

(1997) 05 RAJ CK 0011

In the Rajasthan High Court

Case No : D.R Criminal Appeal No. 90 of 1978

Lakhu Singh and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 29-05-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 157, 32, 35, 62
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (1997) 2 RLW 1072 : (1997) 3 WLC 4 : (1997) 1 WLN 510

Hon'ble Judges : S.C. Mital, J;G.L. Gupta, J

Bench : Division Bench

Judgement

S.L. Gupta and S.C. Mital, JJ.—Through this appeal, appellants Lakhu Singh, Doongar Singh, Udai Singh, Khet Singh, Chand Singh, Ishwar Singh, Panney Singh, Asu Singh and Shaitan Singh have challenged the judgment of the learned Sessions Judge, Bikaner dated 23.1.78 whereby he convicted and sentenced them as follows:

(i) u/s 148 IPC : One year R.I. (ii) u/s 302/149 IPC : Imprisonment for life and a fine of Rs. 100; in default two months rigorous imprisonment. (iii) u/s 307/149 IPC : 7 years R.I. and a fine of Rs. 50/-, in default, one month's R.I.

(iv) Doongar Singh was also convicted u/s 325 IPC and sentenced to rigorous imprisonment for two years and accused Udai Singh was also convicted u/s 323 IPC and was sentenced to six months rigorous imprisonment.

All the sentences were ordered to run concurrently.

2. Appellants Chand Singh and Panney Singh have expired during the pendency of appeal, and therefore, their appeal stands abated.

3. The facts of the case may be put in narrow compass. On 10.8.75 at 2 am. Amra Ram (PW 3) approached Shri Jeev Raj Singh (PW 11) Dy. S.P. Bikaner and informed him that his father Moola Ram has been murdered and his mother and

brother have been injured Shri Jeev Raj Singh recorded his statement Ex. P/2 in which Amra Ram stated that in the evening, when he and his brother Surja while in their field, heard the cries of his mother and therefore, they rushed towards the place from where the cries were coming and on the way they met their brother Mahaveer who told them that their father was being beaten. As they reached near the place of occurrence, they saw accused Lakhu Singh, Shaitan Singh, Khet Singh, Chand Singh, Asu Singh, Doongar singh, Udai Singh, Ishwar Singh, and Panney Singh landing blows to his father Moola Ram by spear, "Seal" and "lathis" and his mother was crying for help. The 9 accused surrounded his brother Surja and started giving beatings to him and when his mother came to his rescue, she was also given beatings. It was stated that he took his father, brother and mother at the bus stand where Kishna Ram advised him to approach the police. In this statement it was also stated that for some days there was enmity between Lakhu Singh and his family and all the accused are related to Lakhu Singh. On this report, a case was registered at Police Station, Jamsar u/s 147, 148, 149 and 307 IPC and the police chalked the formal FIR Ex. P/15. When the police went to the bus stand it found that Moola Ram had already died. The police held the usual investigation. The autopsy was held by Dr. Manohar Swami. He had also seen the injuries of Surja and Jaita. The accused were arrested and at the information of Lakhu Singh, Shaitan Singh and Chand Singh, "Sela", spear and "Kasiya" were recovered. "Lathis" were recovered at the instance of other accused. After the completion of the investigation a challan was submitted.

4. The Sessions Judge charged all the accused with the offences u/s 148, 307 and 302 IPC. They pleaded not guilty. The prosecution examined 12 witnesses. Out of them PW 1 Jaita and PW 2 Surja are the injured eye witnesses. PW 3 Amra is the eye witness who had lodged the FIR. PW 5 Phoose Khan was examined to give circumstantial evidence against accused Lakhu Singh. He has, however, turned hostile. PW 4 Kishna Ram was associated as "Motbir" during investigation. PW 6 Magni Ram, Head Constable had taken the sealed packets of this case to the FSL at Jaipur. PW 8 Dr. S.C. Bhargava had x-rayed the injuries of Surja Ram and Jaita. PW 12 Dr. Hanuman Kaswan was examined to prove the writings and signatures on the post-mortem report and the injury reports prepared by Dr. Manohar Swami who has not been examined in the case. PW 7 Jasbir Singh, PW 9 Motilal, PW 10 Swaroop Singh and PW 11 Jeev Raj Singh are the police officials. In this case, the learned Sessions Judge had inspected the site and placed the inspection note on record. Accused in their statements u/s 313, Cr. P.C. denied accusation. They did not examine any witness in defence.

