

(1976) 02 RAJ CK 0014

In the Rajasthan High Court

Case No : Criminal Appeal No's. 668 and 749 of 1975

Poosa Ram and Others

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 17-02-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Penal Code, 1860 (IPC) — Section 307, 326, 34, 352
Probation of Offenders Act, 1958 — Section 3

Citation : (1976) RLW 129 : (1976) WLN 135

Hon'ble Judges : Kalyan Dutta Sharma, J

Bench : Single Bench

Judgement

Kalyan Dutta Sharma, J.—Criminal Appeal No. 698 of 1975 filed by Poosa Ram and S.B. Criminal Appeal No. 749 of 1975, filed by Amia alias Amrit Lal arise out of on and the same judgment of the Additional Sessions judge, Jodhpur, dated 25th October, 1975, by which Poosa Ram was convicted u/s 307, I.P.C. and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 1000/-, in default of payment of fine to further suffer eight months rigorous imprisonment and Amia appellant was convicted u/s 326/34, I.P.C. and awarded sentence of two years" rigorous imprisonment and a fine of Rs. 400/-, and in default of payment of fine rigorous imprisonment for four months By his very judgment another co-accused Ghanshyam was convicted u/s 352/34, I.P.C. and was released after admonition u/s 3 of the Probation of Offenders Act, Ghanshyam, however, did not file an-appeal against his conviction and sentence.

2. The prosecution cases against both the appellants may be stated, In brief, as follows. On the intervening night of 11th and 12th June, 1973, Laxmi Narayan son of Motilal Ghanchi was sleeping inside his house at about 11.30 pm. His brother Madan Lal also was sleeping in the house. At that time somebody called for Madan Lal from outside. On hearing the call Laxmi Narayan got up from his bed and saw one tempo rickshaw standing outside cut side his house. He saw one Ghanshyam Ghanchi standing by the side of the rickshaw calling his brother

Madan Lal Madan Lal did not come out of the house. Thereupon Ghanshyana went away in the rickshaw. After about half an hour Laxmi Narayan heard another call from outside. He got up and saw two tempo rickshaws standing outside his house. He further saw that Poosa Ram, Amia and Ghanshyana were standing near the rickshaws. This time also Madan Lal did not respond to their call. The aforesaid persons thereupon, went away towards Siwanchi Gate. Thereafter at about 1 am. there was another call for Madan Lal, Laxmi Narayan again got up and saw Ghanshyana standing by the side of a tempo-rickshaw and calling for his brother Madan Lal. This time Madan Lal responded to the call and came out of the house. As soon as he came out, Ghanshyam asked Madan Lal to accompany him to the shop of a betel vendor for the purpose of eating betels. Madan Lal refused to go with him. Thereupon, Ghanshyam assured him that he would not deceive him. Madan Lal acted upon his assurance and went away with him towards Siwanchi Gate. After some time when Madan Lal did not come back, Laxmi Narayan suspected some foul play and started from his house to go towards Siwanchi Gate. As soon as he reached the police outpost, he heard loud cries, i.e. being beaten, being beaten. On hearing the cries, Laxmi Narayan rushed towards "Balaji"s-temple" & saw Poosa Ram, Amia and Ghanshyam beating his brother Madan Lal, who was raising an outcry that he had been hit with a knife Laxmi Narayan saw that blood and intestines had come out of the stomach of his brother. Bajai Singh, Ladu Ram, Chanwar Lal and Munna Lal were present at the place of occurrence. Some other persons including police-men also reached the spot, Ghanshyam ran away from there while Poosa Ram and Amia appellants were apprehended by the police men, As Madan Lal was seriously injured, one of the police-man accompanied by Ladu Ram removed the injured to Mahatma Gandhi Hospital, Jodhpur, in a tempo rickshaw, Shortly afterwards, the police-van also reached there and took away Poosa Ram and Amia appellants. Lami Narayan rushed to the police station, Khanda Phalsa, to make a report of the incident. At 1.30 am Laxmi Narayan lodged a verbal report Ex. P.1 with the police on the basis of which the Station House Officer, Khanda Phalsa, registered a case u/s 307/34, I.P.C. against the two appellants and Ghanshyam co-accused. The Station House Officer made the usual investigation into case. He reached the place of occurrence and inspected the site in the prepared site-inspection memo Ex. P2 and site plan Ex. P9. He seized both these articles vide memo of seizure Ex. P3 and sealed them in the presence of Motbirs Stains of blood were lying on the ground. He took blood-stained earth vide memo of recovery Ex. 4 and sealed it also in a tin. Then he arrested the three miscreants. After his arrest Poosa Ram appellant gave the Station House Officer an information on 19th June, 1973, that he had thrown one knife over the shop of a vegetable-seller and that he was prepared to get it recovered. The above information was recorded by the Station House Officer in a memo Ex. P.12 Later on, the Station House Officer recovered the knife from the place mentioned in the memo of information in the presence of Mohammed Khan and Nisar Khan Motbirs, vide memo of recovery Ex. P13. The knife had no stains of blood on it. It was, however, sealed there and then. The knife was later on sent along with other articles to the Chemical Examiner, Jaipur

