
(2003) 08 AHC CK 0036

In the Allahabad High Court

Case No : Criminal Appeal No. 1436 and Government Appeal No. 2406 of 1980

Noor Mohammad and Others (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 111, 378
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2003) 3 ACR 2990

Hon'ble Judges : V.N. Singh, J;U.S. Tripathi, J

Bench : Division Bench

Advocate : G.S. Hajela, Dhan Prakash and Sudhir Prakash, for the Appellant;
L.V. Singh and A.G.A., for the Respondent

Judgement

U.S. Tripathi, J.—The above two appeals have been preferred against the judgment and order dated 2.7.1980 passed by 1st Additional Sessions Judge, Farrukhabad in S. T. No. 78 of 1980 convicting the Appellants Noor Mohammad, Mohammad Masi and Bashir u/s 302 read with Section 34, I.P.C. and sentencing each of them to undergo imprisonment for life and acquitting them under Sections 147, 148, 324 read with Section 149 and Section 323 read with Section 149, I.P.C. and acquitting Appellants Mohammad Shami and Ayub.

2. The prosecution story, briefly stated, was as under:

Munna deceased (24) was nephew of Rais Bux (P.W. 1) and was residing in the house adjacent towards east of his house. A long standing enmity was going on between Munna deceased and Noor Mohammad Appellant. Proceeding u/s 107/117, Cr. P.C. had also taken place between them. Noor Mohammad and others, were larger in number and they often transacted quarrel with Munna deceased.

3. On the morning of 1.12.1979 vocal quarrel had taken place between ladies of the houses of the parties. At that time Munna deceased was not at his house. He

came to his house at about 12 noon. It was 10th day of Moharram. At about 1 p.m. Liyakat Hussain (P.W. 3) came to his house and asked him to accompany him to Sekhpur to see Tazia fair. Munna deceased told him that he would accompany him after taking bath. Saying it he proceeded to the well to take bath. When he came out of his house in the lane adjacent towards north of his house, Appellants Noor Mohammad his brother Ayub, his sons Masi, Shami and Bashir came there. Bashir was having lathi and other accused persons were having knives. They told Munna deceased that he claimed himself more and they would eliminate him. Hearing it Munna deceased ran towards west. The above accused persons chased him and surrounded him on the rasta towards west of the house of the deceased and started inflicting injuries on him with their respective weapons. Rais Bux (P.W. 1), Liyakat Hussain (P.W. 3), Farid (P.W. 6), Suleman, Riyajuddin and others rushed to the spot and tried to apprehend the accused persons. Accused Mohammad Masi inflicted knife blow on Liyakat Hussain (P.W. 3) and Bashir inflicted lathi blow on Rais Bux (P.W. 1) and all the accused made their escape good. Munna deceased received severe injuries. Liyakat Hussain (P.W. 3) got prepared report (Ext. Ka-1) of the occurrence from Iqrar Khan and taking Munna deceased and other injured persons came to Police Station, Kamalganj where he lodged report (Ext. Ka-1) at 2.05 p.m. Chik F.I.R. (Ext. Ka-2) was prepared by Head Constable Babu Lal (P.W. 2), who made an endorsement of the same at G.D. report (Ext. Ka-3) and registered a case against 5 accused persons under Sections 147, 148, 323, 324 and 307, I.P.C.

4. Investigation of the case was taken up by Sri Arvind Misra, Investigating Officer (P.W. 7), who interrogated Munna deceased at the police station. His condition was serious and he was sent to Primary Health Centre, Kamalganj for medical examination. On reaching the hospital he was declared dead by Dr. Arvind Misra (P.W. 7), who sent information to this effect to S.H.O. P.S. Kamalganj.

5. On receipt of above information the case was altered u/s 302, I.P.C. The Investigating Officer interrogated Rais Bux (P.W. 1), Liyakat Hussain, (P.W. 3) and sent them to Primary Health Centre, Kamalganj for medical examination where they were medically examined by Dr. Arjun Kumar (P.W. 4) who found one contusion on the back of right elbow of Rais Bux (P.W. 1) and prepared injury report (Ext. Ka-6). He also examined Liyakat Hussain (P.W. 3) and found one incised wound over right forearm and prepared injury report (Ext. Ka-5).

