
(2014) 09 AHC CK 0148
In the Allahabad High Court
Case No : Criminal Appeal No. 670 of 1988

Ram Bachan

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Army Act, 1950 — Section 3(i), 70
Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374(2), 82, 83
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 300, 302, 323, 336, 337

Citation : (2015) 2 ACR 1321 : (2014) 87 ALLCC 848

Hon'ble Judges : Arun Tandon, J; Akhtar Husain Khan, J

Bench : Division Bench

Advocate : Sheo Mani Yadava, K.K. Misra and Prem Prakash, Advocate for the Appellant; Bhan Yadav, A.G.A., Om Prakash Gupta and Sagir Ahmad, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Akhtar Husain Khan, J.—Accused appellants Ram Bachan, Sudama, Chandrika and Hari Lal have filed this appeal u/s 374(2) Cr.P.C. against the judgment and order dated 28th March, 1988 passed by 4th Additional Sessions Judge, Azamgarh whereby learned 4th Additional Sessions Judge, Azamgarh has convicted accused appellant Ram Bachan for offences punishable u/s 302 I.P.C. and section 337 I.P.C. read with section 34 I.P.C. and accused appellants Chandrika, Hari Lal and Sudama for offences punishable u/s 302 I.P.C. read with section 34 I.P.C. and section 337 I.P.C. and sentenced accused appellant Ram Bachan for offence punishable u/s 302 I.P.C. with imprisonment for life and for offence punishable u/s 337 I.P.C. read with section 34 I.P.C. with rigorous imprisonment for six months and accused appellants Chandrika, Hari Lal and Sudama for offence punishable u/s 302 I.P.C. read with section 34 I.P.C. with imprisonment for life and for offence punishable u/s 337 I.P.C. with rigorous imprisonment for six months.

2. Learned 4th Additional Sessions Judge, Azamgarh directed that both sentences of each accused appellants shall run concurrently.

3. Accused appellant No. 2 Sudama is reported dead. Appeal abated in respect of him.

4. Shri P.P. Yadav, Advocate appeared on behalf of appellant No. 1 and Shri Rajul Bhargava, Advocate appeared on behalf of appellants no. 3 and 4. Shri Bashrat Ali Khan learned A.G.A. appeared for the State and Shri G.K. Mishra, Advocate appeared on behalf of the complainant.

5. We have heard the parties and perused the records.

6. According to F.I.R. Ext. Ka-1 in brief, prosecution case is that there was an enmity between complainant Kharpattu and accused appellant Ram Bachan regarding dispute of land and civil litigation was pending between them. On the disputed land accused appellant Ram Bachan was constructing boundary wall. Complainant Kharpattu prohibited him from construction, whereupon he abused complainant Kharpattu and threatened him to kill.

7. In the above circumstances, on 9.6.1986 at 8.00 A.M. accused appellants Ram Bachan, Sudama, Chandrika and Hari Lal armed with bomb and bricks started construction of wall on the above disputed land. Complainant Kharpattu and his family members forbade them. Whereupon accused appellants started throwing bricks and bomb. The bomb was being thrown by accused appellant Ram Bachan and bricks were being thrown by accused appellants Sudama, Chandrika and Hari Lal. Explosion of bomb caused injuries to Smt. Radhika, daughter of complainant, while Muneshwar uncle of complainant and Smt. Gulabi Devi wife of complainant suffered injuries from bricks. Occurrence was seen by Gujeshwar, Parbhunath etc.. They intervened but they could not catch accused appellants due to fear as the accused appellants were armed with deadly weapons.

8. According to F.I.R. Ext. Ka-1 after occurrence complainant Kharpattu, his wife Smt. Gulabi Devi and uncles Muneshwar and Gujeshwar were going to police station Madhuban alongwith injured Smt. Radhika, daughter of complainant, who was on cot but till they reached P.S. Madhban Smt. Radhika succumbed to injuries.

9. Complainant Kharpattu presented the First Information Report Ext. Ka-1 on 9.6.1986 at 10.05 A.M. On the basis of which chik report Ext. Ka-1 was written and Crime No. 93 of 1986 u/s 302, 336 I.P.C. was registered in P.S. Madhuban against accused Ram Bachan, Sudama, Chandrika and Hari Lal. Investigation was started by police. Thereafter, inquest report of Smt. Radhika was prepared. Dead body was sent for post mortem in sealed cover after having completed other necessary formalities. Later on, investigation was completed in accordance with law. After having completed investigation police submitted charge sheet against accused appellants Ram Bachan, Sudama, Chandrika and Hari Lal u/s 302, 336 I.P.C.. Whereupon concerned Magistrate took cognizance and after compliance of

section 207 Cr.P.C. committed the case to the court of Session for trial of accused appellants. Thereafter, Session trial no. 20 of 1987 (State Vs. Ram Bachan and three others) u/s 302, 337 I.P.C. was registered in the Session court of Azamgarh.