5. The learned Sessions Judge held that Moola Ram had met homicidal death. He further found that Jaita and Surja had suffered injuries in that occurrence. Holding that accused had caused injuries to Moolaram, Jaita and Surja, he convicted the appellants as stated above.

6. We have heard the arguments of the learned Counsel for the appellants and learned Public Prosecutor for the State respondent and learned Counsel for the

complainant and have gone through the record of the case.

7. Mr. Garg, learned Counsel for the appellants contended that the occurrence had taken place after sun set and there were no chances of Amra and Surja to hear the cries of Jaita from the distance of about 1450 ft. and therefore, there was no occasion for the witnesses to have gone to place of occurrence. According to him, the prosecution has not come out with true story and the FIR is the post investigation document. He contended that the medical officer who had held autopsy and seen the injuries of the witnesses has not been examined and therefore, the direct evidence does not get corroboration from the medical evidence. According to him the post-mortem report and the injury reports do not stand proved by the statement of Dr. Hanuman Kaswan. His further submission was that there is over implication of the accused in this case and it is not possible to disengage truth from the falsehood and therefore, all the accused are entitled to acquittal.

8. Mr. Singhvi, on the other hand contended that the trial Court has rightly believed the statements of the two injured witnesses and Amra, eye witness. According to him, the evidence produced through Dr. Hanuman Kaswan is relevant u/s 32 & 35 of the Evidence Act as Dr. Swami's attendance could not be procured without unreasonable delay and expenses. Though he could not be produced in the case but the post-mortem report and the injury reports stand proved to be in the hand writing of Dr. Swami. He contended that there are no circumstances to hold that the FIR was ante dated or ante timed.

9. We have given the matter our thoughtful consideration. The contentions of Mr. Garg revolve round two points: (i) The post-mortem report and the injury reports have not been proved by primary evidence, (ii) the FIR is post investigation document. We shall first consider these two points.

10. As already stated, the autopsy was held by Dr. Manohar Swami and he had also seen the injuries of Jaita and Surja. A perusal of the order sheets recorded by the trial Court clearly reveals that the Sessions Judge made earnest efforts to procure the attendance of Dr. Swami. However, as Dr. Swami left India and started living abroad, he could not be produced by the prosecution. When the trial Judge was satisfied the Dr. Swami's attendance could not be procured without unreasonable amount of delay and expenses, he permitted the prosecution to examine the person who was conversant with the hand writing and signatures of Dr. Swami. Thereafter, the prosecution examined PW 12 Dr. Hanuman Kaswan who has deposed that he had worked with Dr. Manohar Swami and he was conversant with his writing and signatures. He has stated that post-mortem report Ex. P/55 and injury reports Exs. P/53 & P/54 are in the hand writing of Dr. Manohar Swami and bear his signatures. He has further deposed that in the registers of injury reports and post-mortem the carbon copies of the documents Ex. P/53, P/54 and Ex. P/55 are available. He has also deposed that both these registers were maintained regularly in the hospital. Not a single question has been asked to Dr. Kaswan in his cross examination regarding his

evidence that he was conversant with the hand writing and signatures of Dr. Manohar Swami and that the registers of the three documents were maintained in the ordinary course of business. There is, therefore, absolutely no reason to disbelieve the statement of Dr. Kaswan and it is fully established that the three documents Ex. P/53, P/54 and P/55 were prepared by Dr. Manohar Swami in discharge of his official duties.

11. u/s 32(2), Indian. Evidence Act when the statement was made by a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him, the books kept in ordinary course of business or in the discharge of professional duty, the same is relevant fact in the circumstances mentioned under the main part of Section 32.

12. Section 32 provides that when a statement written or verbal is made by a person in the discharge of professional duty whose attendance cannot be procured without an Amount of delay, the same is relevant and admissible in evidence. In the instant case, the medical officer who had prepared the documents was not available in India and his attendance could not be procured without an amount of delay or expenses which under the circumstances of the case was unreasonable.