for analysis. The report of the Forensic Science Laboratory, Jaipur, and that of the Serologist (Exs. P14 and P15 respectively) were received. After collecting necessary evidence, the Station House Officer submitted a charge-sheet against the two appellants and Ghanshyam co-accused in the court of the Additional Munsiff Judicial Magistrate First Class No. 1, Jodhpur, under Sections 307 read with 34, I.P.C. The learned Magistrate perused all the documents furnished by the investigating agency u/s 173 Cr.P.C. and committed the three accused to the court of the Sessions Judge, Jodhpur, for trial u/s 307/34, I.P.C. The Sessions Judge transferred this case to the court of the Additional Sessions Judge No. 2, Jodhpur, for trial according to law. The learned Additional Sessions Judge proceeded to try the case and framed a charge u/s 307, I.P.C. simpliciter against Poosa Ram. The other two accused namely, Amia and Ghanshyam were charge sheeted by him u/s 307/34, I.P.C. The accused pleaded not guilty to the charge and claimed to be tried. As many as 12 witnesses were produced from the side of the prosecution to prove guilt of the accused persons. After the prosecution evidence was over, the statements of the accused were recorded u/s 313, Cr.P.C. by the Additional Sessions Judge, Amrit Lal appellant pleaded that the incident did not take place in the manner stated by the prosecution. He gave a parallel story by stating that he and Poosa Ram were getting their engine repaired by Sohan mechanic on 12th Road, Sardarpura. At about 12 or 1 am. the work was over. Then they hired a rickshaw of Ramjhan for going to their house. While they were passing to that rickshaw near the shop of Adamal at Siwanchi-Gate, given persons namely, Ladu Ram, Chanwar Lal, Madan Lal Laxmi Narayan, Munni Lal, Chimiya and Ganga Ram surrounded their rickshaw and caused it to be stopped. Madan Lal gave two or three lathi thrusts to Ramjhan driver of the rickshaw and then hit him twice or thrice with a short-stick on his neck, after pulling him out of the rickshaw. Then Ladu Ram and Madan Lal caught hold of the clothes of Poosa Ram and began to pull him also out of the rickshaw. Poosa Ram resisted to vain. In the course of pulling him out, his clothes were torn Amia also was pulled out by Laxmi Narayan and Munilal and was given a lathi blow. As a result of the blow, Amia fell down. Then Munilal gave him a kick with his shoe near his right eye Madan Lal while beating Poosa Ram caught hold of his hair and made him sit down, while saying that he would kill the latter. Then Amia rushed to the (sic) of Poosa Ram and aimed a blow on the hand of Madan Lal with a knife. The blow accidentally missed the target and hit Madan Lal in his stomach. The police man came there and took away Amia to hospital wherein he was admitted as an indoor patient. He regained his consciousness in the hospital on the third day Amia further pleaded that Madan Lal had beaten him twice prior to this occurrence and had broken his ribs. According to him, Poosa Ram was his partner. So Madan Lal and his companions wanted to do away with Poosa Ram.

3. Similar was the statement of Poosa Ram before the learned Additional Sessions Judge, Ghanshyam set up a plea of alibi and denied to have committed the offence, with which he was charged. The appellants adduced evidence in their defence. They examined Ramzan. DW. 1, Daulal DW. 2 and Dr. P. Dayal,

DW. 3 in support of their case. The Additional Sessions Judge after careful scrutiny of the entire evidence came to a finding that the prosecution has succeeded to proving the guilt of the two appellants beyond reasonable shadow of doubt and there was no occasion for the exercise of the right of private defence of person by the appellants. Consequently, he convicted and sentenced both the appellants in the manner state above Aggrieved by their convictions and sentences the two appellants have filed separate appeals.

4. As regards Ghanshyam, the finding of the trial Judge was that he bad no common intention with the appellants to kill Madan Lal of to cause any grievous hurt to him with a sharp-edged weapon like knife but had a common intention to makes an assault upon him only. Hence Ghanshyam was convicted u/s 352/34, I.P.C. As Ghanshyam has not preferred any appeal it is not necessary for me to consider his case.

5. I have carefully gone through the entire evidence on the record and heard the arguments at length. As common questions of law and facts arise for determination in both these appeals, the, disposed of together by one single judgment.

6. Firstly, it has been strenuously contended before me on behalf of Poosa Ram that the prosecution has utterly failed to bring guilt home to the appellants beyond reasonable doubt. It was further argued that unless the appellants are proved guilty of the offence of attempt to murder, they are presumed to be innocent & the responsibility to prove their guilt lies squarely on the shoulders of the prosecution, because the general burden is never shifted & it never rests on the accused to establish his innocence. In support of his above contention, Mr. Than Chand Mehta, learned Counsel for Poosa Ram appellant invited my attention to certain circumstances which according to him are so probable that a man of ordinary prudence would certainly act upon the supposition that they did exist. The first circumstance that was brought to the notice is that the evidence of the prosecution relating to the pretext on which Madanlal injured was brought to place of occurrence from his house by Ghanshyam was conflicting According to the learned Counsel appearing on behalf of Poosa Ram, Laxmi Narayan, PW. 3 who lodged the first information report report with the police soon after the occurrence, stated in his deposition that Ghanshyam called out Madan Lal injured from the latter's house & asked the latter to accompany him to the market for rating betel leaves. Madan Lal was reluctant to go with Ghanshyam. Thereupon Ghanahyam accused him that he would not deceive the latter Madanlal acted upon his assurance & went away from his house. Laxmi Narayan stated this fact in his first information report also, but Madan Lal injured did not corroborate his brother on this point Madan Lal's version in the trial court was that he came out of his house in the mid night at the call of Ghanshyam and was informed by the latter that his brother Bhanwar Lal had met an accident near the temple of Balaji. On hearing the news of accident of his brother Bhanwar Lal, Madan Lal readily accompanied Ghanshyam to the temple of Balaji without wearing shoes

and other clothes on his body. The argument of Mr. Than Chand Mehta learned Counsel for Poosa Ram on the basis of this conflicting evidence, is that the story invented by the prosecution that Madan Lal was brought by Ghanshyam from his house to place of occurrence on one pretext or another is false and that the version given out by the defence that Madan Lal and his companions were already present on the place of the incident at the time when the appellants reached there in a tempo rickshaw was true and probable. According to the learned Counsel it looks like an attempt to conceal the real fact that Madan Lal & his associates namely, Laduram Chanwarmal, Laxmi Narayan, Munnilal, China and Ganga Ram were the aggressors, who encircled the tempo-rickshaw in which Poosa Ram and Amiya appellants were sitting and thereafter pulled out the appellants from inside it for the purpose of giving them a beating.