6. The Investigating Officer then proceeded to Primary Health Centre, Kamalganj along with S.I. J. P. Singh and other Constables where he conducted inquest of the dead body of the Munna deceased and prepared inquest report (Ext. Ka-10). He also recovered one blood-stained bandage lying near the dead body of Munna deceased and prepared recovery memo (Ext. Ka-11). He sealed the dead body of Munna deceased and handed over to Constable Shanti Swaroop, (P.W. 8) for taking it for post-mortem. Thereafter, the Investigating Officer reached the spot and interrogated other eye-witnesses including Farid (P.W. 6). On the next day

the Investigating Officer inspected place of occurrence and prepared site plan (Ext. Ka-17). He also took into possession blood-stained and simple earth from the spot and prepared recovery memo (Ext. Ka-18).

7. Autopsy on the dead body of the Munna deceased was conducted on 2.12.1979 by Dr. Suresh Chandra, (P.W. 5) who found 2 contusions, 2 incised wounds and 2 stab wounds on the person of deceased as ante-mortem injuries and cause of death shock and haemorrhage as a result of ante-mortem injuries. The doctor prepared post-mortem report (Ext. Ka-9).

8. The Investigating Officer searched the accused but they were not traceable. The accused persons ultimately surrendered in the Court. The Investigating Officer interrogated them in the jail and on completion of investigation submitted charge-sheet against the 5 accused persons.

9. Accused Noor Mohammad, Ayub and Mohammad Shami were charged with the offences punishable under Sections 148, 302 read with Sections 149, 324 read with Section 149 and 323 read with Section 149, I.P.C. while accused Masi was charged with the offences punishable under Sections 148, 302 read with Section 149, I.P.C., 323 read with Section 149, I.P.C. and 324, I.P.C. Accused Bashir was charged with the offences punishable under Sections 147, 302 read with Section 149, 324 read with 149, I.P.C. and 323, I.P.C. The accused pleaded not guilty and their defence was that they were falsely implicated on account of enmity.

10. The prosecution in support of its case examined Rais Bux (P.W. 1), Head Constable Babu Lal, (P.W. 2), Liyakat Hussain (P.W. 3), Dr. Suresh Chandra (P.W. 5), Farid (P.W. 6), Sri Arvind Misra, Investigating Officer (P.W. 7) and Constable Shanti Swaroop, (P.W. 8). Rais Bux (P.W. 1), Liyakat Hussain (P.W. 3) and Farid, (P.W. 6) were witnesses of fact while evidences of other witnesses was formal in nature. The accused did not adduce any evidence in their defence.

11. The learned sessions Judge on considering the evidence of the prosecution held that participation of accused Mohammad Shami and Ayub was doubtful and therefore, he acquitted them giving benefit of doubt. He further held that since two accused have been acquitted the offence punishable under Sections 147 and 148, I.P.C. was not made out but prosecution successfully proved the guilt of accused Noor Mohammad for the offences punishable u/s 302 read with Section 34, I.P.C., 324/34 and 323/34, I.P.C. of accused Mohammad Masi for the offences punishable under Sections 302/34, 324 and 323/34 and accused Bashir for the offences punishable under Sections 302/34, 324/34 and 323, I.P.C. Accordingly, he convicted Noor Mohammad under Sections 302 read with Section 34, I.P.C. 324/34, I.P.C. and 323 read with Section 34, I.P.C., accused Masi u/s 302 read with Sections 34, 324 and 323 read with 34, I.P.C. and Bashir u/s 302 read with Sections 34, 323, I.P.C. and 324 read with 34, I.P.C. But sentenced above accused Noor Mohammad, Mohammad Masi and Bashir to undergo imprisonment for life u/s 302 read with Section 34, I.P.C. only holding that they need not be sentenced for other offences separately.

12. Aggrieved with their above convictions and sentence Appellants Noor Mohammad, Mohammad Masi and Bashir filed Criminal Appeal No. 1436 of 1980. The State of U.P. filed Government. Appeal No. 2406 of 1980 against the acquittal of Mohammad Sami and Ayub for all offences and acquittal of Noor Mohd., Mohammad Masi and Bashir under Sections 148 and 147, I.P.C. and not sentencing Noor Mohammad u/s 323 read with Sections 34, 324 read with Section 34, I.P.C., Bashir under Sections 323 and 324 read with Section 34, I.P.C. and Mohammad Masi under Sections 324 and 323 read with Section 34, I.P.C.