13. The Patna High Court in the case of Rambalak Singh v. State 1964 Patna 62 had occasion to consider the scope of Section 32 of the Evidence Act and observed at Para 9 that when the Doctor was not easily available, the post-mortem report prepared by him would be admissible In evidence if it was proved by other evidence. This Court had also occasion to consider the scope of Sec, 32(2) of the Evidence Act in the case of State of Rajasthan v. Mathuralal 1971 RLW 260 wherein it was observed that if the doctor who wrote the injury report was dead and; the compounder proved his writings, the injury report was admissible u/s 32(2) of the Evidence Act. The Hon"ble Supreme Court of India, in the case of Prithvi Chand v. State of H.P. 1989 SC 702 in a case of rape, where the attendance of the lady doctor who had examined the prosecutrix had proceed on long leave, could not be procured without undue delay, observed at Para 4 as follows:

Section 32 of the Evidence Act provides that when a statement, written or verbal, is made by a person in the discharge of professional duty whose attendance cannot be procured without an amount of delay, same is relevant and admissible in evidence. Besides, since the carbon copy was made by one uniform process the same was primary evidence within the meaning of Explanation 2 to Section 62 of the Evidence Act. Therefore, the medical certificate Ex. P-E was clearly admissible, in evidence.

14. It is, thus, obvious that u/s 32(2), the injury reports and the post-mortem report prepared by Dr. Swami are relevant and they can be used as evidence after having been proved to be in his hand writing by Dr. Hanuman Kaswan (PW 12). The trial Court has, thus, not erred in using this documentary evidence

against the accused.

15. The next question to be considered is at what time the FIR Ex. P/15 was recorded. It may be recalled that this FIR was recorded on the statement of Amra Ex. P/2, recorded by Jeev Raj Singh at Bikaner. In the statement Ex. P/2 it is stated that Amra had appeared before Shri Jeev Raj Singh at 1 a.m. on 10.8.75. There is an endorsement below the statement of Amra recorded by Shri Jeev Raj Singh that the original statement was sent to the police station for registering the case and informing the FIR number. There is further endorsement recorded by Jasbir Singh, Head Constable, PS Jamsar that this statement was produced by Shri Jeev Raj Singh, Dy. S.P. himself on which case No. 35 u/s 307, 147, 148 and 149 IPC was registered. No time is recorded on this endorsement. In the formal FIR Ex. P/15, in the column meant for recording date and time of the FIR, it is stated that report was lodged at 1 a.m. and in the Rojnamcha the entry was made at 2.30 a.m. at No. 219. At the end of this FIR, time 4.45 p.m. is written on the left side of the signatures of Jasbir Singh, Head Constable. Inquest Memo Ex. P/3 indicates that the police had reached the place of occurrence at 4.30 a.m. on 10.8.75 and the police was there upto 2 p.m. In these circumstances, it was contended that the FIR was not recorded at 1 a.m. but it was recorded at 4.45 P.M. after the police completed the investigation at the spot on 10.8.75. Prima facie, the contention is attractive, but for the reasons which we will presently show, it cannot be accepted.

16. It has not come on record as to when and by whom the time "4.45 p.m." was written in the FIR Ex. P/15. A perusal of the FIR clearly indicates that this time is recorded in different ink than the one in which the entire FIR Ex. P/15 was written. Even it is also doubtful that this time "4.45 p.m. appeared on the document during the trial of the case. Not a single question has been asked either to Jeev Raj Singh or Jasbir Singh regarding the time of 4.45 p.m. written on the document, though there was clear evidence on record in the statements of Amra Ram and Jeev Raj Singh that the FIR was lodged at 1 a.m. and Amra Ram was taken by Jeev Raj Singh in his Jeep at Jamsar where the case was registered by jasbir Singh and FIR Ex. P/15 was prepared at 2.30 a.m. There is nothing on record to hold that Jeev Raj Singh did not go to the police station alongwith Amra Ram at 2.30 a.m. Simply because in the statement Ex. P/2 it was recorded by Jeev Raj singh that he would send the statement to PS Jamsar for registering the case, it cannot be inferred that Jeev Raj Singh himself did not go to the police station that night to produce the statement Ex. P/2 before the incharge of the police station, It seems that Jeev Raj Singh though first intended to send the statement through someone else but later on thought it proper to go himself to the police station. There was nothing wrong in the procedure adopted by Shri Jeev Raj Singh when he himself went to the police station and produced the statement before Jasbir Singh. It has not been suggested that the Dy. S.P. had not gone to the police station at 2.30 a.m. A clear cut question has also not been asked to Jasbir Singh inviting his attention towards the time 4.45 p.m." recorded on Ex. P 5 that he had received the FIR at 4.45 P.M. Only a vague