7. I have critically examined the evidence on the point and have come to the conclusion that the above contention is devoid of force. It is no doubt true that there is variance between the evidence of Laxmi Narayan and Madan Lal injured with regard to the pretext on which Madan Lal injured was taken out of his house by Ghanshyam to the place of occurrence but the other evidence led by the prosecution clearly goes to prove that Madan Lal himself did not reach the place where he was assaulted and that the appellants were seen moving in tempo rickshaws near about the scene of occurrence prior to the actual assault made upon Madan Lal, Banshi Lal PW. 8 clearly stated in his deposition that in the night between 11th and 12th June 1973, he was deputed at the police outpost Siwanchi Gate for patrolling the area. At about 12.30 a.m. he saw two three-three tempo-rickshaw moving on the road near grain market, Jodhpur. The three wheeler tempos were going towards the house of Madan Lal. After about ten or fifteen minutes he came to the crossing of grain market after patrolling the area of Sindhiyon ka Bas. At that time he saw one of the tempo-rickshaws standing near the temple. He saw the other rickshaws moving to and from He asked Poosa Ram and Amiya appellants why they were moving to and from the tempo rickshaws. There upon both the appellants disclosed to Banshi Lal that their relative had died and that they had come to call for their other relatives. Banshi Lal has been cross-examined at length by the learned Counsel for the appellants. He was confronted with and contradicted by his previous statement which he gave before the Investigating Officer during the course of investigation, but no such fact could be elicited from the cross-examination which may tend to destroy his credibility or to impeach his credit. It is no doubt true that in his statement before the police Banshi Lal did not say that the appellants told him that they had come to call for Madan Lal and that Ghanshyam had gone in another auto-rickshaw to the house of Madan Lal for bringing him but it is conclusively established by the evidence of Banshi Lal that the appellants were seen moving near about the place of occurrence shortly before the incident. The evidence of Banshi Lal negatives the defence version that as soon as Poosa Ram and Amrit Lal appellants came to the spot in a tempo rickshaw near Balaji's temple they were surrounded and pulled out of the rickshaw and beaten by Madan Lal and his

associates.

8. Apart from the evidence of Bansi Lal, there is another circumstance which lends support to the testimony of Madanlal injured that he was brought from his house by Ghanshyam to the place of occurrence where Poosa Ram and Amiya appellants had met him in an aggressive mood. The circumstance is that according to the statement of Ramjan, DW. 1 the appellants boarded the tempo-rickshaw driven by Ramjan at 5th road Sardarpura for going to Kabutron ka Chowk. Ramjan, DW. 1 admitted in his cross examination that the usual way for going to Kabutron ka Chowk from 5th Road Sardarpura is through Mahatma Gandhi Hospital, near Jalori Gate and that he was taking Poosaram and appellants in his rickshaw through Siwanchi Gate of his own sweet will without being asked by them to go by that way. It is not understandable why the appellants had left the usual way & had been going to their house at Kabutron ka-Chowk through another way at odd hours in the night. Even assuming that, they were taken away by Ramjan of his own accord through Siwanchi Gate, there is no reasonable explanation why the appellants informed Banshilal PW. 3 that their relative had died and that they had come to call for other relatives. In these circumstances, I feel persuaded to hold that the version given out by Madanlal injured that he was called from his house by Ghanshyam and taken to Balaji's temple on the pretext that his brother Bhanwarlal had met an accident appears to be true and reliable. Madanlal had accompanied Ghanshyam to the place of occurrence without wearing shoes and other clothes on his body, because it was quite natural that on hearing about his brother Bhanwar Lal having met an accident, he would have started bare footed there and then along with Ghanshyam informant without wasting any time in putting on cloths and shoes. The evidence of Laxmi Narayan PW. 3 is not credible on this point, because the relations between Ghanshyam and Madanlal were not cordial and Madanlal would not have accompanied Ghanshyam at odd hours in the night to the shop of betel seller for the purpose of chewing betel leaves. From a careful review of the entire evidence of Laxmi Narayan, I am convinced that his statement is full of exaggerations and he has uttered lies without the least compunction.

9. In his examination in chief, Laxmi Narayan claimed to be an eye-witness to the actual assault made upon his brother by Poosaram with a knife but in his cross examination he reached near Balaji ka temple on hearing cries, he saw his brother Madanlal lying on the ground & the two appellants being carried away by the police. He was confronted with & contradicted by his first information report Ex. P1 & his subsequent statement before the police Ex. D3, wherein he did not state that he had seen Poosaram causing a blow to the person of his brother with a knife. When confronted with his previous report & his statement, he merely deposed that being in a perturbed and terrified state of mind he could not state before the Police that he had seen Poosa Ram giving a knife-blow to Madan Lal. Again he further stands discredited on a material point. In his deposition at the trial Laxmi Narayan stated that first Ghanshyam had come to his house to call for Madan and then after a gap of half an hour the two appellants visited his