13. Both the appeals were preferred against the same judgment and order and, therefore, were taken up together for decision with the consent of parties" learned Counsel.

14. We have heard Sri G. S. Hajela learned Counsel for the accused persons and the learned A.G.A. for the State of U.P. and have perused entire evidence on record.

15. The accused persons have not disputed injuries on the person of Munna deceased, Rais Bux (P.W. 1) and Liyakat Hussain (P.W. 3). However, their contention was that Rais Bux (P.W. 1) obtained forged injury report. Dr. Suresh Chandra, (P.W. 5) who conducted autopsy on the dead body of Munna deceased stated that he found following ante-mortem injuries on the person of the deceased:

(1) Contusion 1-1/2" x 3/4" on the top of left shoulder.

(2) Incised wound 1-1/2" x 1/2" x skin deep on front of right elbow direction transversely.

(3) Contusion 1-1/2" x 1/2" on left scapula upper part.

(4) Stab incised wound 1-1/2" x 3/4" x cavity deep on left side back middle part close to mid line, transversely placed. Direction posterior to anterior.

(5) Stab incised wound 1-1/2" x 1/2" x muscle deep on left scapula upper part vertically placed.

(6) Incised wound 3/4" x 1/4" x skin deep on left side of middle part of head 7 cm. above left ear oblique in direction.

16. He further stated that internal examination showed that posterior wall of peritoneum was cut and peritoneum cavity contained about 3 pounds blood and left kidney was cut transversely at places at hilar region along with renal vessels. Stomach contained semidigested pasty material about 4 ounce. Small intestine was half full. Large intestine contained gasses and faecal matters. The cause of death was due to ante-mortem injuries as a result of syncope, shock and haemorrhage.

17. The accused persons have not challenged above medical evidence and according to their suggestion, knife injury was caused on him by Liyakat Hussain

(P.W. 3) due to which he died. As such the prosecution has established death and cause of death of Munna deceased.

18. Dr. Arun Kumar, (P.W. 4) stated that on 1.12.1979 he examined Rais Bux (P.W. 1) at 3.45 p.m. and found following injury on his person:

(1) Contusion at back of right elbow size 5 cm. x 4 cm. reddish in colour suspect of fracture of under lying bone. Advised X-ray of right elbow. Injury was kept under observations regarding nature and caused by blunt object. Surface abraded. Blood oozing. Duration was fresh.

19. He further stated that on the same day he examined Liyakat Hussain (P.W. 3) at 3.20 p.m. and found following injury on his person:

(1) Incised wound over medial aspect of right forearm 7 cm. below tip of right elbow, size 4.5 cm. x 1 cm. x muscle deep. Edges clean cut. Wound was bleeding wound was gapping, direction side to side, simple in nature caused by sharp edged object and duration was fresh.

20. Though, it was suggested to Rais Bux (P.W. 1) that he obtained forged injury report but the evidence of Dr. Arjun Kumar (P.W. 4) was not challenged. Duration of injuries of above two injured given by the doctor indicated that the above injured persons sustained injury in same transaction in which Munna deceased sustained injury.

21. Date, time and place of occurrence is also not disputed. According to prosecution occurrence took place on 1.12.1979 at about 1.00 p.m. on the rasta towards west of the house of Munna deceased. The ocular witnesses Rais Bux (P.W. 1), Liyakat Hussain (P.W. 3) and Farid (P.W. 6) have stated that the occurrence took place on 1.12.1979 at about 1.00 p.m. on the rasta towards west of the house of Munna deceased. Rais Bux (P.W. 1) and Liyakat Hussain (P.W. 3) sustained injuries in the same transaction. They were examined by Dr. Arjun Kumar (P.W. 4) at 3.45 p.m. and 3.20 p.m. respectively and the doctor found duration of their injury as fresh, i.e., within six hours. The report of the occurrence was lodged at 2.05 p.m. and the distance of police station was 1 km. The Investigating Officer inspected the spot on the next day and found blood on the spot. The Appellants have not challenged above evidence. They have also not suggested any counter date, time and place of occurrence. As such the prosecution has also established the date, time and place of occurrence.