question has been asked that he registered the case after investigation which he has emphatically denied. The statement of Amra. Ram (PW 3) is to this effect that he had reached Bikaner at 1 a.m. to give his statement Ex. P/2 and thereafter the Dy. S.P. had taken him to the police station Jamsar and from there they had gone to the place of occurrence. In our opinion, it is fully established on record that the FIR of the case was lodged at 1 a.m. and there is no merit in this contention that the FIR is post investigation document.

17. Our attention was drawn to this fact that the FIR Ex. P/15 reached the IIaqa Magistrate on 12.8.75 and on this basis it was contended that the FIR was not recorded at the time stated therein. Section 157 requires that first information report should be sent forthwith to the Magistrate empowered to take cognizance of such offence upon a police report. However, the late sending of the FIR is always not fatal to the prosecution case. We have already found that the FIR was not ante timed and was recorded at the time it is written thereon. Endorsement on the FIR Ex. P/15 indicates that it was despatched on 10.8.75 itself. It appears to have been sent to the Assistant Public Prosecutor No.I, Bikaner who in his turn submitted it before the Magistrate on 12.8.75, thus the delay was caused as the FIR was routed through the APP. In such circumstances, the late sending of the FIR does not render the prosecution case doubtful.

18. The central evidence is contained in the statements of PW 1 Jaita, PW 2 Surja and PW 3 Amra. Jaita has deposed to have seen the occurrence from beginning to end. She has deposed that seeing her husband going towards her filed she followed him alongwith his Son Mahaveer of 8 years and she saw accused Lakhu Singh having "Sela" in his hand chasing her husband and as they reached the field of Ishwar Singh, she saw accused Udai Singh, Shaitan Singh, Asu Singh and Doongar Singh coming from behind the "Ker" trees and at the same time accused Ishwar Singh, Panney Singh, Khet Singh and Chand Singh also reached there. According to her Chand Singh had a "Kassi" in his hand, Shaitan Singh had a spear and the other accused were having "lathis" and they surrounded her husband. She has deposed that accused Shaitan Singh inflicted a spear blow on the head of her husband whereby he fell down and thereafter Lakhu Singh landed a "Sela" blow on his neck, Chand Singh gave a "Kassi" blow on his left leg and the other accused inflicted "lathi" blows to him. She has then deposed that on her making noise, Surja Ram and Amra Ram came to the place of occurrence and seeing them accused left her husband and surrounded Surja Ram and stalled giving beatings to him. According to her, Shaitan Singh inflicted a spear blow on the head of Surja Ram, Lakhu Singh gave a "Sela" blow on his hand and Chand Singh gave a "Kassi" blow on his leg. She has deposed that in order to save her son she fell on him when accused Udai Singh and Doongar Singh landed "lathi" blows to her.

19. Mr. Garg urged that no reliance should be placed on the testimony of this witness as the prosecution has not examined Smt. Roopa or Bhanwariya from whose talk this witness anticipated the quarrel. He urged that the conduct of the

witness in taking a child of 8 years with her was most unnatural. It was also pointed out that the injuries to the deceased and Surja stated by her do not tally with the post mortem report and injury report.

20. In our opinion, on the ground that Roopa and Bhanwariya have not been examined, the statement of this witness cannot be discarded, what she has deposed is that Smt. Roopa informed her that Bhanwariya had told her (Roopa) that Surja and Amra would be beaten by Asu Singh, Shaitan Singh, Doongar Singh and Udai Singh and that they have taken their positions in "Ker" trees and therefore, she followed her husband. It is common knowledge that when some person comes to know about the ill intentions of certain other persons, he does not go beyond informing the person concerned. He never likes to come in open. It is, obvious that what Mst. Roopa informed Jaita was in strict confidence and therefore, it cannot be expected that Smt. Roopa would come to depose about the talk she had with Jaita. It is to be noticed that Jaita herself has suffered injuries in the occurrence, therefore, her presence at the place of occurrence cannot be doubted. Even if we ignore that Jaita had gone to the place of occurrence on knowing from Smt. Roopa, it will not adversely affect the testimony of Jaita. Since Jaita had suffered injuries in the occurrence it lends assurance that she was present there. In these circumstances, the non examination of Roopa or Bhanwariya does not render the testimony of Jaita doubtful.