house in a tempo rickshaw and Poosa Ram called Madan by his name and on hearing the call he (Laxmi Narayan) got up and looked at them from his balcony. Thereupon, both the appellants asked Laxmi Narayan where his brother Madan was Laxmi Narayan gave them a reply that Madanlal was lying asleep and then according to him the appellants knocked at the door of his he use and went away from there. Curiously enough, Laxmi Narayan omitted to state in his report or subsequent statement that Poosa Ram had called his brother and that some talks took place between him and the appellants about Madanlal. Laxmi Narayan's evidence, there-fore, does not inspire confidence. His version that Ghanshyam asked Madan Lal, when the latter came out of his house at the former's call, to accompany him to the market for chewing betel leaves appears to be wholly unreliable. The reason is that at first he claimed to have seen the two talking to each other outside his house, but in next breath he repudiated his above version & stated that when the talks were going on between Ghanshyam and Madanlal outside his house, he was lying throughout on his bed. No reliance can be placed on the testimony of such a witness who has no respect for truth. It was highly probable that Laxmi Narayan did not hear the talks, between his brother and Ghanshyam outside his house, because, if he had heard the talks, he would have asked his younger brother not to go to the market in the odd hours of night for the purpose of chewing betel leaves along with a person with whom their relations were strained. Consequently, I have no hesitation in believing the statement of Madanlal injured that he was called out and taken he Ghanshyam to the place of occurrence on the pretext that his brother Bhanwarlal had met an accident. The learned Counsel appearing for Poosaram vehemently contended before me that the earliest version given out by Laxmi Narayan in the first information report & in his subsequent statements relating to the pretext on which Madanlal was taken away by Ghanshyam from his house should be given due weight. According to him Madanlal was examined after 24 days by the police & had ample time to tell a different tale about the pretext on which he was taken by Ghanshyam to the place of occurrence. The learned Counsel argued that Madanlal did not adhere to the version given out by his brother Laxmi Narayan because he knew it well that no prudent man would believe that he had accompanied his enemy Ghanshyam to the market for chewing betel leaves at odd hours in the night without wearing shoes and full clothes on his person. The above contention has no force, because Madan Lal could not be examined by the police earlier than 6th July, 1973, as Madan Lal's physical condition was serious and he was not in a position to give out any statement before the police. There is no material on the record to suggest or show that he concocted a different story relating to the pretext on which he was taken away by Ghanshyam to the place of occurrence from his house merely because the version given out by his brother Madanlal on this point was unconvincing.

10. Another contention put forward by the learned Counsel for Poosa Ram appellant is that Madao Lal sustained one injury only on his body with a sharp-edged weapon although all the eye-witnesses to the occurrence stated in their

depositions at the trial that he was given fist blow and slaps by the two appellants. It was further argued that the evidence of the eye-witnesses was liable to be rejected on this score as it was in direct conflict with the testimony of the medical officer. The above contention also is devoid of force. It is no doubt true that Vijai Singh, PW. 1, Banshi Lal PW. 8 and Ram Singh PW. 10 stated in their depositions at the trial that they had seen both the appellants fighting with Madan Lal with fists and slaps but Madan Lal whose statement has been relied upon by the trial court definitely stated that he did not sustain any injury other than the stab wound on his person although the appellants were using their fists and slaps. The entire evidence of the eyewitnesses cannot be discarded merely on the ground that the Medical officer did not find any injury other than the stab wound on the body of Madan Lal at the time of medical examination. The possibility of slaps and fist blows having not fallen or left any external marks of injuries on the person of Madan Lal at the time of medical examination cannot be ruled out. Hence I do not feel persuaded to brush aside the evidence of the eye witnesses merely on this score.

11. That Poosa Ram accused was responsible for the knife injury on the person of Madan Lal admits of no doubt. In his statement at the trial, Madanlal has given a detailed version of the manner in which the occurrence took place. He stated that he was called out of his house by Ghanshyam and was taken to the place of occurrence on a false pretext that his brother Bhanwarlal had met an accident. As soon as he reached the place of occurrence, he was caught hold of and manhandled by Poosa Ram, Amiya and Ghanshyam. Thereafter Poosa Ram took out a knife from his pocket and hit him on the stomach. Upon receiving a knife-injury Madanlal cried aloud that Poosa Ram had stabbed him with a knife. As a result of the blow, the intestine came out of Madanlal's stomach and he fell down and then became unconscious. Banshilal PW. 8 corroborated the version of Madanlal injured by stating that the latter was crying that Poosa Ram had stabbed him with a knife. Banshi Lal was a police constable who was patrolling the area. On hearing the noise he had reached the place of occurrence and saw that intestine had come out of the wound received by Madanlal and that the wound was bleeding. He saw Poosa Ram and Amrit Lal standing there and using criminal force to Madanlal with their slaps and fists. According to him, Laxman, Ram Singh and others were intervening to save Madanlal. Similar is the statement of Ram Singh, Head Constable, PW. 2, who also heard Madanlal saying that he had been hurt with a knife by Poosa Ram. The prosecution examined Bijai Singh, Munni Lal and Laxmi Narayan also to corroborate the testimony of Madanlal injured, but their evidence has been discarded by the learned Additional Sessions Judge for reasons mentioned in his judgment, with which I fully agree. Although Bijaisingh, Munnilal and Laxmi Narayan claimed to have seen Poosa Ram causing a blow to the stomach of Madanlal but their evidence is full of contradictions and exaggerations on material points and it is highly risky to rely upon them. They had been subjected to a lengthy cross examination and were confronted with and contradicted by several portions of the previous statements