22. The learned Counsel for the accused person contended that lodging of report by Liyakat Hussain (P.W. 3) is doubtful and informant Liyakat Hussain (P.W. 3) had himself assaulted the deceased and concocted a false case against the accused person. That the dying declaration recorded by the Investigating Officer is doubtful and there were also interpolation in F.I.R. and inquest report which show that implication of accused persons is false. On the other hand, the learned A.G.A. argued that the prosecution has established complicity of all the five accused and the learned Sessions Judge had wrongly given benefit of doubt to

accused Mohammad Shami and Ayub and that wrongly held that accused were not members of unlawful assembly. That though accused Noor Mohammad, Mohd. Masi and Bashir were convicted under Sections 324/34, I.P.C. 323 read with 34, I.P.C. and Sections 324 and 323/34, I.P.C. and under Sections 323 and 324 read with 34, I.P.C. respectively but no sentence was awarded to them under said section and no reason has been assigned for it.

23. Before advertng to the contentions raised by the learned Counsel for the parties, we would like to give the gist of testimony of the eye-witnesses.

24. Rais Bux (P.W. 1) stated that Munna deceased was his nephew. House of Munna deceased was adjacent to his house. His house and house of Munna deceased faced towards north, towards lane. There was a road north south, towards west of the house of Munna deceased. On the date of occurrence he was at his house. At about 1.00 p.m. Munna deceased came out of his house for taking bath at the well. Accused Noor Mohammad and his two sons Mohammad Masi and Mohammad Shami accused and his brother Ayub accused, all armed with knives and Bashir armed with lathi came from eastern side. They told of Munna deceased that he claimed himself more and they would eliminate him. Hearing it Munna ran towards west. After chasing about 10 paces the accused persons caught hold of Munna deceased on the road and started causing injuries with knives and lathi. He (Rais Bux), Liyakat Hussain (P.W. 3), Farid (P.W. 6), Suleman and Riyazuddin reached there and tried to save Munna, Bashir inflicted lathi blow on his hand and Mohammad Masi inflicted knife blow on Liyakat Hussain (P.W. 3). He and other witnesses tried to apprehend the accused persons but they ran away towards Devrajpur. He, Liyakat Hussain (P.W. 3) and Munna deceased sustained injuries. Munna deceased fell down. On the morning of the occurrence altercation had taken place between the ladies of the family of the parties. Munna deceased was not present at that time. Munna deceased came to his house at about 12 noon. There was long standing enmity between the accused persons and Munna deceased. Liyakat Hussain (P.W. 3) got prepared report from Iqrar Khan and taking Munna deceased he proceeded to police station. The witness also accompanied them. The witness (Rais Bux) also went to the police station. At the police station Liyakat Hussain (P.W. 3) lodged report. The Investigating Officer interrogated them and thereafter sent them to Kamalganj for medical examination. Munna deceased died in the hospital at Kamalganj.

25. Liyakat Hussain (P.W. 3) stated that on the date of occurrence it was Moharram. At about 1.00 p.m. he was going to Shekhpur to see Tazia fair. House of Munna deceased was lying in the way of Shekhpur. He came to the house of Munna deceased and asked him to go to Shekhpur for seeing Tazia fair. He told that the would take bath and thereafter, would proceed with him. Munna deceased then came out of his house for taking bath. Accused Noor Mohammad, Mohd. Masi, Ayub, Shami having knives and Bashir having lathi chased Munna deceased, saying that he should be finished. Munna ran towards west. The above

accused caught hold of Munna deceased on the road and inflicted knife and lathi blows on him. Munna deceased sustained lathi and knife injuries. He and Rais Bux (P.W. 1) rushed to save Munna deceased. Accused Mohammad Masi inflicted one knife blow on him and accused Bashir inflicted lathi blow on Rais Bux (P.W. 1). He and Rais Bux (P.W. 1) sustained injuries. On his alarm Farid (P.W. 6), Riyazuddin and Suleman came to the spot. They challenged the accused persons and then they ran away towards Devrajpur. He got prepared report of the occurrence from Iqrar Khan and taking Munna deceased and other injured came to police station and lodged the report. At the police station the Investigating Officer interrogated Munna deceased and thereafter, sent him and other injured to hospital. At the hospital he and Rais Bux (P.W. 1) were medically examined. Munna deceased died within two minutes of reaching of the hospital and he could not be medically examined. There was long standing enmity between Munna deceased and the accused persons.