10. Learned Additional Sessions Judge, Azamgarh framed charges against accused appellant Ram Bachan for offences punishable u/s 302 I.P.C. and section, 336 I.P.C. read with section 34 I.P.C. and against accused appellants Sudama, Hari Lal and Chandrika for offences punishable u/s 302 I.P.C. read with section 34 I.P.C. and section 337 I.P.C. read with section 34 I.P.C..

11. All the accused pleaded not guilty and claimed to be tried.

12. Prosecution examined P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar, P.W.-3 Gulabi, P.W.-4 Constable Girja Prasad Pandey, P.W.-5 Dr. G.S. Tekariwal, P.W.-6 Constable Pramod Kumar, P.W.-7 S.I. Ram Sumer Ram, P.W.-8 S.I. Ram Chandar Mishra and P.W.-9 Dr. J.P. Narain.

13. After prosecution evidence statement of all accused were recorded u/s 313 Cr.P.C.. All the accused stated that they have been falsely implicated due to animosity. No evidence was adduced on behalf of accused in defence.

14. Learned 4th Additional Sessions, Judge, Azamgarh heard the arguments of the parties and passed impugned judgment and order dated 28.3.1988 whereby he has convicted and sentenced accused appellants as mentioned above.

15. Learned counsel for accused appellants contended that accused appellants are innocent and have been falsely implicated.

16. Learned counsel for accused appellants contended that F.I.R. is anti time and whole story of prosecution is false and concocted.

17. Learned counsel for accused appellants further contended that P.W.-2 Muneshwar is uncle of complainant Kharpattu, while P.W.-3 Gulabi is the wife of complainant Kharpattu only these are witnesses of fact and all these witnesses are interested and inimical witnesses. Besides this, there are material contradiction in their statements, therefore, no reliance can be placed upon their testimonies.

18. Learned counsel for accused appellants contended that no blood was recovered by I.O. from alleged place of occurrence, therefore, place of occurrence is also doubtful.

19. Learned counsel for accused appellants contended that accused appellant Ram Bachan was in service of Indian Army and at the time of occurrence he was on duty.

20. Learned counsel for accused appellants contended that the conviction and sentence recorded by trial court is against evidence as well as against law.

21. Learned counsel for accused appellants prayed that appeal should be allowed

and accused appellants should be acquitted of all charges levelled against them.

22. Learned A.G.A. contended that P.W.-2 Muneshwar and P.W.-3 Gulabi are injured witnesses and their statements about occurrence is highly reliable.

23. Learned A.G.A. contended that there is no material contradiction between statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Gulabi Devi and testimonies of witnesses may not be discarded on the ground of minor contradictions.

24. Learned A.G.A. contended that merely on the ground of no recovery of blood statements of witnesses of occurrence may not be disbelieved regarding place of occurrence.

25. Learned A.G.A. further contended that defence has failed to prove that accused Ram Bachan was on duty at the time of occurrence.

26. Learned A.G.A. contended that evidence on record is sufficient to hold accused appellants guilty for offences levelled against them and trial court has rightly held them guilty for offences levelled against them.

27. Learned A.G.A. contended that sentences awarded by trial court are not excessive.

28. Learned A.G.A. prayed that appeal should be dismissed.

29. We have considered the submissions made by the parties.

30. Out of nine witnesses examined by prosecution P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Gulabi are the witnesses of fact and occurrence. All of them have supported version of prosecution in their statements on oath. P.W.-1 complainant Kharpattu has proved First Information Report Ext. Ka-1 also in his statement on oath.

31. P.W.-4 Constable Girja Prasad Pandey has stated in his statement on oath that on 9.6.1986 dead body of deceased Smt. Radhika was handed over in sealed cover to him as well as Constable Pramod Kumar. They carried the dead body of Smt. Radhika to Sadar Hospital, Azamgarh for post mortem and they did not permit anyone to touch the dead body.

32. P.W.-4 Constable Girja Prasad Pandey has stated that after post mortem, he brought post mortem report as well as cloths of deceased in sealed cover to Police Station concerned.