which they gave before the police during the course of investigation. They could not afford reasonable explanations for the inconsistencies appearing in their two statements. Consequently, I agree with the learned Addl. Sessions Judge that these persons were not actual eye-witnesses to assault by Poosaram upon the body of Madanlal with a knife. As for the evidence of Madanlal, Banshilal & Ramsingh, it may be said that it inspires confidence. The learned Counsel for the petitioner could not succeed in assailing the evidence of Madanlal injured on any reasonable ground. He however, challenged the evidence of Banshilal and Ram Singh on the ground that they falsely stated that they had seen Madanlal and the two appellants causing fist blows and slaps and grappling with each other and that their above version did not find support either from the statement of Madan Lal or from the medical evidence. According to him, Madanlal received a single knife-injury on his person. If he was beaten by fists and slaps, he would have received more injuries on his body. I have already dealt with and rejected the above contention of the learned Counsel for the appellants while discussing the evidence of Bansilal. I may further add that Ram Singh, PW. 10 visited the place of occurrence twice. At first he heard a noise coming from the side of Balaji ka-temple while he was keeping outside the police outpost Siwanchi Gate. He got-up and went towards the temple and saw that "Marpaet" was taking place between Madan Lal and the two appellants and that several other persons, namely, Chanwar Lal, Bijai Singh, Ladu Ram, etc were standing there. By "Marpeet" he meant that they were giving slaps and fist blows to each other. As Ram Singh had no other police constable with him, he came back, to his out-post at Siwanchi gate and telephoned to Khanda Phalea police station. The telephone was out of order. So he could not talk to the police at Khanda Phalsa police station. He then telephoned to Flying Squad Control Room and returned to the place of occurrence. At that time he heard Madanlal and other persons saying that Poosa Ram had stabbed Madanlal with a knife. He himself saw that Madanlal sustained an injury in his stomach and that the wound was bleeding and the intestines had come out. He separated the two appellants and then brought them and the injured to the police outpost. The evidence of Ram Singh appears to be convincing. It is highly probable that before Madanlal received a blow at the hands of Poosa Ram with a knife, he was manhandled for some time by Amiya and Poosa and during the course of scuffle he also used his hands to avoid his person being quait hold of by the appellants. Madanlal was brought to the place of occurrence by Ghanshyam on a false pretext. It was quite natural that on seeing the two appellants face to face with him in an aggressive mood, he made some efforts to disengage himself from their grip by using his hands. Hence the version given out by Ram Singh and Banshilal that they saw some scuffle going on between Madan Lal injured and the two appellants appears to be quite convincing. I am, therefore, of the view that the conclusion of the learned Additional Sessions Judge that Poosa Ram was responsible for the knife injury on the stomach of Madanlal is correct.

12 Mr. Thanchand Mehta, learned Counsel for Poosaram strongly con-tended

before me that even if it is held that Poosaram was responsible for the knife injury received by Madan Lal on his stomach, the evidence clearly discloses that he had caused the injury in the exercise of his right of private defence and that he is, therefore, entitled to an acquittal. The learned Counsel for Poosa Ram relied upon *Amzed Khan v. The State* AIR 1952 SC 152, *Mod Singh v. The State* ILR 1954 Raj. 7 , *Jai Dev Vs. The State of Punjab* , *Ram Swaroop v. State* 1972 WLN 507, *Gurbachan Singh v. State of Haryana* 1974 UJ 102 (SC) , *Deo Narain Vs. The State of U.P.* , and *Onkar Singh v. State of U.P.* 1974 CLR 461.

13. I have carefully gone through the rulings mentioned above and scrutinised the evidence in the light of plea set up by the two appellants.

14. Poosa Ram has admitted his presence at the scene of occurrence and stated that although Madan Lal injured and his party beat him to the first instance, he did not stab Madan Lal and that it was Amiya appellant who came to his rescue and acted in the exercise of right of private defence of his person. Such a plea was put forward by both appellants in the trial court but it was rejected by the learned Additional Sessions Judge for reason given out in his judgment. I may observe at the outset that it is open to Poosa Ram to adopt a defence in the alternative that he did not stab Madan Lal but that if he did strike him, he acted in the exercise of his right of private defence of person. Consequently, I proceed to examine the evidence in this case with a view to ascertaining how it supports the plea of private defence of person. Before dealing with the evidence, I may observe that no right of private defence is available to an aggressor. Even if Madan Lal injured used some force in repelling the attack made upon him by the two appellants and Ghanshyam, it cannot be said that a right of private defence of person accrued to either Poosa Ram or to Amiya, because the appellants were themselves the aggressors and Madan Lal received the knife-injury mainly on account of their initial attack. I have already held upon evidence that Madan Lal injured did not reach the place of occurrence on his own accord, as he was persuaded to go there by Ghanshyam from his house at odd hours of night on a false pretext that his brother Bhanwar Lal had met an accident. The appellant and their companions had no business to go to the place of occurrence in the middle of the night and to call for the injured from his house except to assault him. As soon as Madan Lal was brought to the scene of occurrence, he was surrounded & manhandled by the appellants. In view of these facts, I have no doubt in my mind that the two appellants themselves created the necessity for self defence and that they were the real aggressors. If during the scuffle immediately preceding the actual infliction of knife injury, Madan Lal used his hands in repelling the attack made upon him by the appellants and caused some injuries to the assailants, it could not be said that the appellants had a right of private defence against Madan Lal's lawful act of defending himself. The learned Counsel appearing on behalf of Poosa Ram urged before me that, the appellants had also sustained injuries on their bodies at the same time and place that omission by the prosecution to explain their injuries should be treated as a circumstance favourable to the appellants. He relied upon the following circumstances, which,

according to him, were sufficient to render it likely that the appellants had acted in self-defence:

(1) that Ramzan taxi driver was beaten and pulled out of his rickshaw by Madan Lal and his party.