26. Farid, (P.W. 6) stated that on the date of occurrence at about 1.00 p.m., he was at his house. He heard cries from the road and reached on the road. He saw that Rais Bux (P.W. 1), Liyakat Hussain (P.W. 3), Suleman and Riyazuddin were present there. Accused Ayub, Mohammad Shami, Mohammad Masi, Noor Mohammad and Bashir were beating Munna deceased. Bashir was having lathi and others were having knives. All the five accused persons caused injuries on Munna deceased with lathi and knife. Liyakat Hussain (P.W. 3) and Rais Bux (P.W. 1) rushed to save Munna deceased. Mohammad Masi inflicted knife blow on Liyakat Hussain (P.W. 3) and Bashir inflicted lathi blow on Rais Bux (P.W. 1). Liyakat Hussain (P.W. 3) and Rais Bux (P.W. 1) sustained injuries. When other witnesses challenged the accused person they ran away towards Devrajpur. Munna deceased sustaining injury fell down on the spot. He and Yunus brought charpai and took Munna to the police station. Liyakat and Rais also went with him.

27. The motive alleged by the prosecution was that long standing enmity was existing between the parties and both the parties were also challaned u/s 107/117, Cr. P.C. It is also in the evidence of Rais Bux (P.W. 1) that quarrel often took place between the parties and on the morning of the occurrence again quarrel had taken place between ladies of the family of the parties. Father of Munna deceased had died and , therefore, there was every possibility that accused persons were fed up with Munna deceased and they had motive to eliminate him.

28. The contention of the learned Counsel for the accused was that lodging of the report by Liyakat Hussain (P.W. 3) was doubtful as there were interpolations in the report. The learned Counsel for the accused person pointed out that Liyakat Hussain (P.W. 3), the alleged informant admitted in his cross-examination that he lodged report after death of Munna and report was prepared on his dictation as well as on dictation of Munna. That report was written by pencil. But the original report (Ext. Ka-4) shows that it was written by pen and, therefore, original report

(Ext. Ka-4) was not authored by Liyakat Hussain (P.W. 3). Rais Bux (P.W. 1) who was also present on the spot had sustained injuries in the same transaction and was also present at the time of preparation of report has stated that report was got prepared by Liyakat Hussain (P.W. 3). No doubt the scribe of the report was not examined. But presence of Liyakat Hussain (P.W. 3) on the spot is not disputed. He has also sustained injuries in the same transaction which further strengthens his presence on the spot. The witness clarified in his cross-examination that he wrongly stated that report was lodged after death of Munna deceased and in fact, report was lodged prior to death of Munna deceased.

29. Head Constable Babu Lal (P.W. 2) stated that report was lodged at 14.05 hours and it was signed by Liyakat Hussain. He further stated that information regarding death of Munna deceased was received subsequently after registration of case under Sections 147, 148, 323, 324 and 307, I.P.C. and his above evidence was not challenged. The case was altered u/s 302, I.P.C. after death of Munna as per G.D. report (Ext. Ka-3), which shows that it was written at 3.40 p.m. The evidence of Dr. Arjun Kumar, (P.W. 4) shows that he had noted on the report of Police Station, Kamalganj at 2.55 that Munna deceased S/o. Ajmat was unconscious and was not in a position to give dying declaration (vide Ext. Ka-7). He further stated that Munna deceased died on the same day at 3.00 p.m. and he sent a memo to this effect to S.O. Police Station, Kamalganj at 3.30 p.m. His evidence further shows that injured Liyakat Hussain (P.W. 3) and Rais Bux (P.W. 1) were examined at 3.20 and 3.45 p.m. respectively. Those injured persons were brought to hospital by Constable Shanti Swaroop (P.W. 8). Chitthi Majroobi of above injured persons were also sent to the hospital on which there is endorsement that it was a police case. All these documents and evidence of Dr. Arjun Kumar (P.W. 4) established that F.I.R. was lodged prior to death of Munna deceased.