21. Mahaveer, of course, was a child of 8 years. It has not come on the evidence of Jaita that she had taken Mahaveer with her. According to her, Mahaveer had followed her husband and thereafter she had left her house. Both the other sons of the witness were already in the field and she and her husband were going to the field and therefore, it was difficult for her to leave Mahaveer alone at the house. In these circumstances, if Mahaveer was taken towards the field, there was nothing unnatural in her conduct.

22. It was pointed out that according to Jaita "Sela" injury was inflicted in the backside of the neck of Moola Ram but no such injury was found by the medical officer. A perusal of the post mortem report Ex. P/55 indicates that there were as many as 9 incised wounds, one lacerated wound and one abrasion besides the bruises 13 in number on the person of Moola Ram. Out of the incised wounds, there were even injuries on frontal, parietal and occipital regions. Two injuries were found on the occipital region and therefore, it cannot be said that there was no injury at the place pointed out by Smt. Jaita. According to her, the injury was caused on the back side of the neck. Occipital region is situate above the neck. It cannot be said that the statement of Mst. Jaita does not tally with the medical evidence.

23. With regard to the injury of Surja Ram, Jaita has stated that "Sela" was thrust in the right hand of Surja Ram. According to Mr. Garg there was no such injury found on Surja Ram. A perusal of the report Ex. P/53 indicates that there was lacerated wound on the right forearm of Surja Ram., "Sela" is, of course, a

sharp edged weapon and injury if caused by sharp side ought to have been incised wound. There may be some exaggeration when Jaita stated that "Sela" was thrust in the hand but it is obvious that the injury was caused at the right hand of Surja Ram. It might be that sharp edged part of the "Sela" did not touch the body and the injury was suffered by the blunt part of the weapon and therefore, it was lacerated wound. On this ground, the statement of Jaita cannot be seen with suspicion. On this ground also her statement cannot be disbelieved that in the statement Ex. D/I recorded by the police she had not stated that Lakhu Singh had given "Sela" blow on the neck of Moola Ram and Chand Singh had given "Kassi" blow on his left leg. In the police statement it was clearly stated that accused Lakhu Singh had a "Sela" and Chand Singh had a "Kassi" in his hand. The specific injury was not stated, in the statement obviously because the investigating officer did not ask about the particular Injury caused by the particular accused. In these circumstances, it cannot be said that there is improvement in the statement of Jaita when she has deposed that Lakhu Singh had given a "Sela" blow and Chand Singh had given "Kassi" blow to Moola Ram.

24. In our opinion, the trial court has not committed any error in giving credence to the statement of Jaita who himself had suffered injury in the occurrence.

25. Mr. Garg, assailed the testimony of Surja and Amra mainly on two grounds. First, they could not be in a position to hear the cries while standing in their field. Second, having heard the cries they could not go to the place of occurrence unarmed. As already stated, the learned Sessions Judge had inspected the site in this case and he found the distance of about 1450 ft. between the place of occurrence and the place where the two witnesses Amra and Surja Ram heard the cries of their mother. He also found that shouting done at the place of occurrence was heard in low voice at the place where the witnesses depose to have heard the cries and it could not be deciphered as to what was the shouting made. It is to be noticed that both the witnesses were none else, than the son of Jaita. They were very well conversant with the voice of their mother. Jaita (PW 1) has deposed that she had made cries. It was natural for the two witnesses to have identified the voice of their mother. They might not have fully understood as to what Jaita was telling but atleast they could understand that their mother was crying for help. In these circumstances, it cannot be accepted that the witnesses had no occasion to reach the place of occurrence on hearing cries of their mother.