(2) that both Poosa Ram and Amiya were pulled out of the tempo and beaten;

(3) that in the course of beating given to the appellants clothes of Poosa Ram were torn and blood-stained;

(4) that injuries were found on the bodies of Poosa Ram and Amiya on their medical examination;

(5) that both Poosa Ram and Amiya were admitted as indoor patients in the hospital and remained unconscious for some days,

15. The first circumstance relied upon by the learned Counsel for the appellants is that Ramzan, who was driving the tempo rickshaw, was pulled out of the tempo and was beaten by Madan Lal injured and his party. According to the learned Counsel for the appellants, Munni Lal P.W. 2 admitted in his cross-examination that the tempo-rickshaw, in which the appellants were sitting was encircled by five or six persons and that one person caught hold of the neck of its driver and pulled him out. Munni Lal no doubt has made these admissions in his cross-examination, but his evidence is that the tempo was surrounded by five or seven persons and its driver was pulled out by one person after the occurrence was over. He categorically denied that either Madan Lal injured or Laxmi Narayan, Munni Lal, Ladu Ram, Chanwar Lal Ganga Ram and Chiniya had surrounded the tempo and had pulled out its driver. The learned Counsel for the appellants further argued that the statement of Munni Lal PW. 2 that the tempo was encircled by five or seven unknown persons after the occurrence is false, because as soon as the incident was over, the appellants were taken to police station by Ramsirgh and Banshi Lal and no question of their having been found in the tempo could arise. The above contention has no force, There is no proof that Ramzan Sustained any injury on his body. He was not medically examined His explanation that on account of poverty he could not get himself medically examined as to his injuries is not convincing at all, because had there been injuries on his person he would also have been removed to the hospital by constables for the purpose of medical examination. As stated earlier, he was going of the way to KabutronKa-Chowk through Siwanchi Gate. As mentioned above, he could not give any reasonable, explanation why he of his own accord took the appellants in the rickshaw off the way to Kabutron-Ka Chowk through Siwanchi Gate at odd hours in the night. In the absence of his explanation, the reason for his taking the appellants in his rickshaw to the Kabutron-ka Chowk through unusual way via Siwanchi Gate could only be that he was directed by the appellants to go through that way as is clearly evident from the statement of Banshi Lal, PW. 8, to whom the appellants disclosed that they had come in a rickshaw to Balaji-ka temple Siwanchi Gate to call for other relatives in

connection with the death of their relative. It is highly inconceivable in the absence of any material on the record that Madan Lal injured, Laxmi Narayan Munni Lal, Ladu Ram, Chanwar Lal, Ganga Ram and Chiniya knew it before hand that the appellants would pass in a rickshaw through Siwanchi gate and that they should be beaten. There is not an iota of evidence from which it could legitimately be said that the aforesaid persons including Madanlal injured were standing in wait for the arrival of the appellants. The evidence of Ramzan does not inspire confidence and it has been rightly rejected by the trial court Had he been given 3/4 lathi thrusts by Madan Lal injured and further beaten by the latter with a lathi, he would have surely sustained injuries on his body and would have got himself radically examined Apart from this, the referred to above admissions made by Munni Lal in his cross-examination do not appear be true, because as discussed above, Munni Lal was not an eye witness to the commission of the crime and he reached she place of occurrence after the incident was over. In his deposition at the trial, he stated that he was sleeping in his enclosure situated near Dharampura, as his cow had given birth to a calf. He further stated that at about 12 he went to the market to take tea. Then he heard some noise, & saw the occurrence near Hanumanji-ka-temple. He was confronted with and contradicted by his previous statement (portion A to B) wherein he gave a different version by stating that he was sleeping in his enclosure and then he woke up all of a sudden, on bearing a noise, which was coming from the side of grain-market. He got and went there. In his cross examination at the trial he admitted that the distance between the place of occurrence and his enclosure, wherein he was sleeping, was 200 pandas, i.e. 400 paces. It is stated by Madan Lal that he raised an outcry after he was stabbed by Poosa Ram. Consequently, I am unable to hold that Munni Lal was present at the place of occurrence from the very beginning and that he could see how the occurrence started. Hence the contention of the learned Counsel for Poosa Ram appellant that the adverted to above admissions made by Munni Lal referred to the initial stage of the occurrence is not acceptable. The learned Counsel for Poosa Ram appellant further relied upon the statement of Ram Singh, PW. 10, in support of his contention that Ramzan rickshaw driver was beaten by Madan Lal. He invited my attention to Ram Singh's cross-examination, wherein he was confronted with and contradicted by portion A to B of his previous statement Ex. D6, which he gave before the police and wherein he claimed to have seen Madanlal beating Ramzan also. Ram Singh, PW. 10, stated in his examination in chief that when he reached the place of occurrence on hearing the noise for the first time, he saw scuffle going on between Madan Lal and the two appellants Poosa Ram and Amiya. It is highly probable that during the scuffle when Madan Lal injured was using his bands indiscriminately to ward off the assault being made upon him, Ramzan, who was definitely present there, would have come in between and received a fist blow or a slap Consequently, I cannot persuade myself to believe that Madan Lal injured, Munnilal, Laxmi Narayan, Ladu Ram Chanwar Lal Ganga Ram and Chiniya were the person who encircled the tempo-rickshaw of Ramzan and made an attack on him in the firer instance.