33. P.W.-5 Dr. G.S. Tekariwal has stated on oath that on 1.6.1986 he was posted in District Hospital, Azamgarh. On that day at 2.00 P.M. he conducted post mortem of deceased Smt. Radhika daughter of complainant Kharpattu resident of Hasanpur, Nemdal P.S. Madhuban, District Azamgarh. The dead body was brought by Constable 1929 Pramod Kumar and Constable 597 Girja Shanker in sealed cover and was identified by them.

34. P.W.-5 Dr. G.S. Tekariwal has proved post mortem report of deceased Radhika Ext. Ka-2 and has stated that the cause of her death was shock and bleeding as a result of ante mortem injuries. He has further stated that death of deceased Radhika may occur between 8 to 10 A.M. on 9.6.1986.

35. P.W.-5 Dr. G.S. Tekariwal has stated in his statement that the injuries of deceased Radhika might have been caused by bomb and were sufficient for death in ordinary course.

36. P.W.-6 Pramod Kumar has stated on oath that on 9.6.1986 he was posted at Chauki Rampur. He has stated that on that day dead body of deceased Radhika was entrusted to him with papers for post mortem. He brought the dead body to Sadar Hospital, Azamgarh where he entrusted dead body and papers to doctor. He has further stated that after post mortem he brought post mortem report as well as cloths of deceased in sealed cover to P.S. Concerned.

37. P.W.-7 S.I. Ram Sumer Ram has stated on oath that on 16.6.1986 he was posted in P.S. Madhuban District Azamgarh on the post of Station-in-charge. He has stated that the investigation of crime relating to this appeal was being conducted by S.I. Ram Chandar. Only arrest of accused was yet to be done. He executed process u/s 82/83 Cr.P.C. against accused Ram Bachan and Sudama. He has stated that he recorded statement of accused Chandrika in jail, thereafter he submitted charge sheet.

38. P.W.-8 S.I. Ram Chandar Mishra is also Investigating Officer. He has stated on oath that on 9.9.1986 he was posted as S.I. In P.S. Madhuban, District Azamgarh. Crime No. 93 of 1986 u/s 336, 302 I.P.C. was registered in P.S. Madhuban in his presence and investigation was entrusted to him.

39. P.W.-8 S.I. Ram Chandar Mishra has stated in his statement that he received information from police station Madhuban at Chauki Rampur through Constable. Thereafter, he went to police station Madhuban and obtained copy of chik, G.D. and other papers relating to Panchnama. He made entry of copy of chik and G.D. relating to registration of crime in case diary. Thereafter, he prepared inquest report of deceased Radhika Devi. He has further stated that he prepared phot nash, report to C.M.O. for post mortem, form-13 and form-33 in his hand writing with his signature. He has proved inquest report Ext. Ka-4, photo nash Ext. Ka-5, report to C.M.O. Ext. Ka-6, form-13 Ext. Ka-7 and form-33 Ext. Ka-8.

40. P.W.-8 S.I. Ram Chandar Mishra has stated that he entrusted dead body of Smt. Radhika in sealed cover to Constable Pramod Kumar and Girja Shankar for carrying to Sadar Hospital, Azamgarh for post mortem. Thereafter, he went to place of occurrence and inspected place of occurrence. He has stated that he prepared site plan of place of occurrence Ext. Ka-9 in his hand writing with his signature.

41. P.W.-8 S.I. Ram Chandar Mishra has stated in his statement that he has collected particles of bomb as well as pieces of bricks from the place of

occurrence and prepared Fard Ext. Ka-10 with his signature. He has stated that he gave pieces of bricks in supurdagi of complainant Kharpattu.

42. P.W.-8 S.I. Ram Chandar Mishra has stated in his statement that on 10.6.1986 he arrested accused Hari Lal and entered him into police station. Thereafter, on 12.6.1986 he recorded statement of witnesses Muneshwar, Smt. Gulabi, Prabhu Nath and Gulab Yadav.

43. P.W.-8 S.I. Ram Chandar Ram has stated in his statement that on 13.6.1986 he made entry of injury report of injured Muneshwar and Smt. Gulabi. He has further stated that on that day second copy of post mortem report was received in police station. He has stated that on the same day investigation was transferred vide order of Circle Officer, therefore, he handed over investigation to S.I. Ram Sumer Ram P.W.-7.

44. P.W.-8 Ram Chandar Mishra has proved chik F.I.R. Ext. Ka-11 and copy of G.D. relating to registration of crime Ext. Ka-12 by identifying writing and signatures of Head Moharir Rajbali Yadav.