26. It has not come in the evidence that Jaita had cried that someone was beating her husband. She had only made cries and therefore, Amra and Surja could not think that there was attack on their father or mother. They could only understand that there was some trouble and hearing the cries, they rushed to the spot. In these circumstances, on the ground that they did not take any weapon with them, does not detract their testimony. It is also to be noticed that at that time, Amra and Surja Ram were not having weapons in their hands. They had already made preparation to leave the field. On hearing the cries of their

mother, they could not afford to waste time in collecting the weapons. In our considered opinion, there is absolutely no reason to disbelieve the statements of Surja and Amra. As already stated, in that occurrence Surja himself had sustained injuries. This ensures the presence of Surja at the place of occurrence.

27. It has appeared in the statement of PW 3 Amra Ram that when he heard the cries of his mother, he had seen Mana Ram Kumhar, Kan Singh Rajput and Anne Khan going towards the village and they had drunk water in their field. On the basis of this statement, it was contended that the three witnesses must have seen the occurrence and the prosecution has not examined these three persons and therefore, adverse inference should be drawn against the prosecution. In our opinion, the argument carries no weight. What the statement of Amra indicates is that before the occurrence the three persons had drunk water in his field and after they had gone from there, there was cry of her mother. It may be that when her mother made cries, the three persons were also seen by the witness at some distance going towards the village but it does not mean that the three persons were in the hearing zone and they had witnessed the occurrence. In these circumstances, adverse inference cannot be drawn against the prosecution by their non-production.

28. Phoose Khan (PW 7), who was examined to depose against accused Lakhu Singh, has turned hostile and Swaroop Singh (PW 10) Investigating Officer has admitted that when he arrested Lakhu Singh on 12.8.75, there was plaster tied on his left elbow. On these facts, it was argued that Lakhu Singh has been falsely implicated in this case. In the cross examination of the three main witnesses; Jaita, Surja Ram and Amra, it has not been suggested that there was plaster on the hand of the accused at the time of occurrence. This fact has appeared for the first time in the cross examination of Phoose Khan who stated that when he saw Lakhu Singh, he did not have anything in his hand and there was plaster tied on his left hand. It is on this statement that the witness was declared hostile by the prosecution as he had introduced new fact. In our opinion, on the basis of introduction of a new fact by the hostile witness, it cannot be found that there was plaster tied on the hand of Lakhu Singh at the time of occurrence. It may be that there was plaster on his hand when he was arrested on 12.8.75 i.e. three days after the occurrence but it does not establish that there was plaster on his hand at the time of occurrence. It may be that in the occurrence Lakhu Singh accused also sustained some injuries on his hand at the hands of his co-accused while inflicting blows to Moola Ram, Surja Ram and Jaita and therefore, he got treatment somewhere and a plaster was tied. However, it is not established on record that there was any injury on the hand of accused Lakhu Singh in the evening of 9.8.78 when the occurrence had taken place. By the evidence of the three eye witnesses, it is amply proved that he had a "Sela" in his hand and he had used the same to inflict injuries to Moola Ram as also Surja Ram.

29. There appears some over writings in the FIR Ex. P/2. On this basis, it was argued that the occurrence had taken place in the darkness and the assailants

could not be identified-In our opinion, there is no substance in this contention. Shri Jeev Raj Singh has explained in what circumstances the over writings were made in the statement Ex. P/2. According to him, the pen which he was using was defective and report was written in the night and therefore, some cuttings were made and the words were written again. The portion towards which Mr. Garg invited our attention, reads as: % vkt "kke fNirs le; dh ckr gS A

30. He argued that there was word ^jkr^ in place of ^"kke^ and there was the word ^ckn^ in place of ^ckr^ In our opinion, it is not correct. The word ^"kke^ is very clear. It cannot be accepted that first word ^jkr^ was written. From the sequence of the sentence it is very clear that the occurrence took place in the evening when the sun was setting therefore there could not be word ^jkr^. The word which has been cut after the word ^dh^ would not be ^ckn^ and it was ^ckr^ from the very beginning. Had the word been ^ckn^ it would have been preceded by work ^ds^ and not ^dh^ and followed by the word ^dh^ which is not there. The words ^fnu fNirs le;^ clearly indicate that the occurrence had not taken place after sun set. In any case, it has not come on record that at the time of occurrence there was no visibility. The accused belonged to the some village to which the witnesses belonged. They were close neighbours. The witnesses could not commit any mistake in identifying the accused.