16. Another circumstance put forward by the learned Counsel for the appellants is that both the appellants were pulled out of the tempo rickshaw and were beaten by Madan Lal and six others and that as a result of the beating, both Poosa Ram and Amiya sustained injuries on their persons which were noticed by the Doctor upon their medical examination. The above contention is devoid of substance. It does not transpire from the prosecution evidence that the two appellants were forcibly taken out of the tempo-rickshaw by Madan Lal and six others and that they were beaten by the latter. It is undoubtedly true that the appellants sustained following simple injuries on their bodies at the time of the occurrence:

Poosa Ram:

1. abrasion - 2.6 cm. x 1 cm. on the left lower lid. There was ecchymosis of the lid.
2. ill defined swelling over the dorsal aspect of left hand.
3. abrasion 5 cm. x 3.5 cm. on the waist on right side 6 cm. from the mid-line.
4. bruise 1.5 cm. x 1 cm, on the pinna of left ear.

Amiya:

1. bruise 6 cm. x 1 cm. right on the lower lid and zygomatic region.
2. abrasion 3 cm. by Order 12 cm. on the occipital region of scalp.

It is as many as six or seven persons had attacked and beaten the appellants, the latter would have sustained much more serious injuries on their bodies. It appears that the injuries were received by them during the scuffle which ensued between them & Madanlal injured immediately preceding the infliction of knife-injury on the stomach of Madanlal by Poosa Ram. I have already held that the appellants were the aggressors who caused Madanlal to be brought to the place of occurrence on a false pretext and attacked and caught hold of him. Madanlal was justified in using his hands in repelling the attack made upon him by the two appellants and Ghanshyam. If during the scuffle the two appellants received a few simple injuries on their persons, it cannot be said that the right of private defence of person accrued to them. Hence, the circumstance that the two appellants received some injuries during the scuffle does not give rise to an inference that they were first beaten by Madanlal & six others and that the appellants acted in self-defence.

17. The next circumstance relied upon by Mr. Thsn Chand Mehta, appearing on behalf of Poosa Ram, also does not probable the existence of the right of private defence of person because in a scuffle which ensued between the two appellants and Madanlal, the clothes of Poosa Ram were torn. The clothes were stained with blood, because Poosa Ram received some injuries on his body at the hands of the injured when he and his companion Amiya were trying to catch hold of the litter. The learned Counsel for Poosa Ram appellant vehemently contended before me

that the Baniyan Article 2 belonged to Poosa Ram who put it off his body and threw it on the place of occurrence, as it was torn and blood stained and that the persecution made a false and futile attempt to prove that the Baniyan was of the injured. According to him, it was done by the persecution in order to suppress the real fact that Poosa Ram was beaten by Madanlal and his six companions. The above contention is not tenable. Even if the torn and blood stained Baniyan belonged to Poosa Ram, it does not give rise to any presumption, in the absence of any evidence on the record, that Poosa Ram was pulled out of the tempo rickshaw and then attacked and beaten by Madanlal and six others. The probability of Poosa Ram's clothes having been torn and blood stained could not be ruled out in a scuffle that took place between him and Amiya on one side and the injured on the other.

18. It was further argued that the injuries sustained by Poosa Ram and Amiya were not superficial because it is admitted by Jagdish Singh, Investigating Officer, PW. 12 in his statement that Poosa Ram and Amiya remained unconscious in hospital for some days and were not in a position to give their statements upto 15.6.73. I have gone through the statement of Jagdish Singh, PW. 12 Jagdish Singh admitted in his cross-examination that at about 11 a.m. on 12.6.73 Poosa Ram and Amiya were unconscious and that on 13.6.73 at 7pm he was informed by Abdul Karim on telephone that the two appellants were not physically fit to give their statements and that he did not record the statement of Poosa Ram and Amiya upto 15.6.1973 on the advice of the Medical Officer. The above statement does not find support from the testimony of Dr. P. Dayal, DW. 3, who stated in definite & clear terms that, in his opinion, Amiya & Poosaram did not require admission into hospital as indoor patients & that he did not advise that they should be admitted in hospital. Apart from this it does not transpire from the evidence of Banshi, PW. 3 & Ramsingh, PW. 10 that soon-after the occurrence when Poosaram and Amiya were taken to the police outpost, they were unconscious or had lost their senses at the police outpost. Injuries sustained by Poosa Ram and Amiya were not on vital parts of their bodies and were not of such a nature as could render them unconscious. Having considered all the facts and circumstances of the case, I am of the view that the plea of private defence of person set-up by the two appellants, is unacceptable and the circumstances pointed out by the learned Counsel for Poosaram appellant do not justify an inference that Amiya used knife in defence of Poosa Ram's life or limb or that Poosaram used it in exercise of his right of private defence of person. No self-defence was necessary, because the appellants were themselves the aggressors. Before Madanlal was attacked, and given a knife injury by Poosa Ram, he had not done anything so as to cause in the minds of Poosaram and Amiya an apprehension that he was about to take their lives or was going to cause grievous bodily injury to any of them.

19. The next question that arises for determination is whether the knife injury caused to the stomach of Madanlal was caused by Poosa Ram with such intention or knowledge and under such circumstances that if by that act he had caused the

death of Madan Lal, he would be guilty of murder It depends upon the facts and circumstances of each particular case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of the weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injuries and the severity of the blow or blows are important factors that may be taken into consideration in coming to a finding whether in a particular case the accused can be convicted of an attempt to murder Madanlal sustained one knife injury which is described by Dr. P. Dayal PW. 11, as follows:

incised wound 4 cm. x 0.5 cm. in the right appigestric region. Loops of intestine are protruding through the wound.