45. P.W.-9 Dr. J.P. Narain had examined injuries of P.W.-2 Muneshwar and P.W.-3 Gulabi. He has stated in his statement on oath that on 9.6.1986 he was posted as Medical Officer in State Allopathic Hospital, Madhuban, Azamgarh. On that day at about 7.45 P.M. he examined Smt. Gulabi Devi aged about 45 years wife of Kharpattu resident of Hasanpur P.S. Madhuban, District Azamgarh. He has stated that on the same day at about 8.05 P.M. he conducted medical examination of Muneshwar son of Sewak aged about 55 years, whose address was same as that of Smt. Gulabi.

46. P.W.-9 Dr. J.P. Narain has proved injuries as well as injury reports of said two injured Ext. Ka-13 and Ext. Ka-14.

47. No evidence has been adduced on behalf of accused in defence.

48. We have examined evidence adduced by prosecution in the light of contentions of the parties.

49. According to prosecution occurrence has taken place on 9.6.1986 at about 8.00 A.M. within village Hasanpur Mutlik Nemdod P.S. Madhuban, the then district Azamgarh, now district Mau.

50. According to chik F.I.R. Ext. Ka-11 as well as G.D. relating to registration of crime Ext. Ka-12, F.I.R. Ext. Ka-1 has been lodged on 9.6.1986 at 10.05 A.M., 2.05 hours after occurrence. The distance of police station from place of occurrence is six miles as is apparent from chik F.I.R. Ext. Ka-11. P.W.-1 complainant Kharpattu has stated in his statement that he got F.I.R. Ext. Ka-1 written by his son Vijay Kumar Patel and presented the same in police station Madhuban. He has proved First Information Report Ext. Ka-1 in his statement on oath. Scribe of First Information Report Ext. Ka-1 Vijay Kumar Patel son of complainant Kharpattu has not been examined by prosecution.

51. Chik F.I.R. Ext. Ka-11 and copy of G.D. relating to registration of crime as well as statement of P.W.-8 Ram Chandar Mishra shows that Head Moharir Rajbali Yadav was scribe of chik F.I.R. and G.D. relating to registration of crime but he has also not been examined by prosecution. Chik F.I.R. Ext. Ka-11 as well as G.D. relating to registration of crime Ext. Ka-12 has been proved by S.I. Ram Chandar Mishra as a secondary witness by identifying the hand writing and signature of Head Moharir Rajbali Yadav.

52. We have gone through the whole statements of P.W.-8 S.I. Ram Chandar Mishra as well as P.W.-1 complainant Kharpattu. Defence has not given any suggestion to these witnesses that F.I.R. is anti time. Therefore, we are of the view that non-examination of scribe of F.I.R. Ext. Ka-1 as well as chik F.I.R. Ext. Ka-11 and G.D. relating to registration of crime Ext. Ka-12 would have no adverse effect on prosecution case. Illustration (e) of Section 114 of Evidence Act, 1872 provides that it shall be presumed that judicial and official acts have been regularly performed. Writing of chik F.I.R. and registration of crime is official act of Head Moharir posted at police station, therefore, it shall be presumed u/s 114 of Evidence Act that chik F.I.R. Ext. Ka-11 as well as G.D. relating to registration of crime Ext. Ka-12 has been regularly prepared.

53. Inquest report of deceased Smt. Radhika Ext. Ka-8 has been prepared on 9.6.1986 at 14.30 P.M.. In inquest report crime no. 93 of 1986 u/s 336, 302 I.P.C. has been written. In phot nash Ext. Ka-5, form-13 Ext. Ka-7, form-33 Ext. Ka-8 also crime no. 93 of 1986 u/s 336, 302 I.P.C. has been written.

54. Considering the whole evidence on record, it is apparent that F.I.R. has been lodged on 9.6.1986 at 10.05 A.M. and crime no. 93 of 1986 u/s 336, 302 I.P.C. has been registered at the same time in P.S. Madhuban. It is apparent that material on record shows that there is no reasonable ground to disbelieve that F.I.R. is anti time. Thus, evidence on record is sufficient to show that F.I.R. is prompt.

55. Learned trial court has also recorded finding in its impugned judgment that F.I.R. is prompt.

56. In view of discussion made and conclusion drawn above, the finding of trial court regarding promptness of F.I.R. appears to be correct.

57. According to F.I.R. Ext. Ka-1 as well as statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi, witnesses P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi have also suffered injuries of bricks in the occurrence alleged by prosecution.