31. In our view, the learned Sessions Judge has rightly believed the statements of the three witnesses and has rightly found that all the 9 accused had taken part in the occurrence in which Moola Ram, Jaita and Surja Ram were given beatings.

32. Besides the direct evidence, there is evidence of recovery of the weapons at the instance of the accused persons. "Sela" was recovered at the instance of accused Lakhu Singh, Tarsi" was recovered at the instance of accused Shaitan Singh, "Kassi" was recovered at the instance of Chand Singh and "lathi"s were recovered at the instance of other accused. These weapons were kept in sealed condition and were sent to the Forensic Science Laboratory from where the report Ex. P/1 was received indicating that all these weapons "Sela" "Farsi", "Kasiya" and "lathi"s were stained with blood. "Sela", "Kassi" and "Farsi" were also sent to the Serologist and Chemical Examiner who after examination opined vide report Ex." P/52 that these weapons were stained with human blood. Of course, the blood groups of the stains on the items could not be detected but that does not lessen the value of the forensic evidence. The circumstance, that the weapons recovered at the instance of the accused were stained with human blood, strengthens our finding that the accused had taken part in the occurrence. The learned Sessions Judge has rightly used this evidence against the accused.

33. It may be noticed that the deceased has suffered as many as 24 injuries, Surja had suffered 25 injuries and Jaita had suffered 2 injuries. Thus, total 52 injuries were inflicted on the three persons. By the evidence of Amra, Surja and Smt. Jaita, the involvement of all the 9 accused is amply proved on the record.

34. The motive for the crime is also proved on record. According to Jaita, for some days the relations of the parties were strained. Even Lakhu Singh had launched criminal proceedings for the occurrence which had taken place some days back. Ten days before the occurrence, there was some quarrel for the reason that a child had fallen from the cradle and accused gave beatings after entering into the house of the complainant party. It may be that the aggrieved party in such matters was the complainant party but it cannot be said that there was not ill will in the minds of the accused persons against Moola Ram and others. Looking to the strained relations of the parties before the occurrence, it can safely be presumed that accused had motive to commit the offence.

35. We may look at the defence pleas set up by the accused persons. Accused Khet Singh, Udai Singh, Shaitan Singh, Lakhu Singh and Doongar Singh have pleaded that they was either at their houses or had gone outside the village. This is the plea of alibi. No evidence has been produced by any of the accused in support of this plea. The trial Court has rightly rejected the defence plea.

36. Accused Asu Singh has come out with a story which is rather absurd. He has stated that deceased Mool Ram had illicit relations with his daughter-in-law (wife of Surja witness) and as Surja found the deceased and his wife in compromising position, he inflicted injuries by axe to his father and Moola Ram in his turn caused injuries to Surja. It cannot be believed that 50 year old father in law would elope with his daughter-in-law, No evidence in this regard has been produced. It is to be noticed that according to Asu Singh he was at Bikaner on the day of incident. He has not examined any person through whom he came to know about that incident. Surja Ram (PW2) has emphatically denied the suggestion put in this regard. Amra Ram (PW 3) has also denied the correctness of the incident suggested in his cross examination. There is absolutely nothing on record to accept such absurd plea.

37. Accused Iswar Singh has come out with a case that when he was sitting at his residence alongwith Phoose Khan, Mohini daughter of deceased informed him that there was quarrel between her father and brother Surja and Surja has killed her father. Though Phoose Khan (PW 5) has also stated this fact in his deposition, but he had not stated this important fact in his police statement and therefore, he was declared hostile. There is no other evidence on this point. The statement of Phoose Khan cannot be believed.