The weapon used by Poosa Ram was a sharp edged knife" It is established on the record that prior to the occurrence the relations between the appellants; and the injured were strained. The nature of the injury was grievous. It was the result of a severe blow on the vital part of the body of Madanlal. Soon-after the infliction of the injury, blood and intestines came out of the stomach of Madanlal and he became unconscious The Doctor, who examined the injury of Madanlal, definitely opined that the injury was capable of causing, death & that he survived by sheer luck. All these facts do lead to the inference that it was the intention of Poosa Ram to cause the death of Madanlal. Hence, in my opinion, Poosa Ram was rightly convicted u/s 307, I.P.C.

20. As regards Amiya, it was contended by Mr. Raj Narain appearing on behalf of the complainant that he along with Poosa Ram had an intention to kill or cause a grievous injury to Madanlal as he had caught bold of the injured and participated in making a joint attack on him. In support of his above contention, he relied upon Lalai v. State of U.P. AIR 1974 SC 2218 and Shyam Niranjan Dubey and Others Vs. State of U.P., , In the referred to above rulings existence of common, intention was inferred by their Lordships of the Supreme Court from the conduct of the persons concerned and the facts and circumstances established in those, particular cases. In the present case the facts are different. Amiya, did not share the intention of Poosa Ram to kill Madanlal. Intention to do a certain act is different from the knowledge that a certain act is likely to be done. It is no doubt established by the prosecution evidence in, this case that initially the common intention of the two appellants, was to assault and use criminal force to Madanlal after calling him from his house in the night at the place of occurrence but the mere fact that one of them i.e. Poosa Ram had a deadly weapon, i.e. knife in his pocket does not necessarily mean that Amiya and Ghanshyam had also the common intention to kill or to cause grievous hurt to him. There, is not an iota of evidence on the record that Amiya or Ghanshyam knew that Poosaram had knife in his pocket. He was not holding it in his hand at the time when Madanlal had come to the place of occurrence. The trial court rightly disbelieved the version given out by the eye-witnesses that Amiya instigated his companion Poosaram to

stab Madanlal with a knife prior to the infliction of the knife injury. It transpires from the prosecution evidence itself that the two appellants and Ghanshyam were not having any weapons in their hands at the time when Madanlal was brought to the place of occurrence. I was after some scuffle that Poosaram all of sudden took out knife from his pocket and stabled Madanlal on his stomach. Consequently, even knowledge that grievous injury was likely to be caused to Madanlal by Poosa Ram could not reasonably be imputed to Amiya appellant and Ghanshyam. Hence it is not possible to hold in the circumstances of the case that Amiya, appellant had the common intention to kill Madanlal or to voluntarily cause grievous hurt to him with a sharp edged weapon. The prosecution has no doubt succeeded in proving beyond reasonable doubt that Amiya had a common intention to assault or use criminal force to Madanlal and that in pursuance of this common intention he reached the place of occurrence along with Poosa Ram and Ghanshyam and caught hold of Madanlal injured when the latter had come to the place of occurrence. The offence for which he could be convicted was u/s 352/34, I.P.C. instead of u/s 326/34, I.P.C. In support of my above view, reliance may be placed on an authority of the Supreme Court, *Hardev Singh v. State of Punjab* (10), wherein their Lordships observed as follows:

The view of the High Court that even the person not committing the particular crime could be held guilty of crime with the aid of Section 34 of the Penal Code if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants, is not correct. The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held to be guilty. In this case assault on Tej Kaur by appellant Hardev Singh was his individual act. There was no common intention to commit the murder or cause grievous hurt to anybody. Circumstances are completely lacking to lead us to any such inference.

Hence, I am of the opinion that his conviction should be altered from u/s 326/34, I.P.C. to Section 352/34, I.P.C.

21. As regards sentence awarded to Poosa Ram by the trial court, I may say that it is a bit severe in the circumstances of the case. Poosa Ram was sentenced to default rigorous imprisonment for four years and to pay a fine of Rs. 1000/-, in default of payment of fine to undergo eight months' rigorous imprisonment. In my opinion, ends of justice would be met if the sentence of four years' rigorous imprisonment is reduced to a term of three years and the fine of Rs. 1000/- is reduced to a fine of Rs. 500/- In default of payment of fine to undergo four months' rigorous imprisonment.

22. As I am of the view that Amiya appellant is guilty of the offence punishable u/s 352/34, I.P.C. the sentence passed against him u/s 326/34, I.P.C. cannot be maintained and deserves to be considerably reduced. The ends of justice would be met if the sentence of two years' rigorous imprisonment is reduced to rigorous imprisonment for three months only and the sentence of fine of Rs.

400/-, and in default four months rigorous imprisonment is set aside.

23. I, therefore, partly accept the appeal of Poosa Ram and while maintaining his conviction u/s 307, I.P.C. reduce of four years, rigorous imprisonment and a fine or Rs. 1000/-, in default of to suffer eight months rigorous imprisonment, to three years rigorous imprisonment and a fine of Rs. 500/-, in default of payment of fine Poosa Ram appellant shall undergo rigorous imprisonment for four months. However, the period during which the appellant Poosa Ram remained in detention during investigation, inquiry or trial of the case shall be set off against the term of imprisonment imposed on him by the trial court on his conviction and his liability to under go imprisonment shall be restricted to the remainder of the term of imprisonment imposed upon him.

24. I partly accept the appeal of Amiya alias Amrit Lal appellant also and alter his conviction from u/s 326/34, I.P.C. to one u/s 352/34, I.P.C. and reduce the sentence of two years rigorous imprisonment to three months rigorous imprisonment only. The sentence of fine of Rs. 400/, and in default four months" rigorous imprisonment is set aside. Amiya alias Amrit Lal has already served out three months" rigorous imprisonment. He is in jail and shall be released forthwith if not required in connection with some other case.