appears to be highly probable and is found established by preponderance of probabilities, Nearly three month before the alleged occurrence on 11.9.1979 accused Chandradeo Pandey had submitted a written application to the Officer Incharge of Kateya Police Station indicating his genuine apprehension that the informant alongwith and aided by the gang of criminals was contemplating to cut down his private road. Tie said application has been marked Ext. F and the endorsement of the Investigating Officer (P.W. 16) on the said petition is Est - B.D.W. 3 Gopi Krishna Bihari, the Sub-Inspector of Police, Kateya submitted the enquiry report (Ext. C). But since no timely action was taken by the police on the said written application submitted by appellant Chandradeo Pandey, it ultimately resulted in this unfortunate incident. On account of such inaction of the police and delayed steps taken only two days before the incident, the Superintendent of Police passed suspension order against the said S.I. of police (Ext. J) and also proposed for a departmental proceeding against the Investigation Officer (P.W. 16). Soon after (sic) occurrence, the statement of accused Ram Chandra Khatik had been recorded by the Investigating Officer at 9.00 A.M. on 3.9.1979 itself on the spot and he did state that the firing took place because of the cutting down of the private road of accused Chandradeo Pandey by the informant and his gangmen. The statement of appellant Ram Chandra Khatik is contained in Ext. I. It is, thus, found that the statement of appellant Ram Chandra Khatik regarding the origin and cause of occurrence could not be said to be an afterthought and it clearly establishes that the occurrence took place on account of cutting of the private road of appellant Chandradeo Pandey. The cutting of this private road on the alleged date of occurrence has also been admitted in the protest petition (Ext 5). The investigating Officer (P.W. 6) has clearly stated in paragraph 40 of his evidences that the private road of appellant Chandradeo Pandey passing through plot no. 459 had been freshly cut at two places. The statement of the Investigating Officer in paragraph 40 of his deposition is also supported by Ext. 3, the map prepared by the Amin, which indicates that the private road of appellant Chandradeo Pandey passing through plot nos. 459 and 460 had been cut at two places in revisional survey plot no. 459.

23. It may be stated that according to the statement in paragraph 26 of the deposition of P.W. 10, the informant was claiming half share in plot no. 459. His brother P.W. 6 has admitted in paragraph 21 that a proceeding u/s 145 of the Code of Criminal Procedure was going on with accused Chandradeo Pandey in respect of plot no. 459. Even then the informant (P.W. 10) deliberately

suppressed this fact about the pending proceeding u/s 145 of the Code of Criminal Procedure. On behalf of the defence Ext. M has been filed in order to show that plot no. 459 had been recorded in exclusive possession of one Sudan Pandey, the grand father of appellant Chandradeo Pandey. The statement in paragraph 26 of P.W. 10 shows that Sudan Pandey and accused Chandradeo Pandey is the son of Bhagwan Pandey. The informant (P.W. 10) does not belong to the branch of Sudan Pandey had two sons, Shivdhari Pandey and Bhagwan Pandey. The map (Ext. 3) clearly shows that the road passes through plot no. 460 and goes further east up to the bathan of appellant Chandradeo Pandey in plot no. 480. The map (Ext. 3) shows three roads. Admittedly, no cutting was found in the second road, which is a direct road and a shorter one from the house of the informant going up to the P.W.D. road. Therefore, the object and purpose of blocking the road of the informant could not have been achieved by cutting the third circuitous road in the south east corner at a distance of nearly 1000 ft. from the house of the informant in plot no. 477 and 480. The Investigating Officer (P.W. 16) found trampling marks, blood marks and brick bats as also sufficient dragging marks in plot no. 460, which, admittedly, belonged to appellant Chandradeo Pandey. Sufficient quantity of brick bats were also found in the adjoining north of the bathan in the field of accused Bhagwan Pandey.

24. P.Ws. 3 & 6 have admitted that all the firing was resorted to from near the Sisham tree and Ext. 5 shows that the said Sisham tree is located on the private road of appellant Chandradeo Pandey. The Investigating Officer (P.W. 16) has stated in paragraph 55 of his deposition that the blood spot in plot no. 460 was at a distance of 209 ft. east of the house of the informant. His statement in paragraph 44 further shows that he had submitted a report for initiating a proceeding u/s 144 of the Code of Criminal Procedure between the informant and appellant Jakhan Barhi since in some portion of plot no. 230 he found that the potato and maize plants in the said plot had been ploughed and uprooted.