30. It is true that Liyakat Hussain (P.W. 3) informant stated at one place in his evidence that report was written by pencil. Written report (Ext. Ka-4) was shown to him and seeing it he stated that he cannot say whether it was written by pencil or by ink as he was illiterate. This shows that the witness was not knowing the difference between pencil and ink. Moreover, chik F.I.R. (Ext. Ka-1) was prepared at the police station by pencil. The possibility that the witness gave above statement under some confusion, cannot be easily ruled out and it does not affect his statement that he was author of the report.

31. Liyakat Hussain (P.W. 3) further said that report was partly dictated by him and partly by Munna deceased. This statement of the witness is nothing but an exaggeration and a confused one.

32. It was further contended that the scribe of the report was not examined by the prosecution and he was the best witness to depose as who dictated report to him. Iqrar Khan who was scribe of the report was not an eye-witness. He had not seen the incident and was not known who were present or who were the assailants. He only scribed what was told to him by informant Liyakat Hussain

(P.W. 3). Iqar not being an eye-witness to the incident, there was no necessity to examine him as he could have shown no light. He could not have stated whether the accused were present or not. Therefore, no prejudice has been caused to the accused persons by non-examining the scribe. Vide Anil Kumar Vs. State of U.P.,

33. From the above discussion and observations we find that lodging of report by Liyakat Hussain (P.W. 3) was not doubtful.

34. The occurrence had taken place at about 1.00 p.m. and report of the occurrence was lodged at 2.05 p.m. and, therefore, it cannot be said that there was any delay in lodging the report.

35. Learned Counsel for the accused persons further argued that alleged dying declaration of Munna deceased recorded by the Investigating Officer is doubtful as Munna deceased was unconscious when he was brought to police station and was not in a position to give such statement as stated by the Investigating Officer. Sri Arvind Misra (P.W. 7). The trial court has not discussed or relied on the above oral dying declaration of the deceased recorded by the Investigating Officer. We have seen the dying declaration recorded and proved by the Investigating Officer which is Ext. Ka-9. It is a detailed statement and considering the nature of injuries sustained by Munna deceased and the fact that he died within an hour after lodging of the report, he could not be in a position to give such detailed statement and, therefore, no reliance can be placed on the above dying declaration.

36. The prosecution had relied on eye-witness account of three witnesses, we have to consider whether those witnesses were present on the spot and are reliable.

37. Rais Bux (P.W. 1) is the uncle of the deceased. His house is situated adjacent towards east of the house of the deceased. The house of deceased as well as of Rais Bux (P.W. 1) faced towards north. The witness claimed that at the time of the occurrence he was present at his house. Therefore, the witness was in a position to see the incident from beginning to end. The witness has further stated that when the accused persons chased Munna deceased saying that they would eliminate him, he also rushed to save the deceased and in his above attempt Bashir accused inflicted lathi blow on him. As mentioned above it is established that the witness sustained injury in the same transaction. The presence of injury on the person of the witness confirmed his presence on the spot. No doubt the witness is uncle of the deceased, but on this ground his evidence cannot be discarded. It is also true that the witness has admitted that he had also enmity with the accused persons as he belonged to the Khandan of Munna deceased, but on this ground his testimony cannot be discarded. The witness has faced searching cross-examination and his statement is consistent. Therefore, there is no ground to disbelieve evidence of Rais Bux (P.W. 1).

38. Liyakat Hussain (P.W. 3) stated that on the date of occurrence he was going

to Sekhpur to see Tazia fair. Undisputedly occurrence took place on 10th day of Moharram on which date Tazia is buried and fairs are organized at different places. The witness came to the house of deceased and asked him to accompany him to see the fair. The deceased asked him to wait till he took bath and while he was going to take bath the occurrence took place. The witness, thus was present at the house of deceased when the deceased came out of his house and was chased by the accused persons. The witness has also tried to save the deceased and in his above attempt he sustained knife injury caused by the accused Mohammad Masi. As mentioned above his above injury was sustained in the same transaction. The injury on the person of the deceased again confirmed his presence on the spot.