38. To sum up, it may be stated that there is no substance in the defence plea.

39. As already stated, the medical officer who had held autopsy and had seen the injuries of Surja ram has not been examined in this case, therefore, it has not come on record that the injuries suffered by Surja were sufficient in the ordinary course of nature to cause death. However, a perusal of the post-mortem report Ex. P/55 and injury report Ex. P/53 clearly goes to prove that the injuries were sufficient in the ordinary course of nature to cause death. As many as 24 injuries were caused to Moola and out of them 9 were incised wounds and almost

all of them were on vital parts and as a result of the injuries there were fractures of the temporal parietal and frontal bones. Even in the report, Dr. Manohar Swami had opined that the injuries were sufficient in the ordinary course of nature to cause death. So also, the injury report Ex. P/53 of Surja Ram, indicates that as many as 25 injuries were caused to him and out of them two were the incised wounds caused on the occipital and parietal regions. It is proved by the statement of Dr. Bhargava (PW 8) that there was fracture of skull in right parietal area. It is, thus, obvious that the injuries suffered by Surja were also sufficient in the ordinary course of nature to cause death. The act of the accused in causing intentional death of Moola comes within the net of Section 302 IPC. Their act in causing grievous injuries on the vital parts of Surja brings the case u/s 307, IPC. Since the 9 persons had collected near the place of occurrence having weapons in their hands and Lakhu Singh had also gone having "Sela" in his hand and all of them had taken part in the occurrence, there is no escape from the conclusion that they had formed an unlawful assembly to commit the murder of Moola Ram and Surja Ram. The trial Court has therefore not erred in convicting the appellants. u/s 302/149 and 307/149 IPC. The sentences awarded for the offences cannot be held to be excessive.

40. There is substance in this contention of Mr. Garg that appellants Udai Singh, Khet Singh, Isar Singh, Asu Singh and Doongar Singh could not be convicted u/s 148 IPC as they had lathis in their hands. Lathis are not deadly weapons. Their conviction u/s 148 IPC is, therefore, altered to Section 147 IPC, and they are sentenced to six months R.I. The conviction and sentence of appellants Lakhu Singh and Shaitan Singh u/s 148 IPC are maintained.

41. The last contention of Mr. Garg was that the accused were charged with the offences u/s 302 and 307 IPC and charges were not framed against them with the aid of Section 149, IPC and therefore, the trial Court has erred in convicting them u/s 302 and 307 with the aid of Section 149, IPC. It is true that charges u/s 302 and 307 simpliciter were only framed and the accused were not charged with the aid of Section 149, IPC, however, in our opinion, in the facts and circumstances of the case, the conviction of the appellants with the aid of Section 149, IPC is sustainable. It is to be noticed that all the accused were charged with the offence u/s 148, IPC. In that charge it was stated that all the accused were members of the unlawful assembly and in persecution of the common object of the assembly i.e. to cause the murder of Moola Ram and Surja Ram they committed the offence of rioting. Section 149, IPC comes into play when offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly. In this case, the accused knew from the very beginning that they were required to meet the charges that they were the members of the unlawful assembly and in prosecution of the common object of that assembly, the murder of Moolaram was committed and murderous assault was made on Surja. No prejudice was caused to the accused by non framing of separate charges with the aid of Section 149 JPC. In their statements u/s 313, Cr. P.C. also the accused were asked questions that they came out from behind

the trees in two groups having weapons in their hands and thereafter they took part in the occurrence. Thus, the accused were aware of the charge they were required to meet.

42. In the case of Ishwar Singh Vs. State of U.P., a question arose that whether the accused who were charged u/s 302 read with Section 149, could be convicted u/s 302 IPC without a separate charge under that Section. Their Lordships of the Supreme Court answered the question in the affirmative. In the instant case, the position is reverse. Here the charges u/s 302 and 307 IPC were framed against the accused alongwith a charge u/s 148 IPC and conviction has been recorded with the aid of Section 149 IPC. No authority taking the view that such a course could not be adopted, has been cited before us. Thus, there is no merit in this contention.

43. Consequently, appeal of Chand Singh and Panne Singh stands abated.

Appeal of Lakhu Singh and Shaitan Singh, being devoid of merit, is dismissed.

Appeal of Udai Singh, Khet Singh, Ishwar Singh, Asu Singh and Doongar Singh is partly allowed. While maintaining their conviction and sentence u/s 302/149 and 307/149 IPC, their conviction and sentence u/s 148 are set aside and instead they are convicted u/s 147 IPC and are sentenced to undergo 6 months R.I.

44. The seven appellants shall surrender before the Sessions Judge, Bikaner within 4 weeks, failing which the Sessions Judge shall take steps to arrest the appellants and send them to prison for undergoing the unexpired term of imprisonment.