25. At the stage of investigation and at the very initial stage, almost all the prosecution witnesses have stated that appellant Chandradeo Pandey resorted to firing when the prosecution party started pelting stones and brick bats. This is found in the statement of P.W. 16 in paragraphs 45, 46, 48, 52 & 59. The seizure list Exts. A and 10/as also the statement of the Investigating Officer (P.W. 16) in paragraph 11 and that of P.W. 15 in paragraph 9 indicate that in the process of chasing there was heavy brick batting by the gang of criminals and appellant Ram Chandra Khatik sustained injuries in between his eye brows (Ext. 1). These relevant circumstances found at the spot unmistakably indicate that on protest by appellant by appellant Chandradeo Pandey the informant party aided by the gang of criminals, chased him and he ran for his life towards his bathan and when they had proceeded ahead in their tenacity to kill him, finding that his life was in peril, some one amongst the assembled villagers fired at Suresh Gorh, who was leading the gang from near the Sisham tree in order to save the life of Chandradeo Pandey. Even then the gang of criminals fell upon him and started

chasing him with continuous pelting of brick bats. Appellant Chandradeo Pandey started running away towards his kathan for safety of his life but the gang of criminals did not spare him and menacingly went on rushing ahead to overpower him with a view to finish him. The tenacity of the gang still persisted and they became all the more furious and continued chasing appellant Chandradeo Pandey with all the more vengeance. Thus, finding himself in a most critical and precarious situation, appellant Chandradeo Pandey resorted to firing whereby three criminals died at the spot and only then they started retreating. On perusal of Exts. 7 & 8 series, it appears, that the informant and his associates had chased appellant Chandradeo Pandey up to a distance of 209 ft. from the darwaza of the informant. The injuries found on the persons of the deceased as also on the injured persons are all on the front portion of the body and not a single injury is on the back side of the body and this clearly indicates that the firing stopped after the gang of criminals started flying back towards the informant. These overwhelming circumstances brought on record are elicited from the cross-examination of the prosecution witnesses, the Investigating Officer, the Amin and the documents filed on behalf of the defence which makes the defence case more probable. It has, thus, to be held that the prosecution version regarding the genesis, the manner and the place of occurrence is not true and the truth had been suppressed from the court. The prosecution party were clearly aggressors.

26. It is well settled that the burden on the accused u/s 105, Evidence Act to establish a plea of self defence is not as onerous as that which lies on the prosecution u/s 110 to prove its case, while the prosecution is required to prove its case beyond all reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.

27. In the light of the above discussions, the conclusion is inescapable that the appellants have succeeded in establishing by preponderance of probabilities that the prosecution party was poised for imminent attack on the appellant Chandradeo Pandey, when he fired the fatal gun shot. In such a situation, the appellants had reasonable and immediate apprehension that they would suffer death or grievous hurt if they did not open fire at the deceased. Thus, the death was, in all probability caused by the appellant in the exercise of his right of private defence.

28. In the case of Deo Narain Vs. The State of U.P., the Supreme Court held that:--"According to Section 102 Indian Penal Code the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and such right continues to long as such apprehension of danger to the body continues. The threat, however, must reasonably give to the present and imminent and not remote or distant danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the

appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right.

In such moment of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression."

29. Considering the facts and circumstances of the present case and in view of the discussion of the evidence, both oral and documentary, there is no option but to hold that the prosecution has not succeeded in bringing home the charges levelled against the appellants. Therefore, they are reasonably entitled to benefit of doubt and are, accordingly, acquitted of the charges. Their conviction and sentences are set aside and the appeals are allowed. Appellants in Cr.A.No. 340/87 and 343/87 are on bail and they are discharged from the liability of the bail bonds. In so far five appellants of Cr.A.No. 200/87 are concerned, they are in jail and, accordingly, they are directed to be released forthwith if not wanted in any other case.