39. It was suggested by the accused to this witness that he had illicit connection with Fatera, the unmarried sister of the deceased and in this connection had come to the house of the deceased. That Munna deceased saw him with his sister Fatera and inflicted knife blow on him. That he snatched knife from Munna deceased and inflicted the same on him. The witness had denied the above suggestion and there is nothing on the record to establish it. It is true that Fatera was unmarried, but this alone does not show that she had any illicit connection with the witness. Moreover, besides knife injuries Munna deceased had also sustained two contusions, which according to Dr. Arjun Kumar (P.W. 4) were caused by blunt object. The above contusions were on tip of left shoulder and on left scapula. These injuries could not be caused by fall. This shows that injuries on the deceased were caused by two sorts of weapons and it was not possible for Liyakat Hussain (P.W. 3), to cause such type of injuries to the deceased. Furthermore Liyakat Hussain (P.W. 3) would have not chosen to come to the house of deceased for the purpose suggested by the accused at 1.00 p.m. when there was every possibility of the presence of other family member. Therefore, above suggestion of the accused persons has no leg to stand.

40. The learned Counsel for the accused persons pointed out certain contradictions in the evidence of Liyakat Hussain (P.W. 3) that according to evidence of Liyakat Hussain (P.W. 3) Munna deceased was taken to police station from the place where he had fallen after sustaining injuries, but Rais Bux (P.W. 1) stated that after the occurrence Munna deceased was brought to his house and from there was taken to the police station. That according to evidence of Liyakat Hussain (P.W. 3) mother of Munna deceased was not present at the house while according to the Rais Bux (P.W. 1) she was present. These discrepancies are not material and do not affect the testimony of the witness.

41. Farid (P.W. 6) was also present at his house at the time of occurrence and hearing shrieks of the deceased he reached on the road and saw the incident. His house was situate at a distance of 45 paces towards south of the house of the deceased and he would have easily reached on the spot on hearing shrieks of the deceased. No doubt in his cross-examination the witness admitted that accused Noor Mohammad had lodged report of marpeet against him and his brother. But

on account of it his testimony cannot be discarded as the witness had accompanied to the deceased up to the police station and his presence is noted in the G.D. report (Ext. Ka-2). No doubt the witness stated in his cross-examination that one knife blow and one lathi blow was inflicted on the deceased in his presence. But he also stated that when he was at a distance of 10 paces from the place of incident he saw that accused having knives were inflicting knife blows and accused having lathi was inflicting lathi blow on the deceased. Therefore, it cannot be said that the witness has not seen the occurrence. The above evidence of the ocular witnesses is fully corroborated by medical evidence, F.I.R. and other circumstances of the case and therefore, their evidence is worthy of credence.

42. In view of above evidence on record the prosecution has successfully proved the guilt of the accused-Appellants Noor Mohammad, Mohammad Masi and Bashir for the murder of the deceased, for causing hurt by knife on Liyakat Hussain (P.W. 3) and hurt on Rais Bux (P.W. 1).

43. Coming to the Government Appeal against acquittal of accused Mohammad Shami and Ayub, we find that the learned Sessions Judge had given them benefit of doubt simply on the ground that prosecution witnesses have stated that each of the accused inflicted only one injury on the deceased which could not be taken as correct and it appears to have been stated to exaggerate the number of assailants and, therefore, participation of accused Mohammad Shami and Ayub was doubtful. Having gone through the evidence on record, we find that the learned Sessions Judge had given benefit of doubt to above accused on wrong assumption and misinterpretation of the evidence of the prosecution witnesses. We are aware of the fact that we are dealing with the appeal against acquittal against the above two accused. There can be no dispute with the proposition that in dealing with appeal against acquittal when two views are possible, the view in favour of accused has to be preferred, but where the relevant materials are not considered to arrive at a view by the trial court, the High Court has a duty to arrive at a correct conclusion taking a view different from the one adopted by the trial court. See *Bodhraj v. State of Jammu and Kashmir* 2002 AIR SCW 3655.

44. The criminal jurisprudence, no doubt, requires a high standard of proof for imposing punishment on an accused, but it is equally important that on hypothetical grounds and surmises, prosecution evidence of a sterling character should not be brushed and disbelieved to give undue benefit of doubt to the accused. Benefit of doubt is a rule of prudence and not a rule of law. It may be accorded only when participation of a particular accused has not been established. As held by Apex Court in *Krishnan and Another Vs. State Rep. by Inspector of Police*, , doubts would be called reasonable if they are free from test for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere

vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

45. In the instant case, two injured witnesses and one other ocular witness have categorically stated that all the accused participated in inflicting injuries on the deceased. The nature and number of injuries sustained by the deceased corroborated their above version. The participation of two accused cannot be doubted simply because at one place, Farid, (P.W. 6) stated that each accused caused one injury to the deceased with their respective weapon while there is consistent evidence of all the ocular witnesses that all the five accused came to the door of the deceased, simultaneously and four of them were having knives and one was having lathi. All the five accused simultaneously chased the deceased towards west. All the five accused surrounded him and inflicted injuries on the deceased. Assuming for the sake of argument that any of the accused had not actually caused injuries on the deceased, the liability of all the accused cannot be doubted as in view of the evidence on record, all the accused were members of an unlawful assembly and their common object was to eliminate Munna deceased. Therefore, the learned Sessions Judge had doubted the liability of accused Mohammad Shami and Ayub on hypothetical grounds and surmises. The learned Sessions Judge has also not given any cogent reason as to why the evidence of ocular witnesses against the above two accused was unreliable. While assessing evidence of prosecution witnesses, the Court has to see entire testimony of witness and it is not proper to draw an inference by picking out a solitary sentence from his evidence. Their evidence should be read and assessed as a whole and if we considered the evidence of ocular witnesses as a whole we find that all the five accused had participated in the murder of the deceased, they were members of unlawful assembly and had shared common object of the said unlawful assembly. Therefore, the prosecution had also established the guilt of accused Mohammad Shami and Ayub and it had also established that accused Noor Mohammad, Mohd. Masi and Bashir were members of unlawful assembly and each of them shared common object of such unlawful assembly in committing the murder of Munna deceased and causing hurt to Liyakat Hussain (P.W. 3) by dangerous weapon, i.e., knife and hurt to Rais Bux (P.W. 1). In this regard, no other view is possible and the view taken by the learned Sessions Judge suffers from perversity and is against the evidence on record. It is also apparent from the judgment of trial court that accused Noor Mohammad, Mohd. Masi and Bashir were convicted under Sections 324, 323 read with Section 34, I.P.C. but were not sentenced under those sections separately without assigning any reason.

46. In view of our above discussions and observations, we find that the appeal preferred by accused Noor Mohd., Mohammad Masi and Bashir has no force and is liable to be dismissed and the appeal preferred by the State of U.P. has force and is liable to be allowed.

47. Accordingly, the Criminal Appeal No. 1436 of 1980 preferred by Appellants Noor Mohd., Masi and Bashir is dismissed. The Government Appeal No. 2406 of 1980 preferred by State of U.P. is allowed. Accordingly, accused Noor Mohd., Mohd Shami and Ayub are convicted under Sections 148, 302 read with Section 149, I.P.C., 324 read with Section 149, I.P.C. and 323 read with 149, I.P.C. Accused Masi is convicted under Sections 148, 302/149, I.P.C., 323/149, I.P.C. and 324, I.P.C. and accused Bashir is convicted under Sections 147, 302 read with Section 149, I.P.C., 324 read with Section 149, I.P.C. and Section 323, I.P.C. Accordingly, accused Noor Mohd., Mohammad Shami and Ayub are sentenced to undergo R.I. for a period of two years u/s 148, I.P.C., imprisonment for life u/s 302 read with Section 149, I.P.C., R.I. for a period of one year u/s 324 read with Section 149, I.P.C. and R.I. for a period of six months u/s 323 read with Section 149, I.P.C. Accused Mohammad Masi is sentenced to undergo R.I. for a period of two years u/s 148, I.P.C., imprisonment for life u/s 302 read with Section 149, I.P.C., R.I. for a period of one year u/s 324, I.P.C. and R.I. for a period of 6 months u/s 323 read with Section 149, I.P.C. Accused Bashir is sentenced to undergo R.I. for a period of one year u/s 147, I.P.C., imprisonment for life u/s 302 read with Section 149, I.P.C., R.I. for a period of one year u/s 324 read with Section 149, I.P.C. and R.I. for a period of 6 months u/s 323, I.P.C. All the sentences shall run concurrently.

48. The above accused are on bail. They shall surrender before the C.J.M. concerned to serve out the sentence awarded by this Court. The C.J.M., Farrukhabad is directed to issue non-bailable warrants against the above accused to procure their arrest and send them to jail to serve out the sentence. The C.J.M. shall submit compliance report within one month.

49. The office is directed to send a copy of this judgment to the C.J.M., Farrukhabad within one week.