Phani Bhushan Prasad, J.--In the instant case the allegation that appellant Chandradeo Pandey along with 16 others came in a mob armed with deadly weapons and four persons were killed by the firings of appellant Chandradeo Pandey. But there is no allegation that other appellants had taken any part in the assault excepting appellant Gorakh Pandey against whom there is allegation that he gave a Bhala blow to Sattan Noniya, which caused injury in his neck. The allegation against the other appellants that they were members of the mob armed with deadly weapons does not appear to be correct. If they had actually been there they would have also taken part in the assault. It appears that due to group rivalry and previous enmity those persons who were in the camp of appellant Chandradeo Pandey have falsely been implicated in this case. The possibility of their false implication due to long standing enmity can not be ruled out in the facts and circumstances of this case.

31. It is further to be noted that although there is definite allegation in the Fard Beyan (Ext. 4) that appellant Gorakh Pandey had inflicted injury on the neck of deceased Sattan Noniya but the Doctor (P.W. 14) who held autopsy over the dead body of deceased Sattan Noniya, did not find any injury on the neck of the deceased. The evidence of P.W. 14 belies the allegation of the prosecution that appellant Gorakh Pandey had taken part in the assault. On going through the Fard Beyan (Ext. 4) and the evidence of the witnesses, it appears that the allegation of firing against appellant Chandradeo Pandey alone and further the allegation that other appellants had accompanied him with deadly weapons

appear to be an afterthought. This indicates that attempt has been made to implicate all those with whom the prosecution party had litigation or those who were in the camp of appellant Chandradeo Pandey. This also indicates that correct picture of the occurrence has not been presented in the court.

32. Another important aspect of the case is that although there was indiscriminate firing by appellant Chandradeo Pandey, but neither the informant nor his close relations have been killed or received any serious injury. The four outsiders have been killed and it has been stated that they were the labourers of the informant. This also shows the peculiarity of the prosecution case.

33. Admittedly there was enmity between the prosecution party and appellant Chandradeo Pandey but there is complete absence of any immediate motive for committing such a heinous crime. Absence of immediate motive for committing the offence like the present one clearly suggests that correct version of the occurrence has not been presented by the prosecution. A concocted story appears to have been put forward.

34. As regards the genesis of the occurrence, the prosecution story is not completely free from doubt. It has come in evidence that private road of the appellants was also found out. There was no occasion to cut the road on the date of occurrence. The manner in which the occurrence is said to have taken place does not appear to be convincing. The seizure of brick bats by the Investigating Officer and blood only in the field of appellant Chandradeo Pandey do not explain the prosecution version of the occurrence correctly. According to the Fard Beyan after the occurrence the injured persons had gone to the Sahan of the Darwaja of the informant but surprisingly enough not a drop of blood was found there. This makes the place of occurrence doubtful. It has also been asserted by the informant that he filed a protest petition against the Investigating Officer for not recording the correct statement of the prosecution witnesses. If that is a fact then the investigation becomes doubtful and the advantage of the same should go to the appellants.

35. The conduct of the Investigating Officer in not sending the blood stained earth to the Chemical Examiner for examination also goes against the case of the prosecution. It has come in evidence that immediately after the occurrence appellant Chandradeo Pandey surrendered his arm and the pellets recovered from the dead bodies were received by the Investigating Officer but the gun and the pellets were not examined by the Fire Arm Expert, which would have strengthened the case of the prosecution and would have proved its case beyond doubt that appellant Chandradeo Pandey had fired causing death of the deceased. The sequence of events given in the Fard Beyan (Ext. 4) is not consistent with the evidence of the witnesses. True it is that there is no delay in setting the criminal law in motion but the prosecution version of the occurrence becomes doubtful for the reasons stated above.

36. On behalf of the prosecution it has been asserted that the labourers were

working in the field and were cutting potatoes into pieces for sowing the same but the Investigating Officer did not find a single potato in the field and the explanation offered by the informant that the potatoes were kept inside the house after the occurrence, in itself appears to be absurd and not believable specially in a case like this where four persons had been killed and the matter was reported to the police immediately.

37. On a careful consideration of the materials available on the record and on going through the judgment dictated by my learned brother, coupled with the findings arrived earlier, it can safely be concluded that the prosecution cannot claim that the charges have been brought home to the appellants beyond all reasonable doubts. Thus, I agree with the findings arrived at by my learned brother U.P. Singh J.