58. Statement of P.W.-9 Dr. Jai Prakash Narain as well as injury report of P.W.-3 Smt. Gulabi Ext. Ka-13 shows that following injuries were found on her body at the time of medical examination:-

1-Lacerated wound 1 cm. x 1/2 cm. x skin deep on the upper surface of the left feet, bleeding was present red in colour.

2-Swelling and pain on the left thigh (6 cm. x 6 cm.) just below the left knee joint.

3-Complaint of pain on the left knee joint.

59. Statement of P.W.-9 Dr. Jai Prakash Narain as well as injury report of P.W.-2 Muneshwar Ext. Ka-14 shows that following injuries were found on his body at the time of medical examination:-

1-Lacerated wound 1/4 cm. x 1/4 cm x skin deep on the lateral surface of left leg, blood clotting was present.

2-Abrasion 2 cm. x 1/2 cm. on the medial malleolus of the right leg black in colour.

3-Complaint of pain on the left side of back.

4-Complaint of pain on the right scapular.

60. Statement of P.W.-9 Dr. Jai Prakash Narain as well as injury reports of P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi Ext. Ka-14 and Ext. Ka-13 shows that the injuries of both injured were found about 12 hours old at the time of medical examination. Thus, the injury reports of both injured as well as statement of doctor P.W.-9 Dr. Jai Prakash Narain shows that the injuries found on the body of these injured may be caused at the time of occurrence alleged by prosecution i.e. 8.00 A.M. on 9.6.1986.

61. Perusal of G.D. relating to registration of crime Ext. Ka-12 shows that the injuries of both injured have been entered in G.D. relating to registration of crime Ext. Ka-12.

62. It is apparent from version of F.I.R. Ext. Ka-1 as well statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi that after occurrence complainant as well as both injured witnesses went to police station Madhuban alongwith injured Smt. Radhika Devi for lodging report but till they reach police station Madhuban Smt. Radhika succumbed to injuries. After death of Radhika certainly the whole attention of her family members was towards her and in such circumstances, there was no hurry to get medical examination of injured witnesses P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi who had minor injuries.

63. In view of discussion made above, after having gone through whole evidence on record and circumstances of the case, we are of the view that the evidence on record is sufficient to prove that P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi had suffered injuries in the occurrence alleged by prosecution.

64. Learned trial court has rightly accepted version of prosecution that these two witnesses namely P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi have suffered injuries at the time of occurrence.

65. P.W.-1 Kharpattu is complainant. He has stated in cross examination on Page

12 (Page 21 of paper book) that the place where occurrence took place was his ahata. His dwelling house was 10-12 steps south west from the place where "marpit" took place. In site plan Ext. Ka-9 I.O. has shown dwelling house of complainant Kharpattu near place of occurrence.

66. It is apparent from F.I.R. Ext. Ka-1 as well as statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi Devi that accused appellants started construction of wall in disputed land. Complainant Kharpattu and his family members forbade them, whereupon accused appellants started throwing bricks and bomb in which P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi suffered injuries of bricks while Smt. Radhika (Now deceased) sustained injury of explosion of bomb. Thus, situation of place of occurrence shows that presence of P.W.-1 complainant Kharpattu and P.W.-3 Smt. Gulabi is natural at the time of occurrence. P.W.-2 Muneshwar is also a witness of locality and is injured also.

67. In view of discussion made above, we are of the view that presence of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi at the time of occurrence is fully established.

68. P.W.-2 Muneshwar has admitted in cross examination made by defence on Page 16 (Page 25 of paper book) that Dev Nandan and Bharosey were real brothers, complainant Kharpattu is in the branch of Bharosey and he is in the branch of Dev Nandan. Thus, it is apparent that complainant Kharpattu and P.W.-2 Muneshwar are related to same pedigree and admittedly P.W.-1 complainant Kharpattu and P.W.-3 Smt. Gulabi Devi are husband and wife. But Hon"ble Apex Court has held in the case of Brahm Swaroop and Another Vs. State of U.P., that, "merely because the witnesses were closed relatives to the deceased that cannot be ground to discard their evidence."

69. In view of above pronouncement of Hon"ble Apex Court statement of witnesses may not be discarded merely on the ground of relationship.

70. During statement before trial court P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi developed a new thing by stating that accused Sudama was armed with Ballam. Thus statement of above three witnesses that the accused Sudama was armed with Ballam is inconsistent with version of F.I.R. Ext. Ka-1 but none of the said witnesses has said that Sudama used Ballam. All of them have stated that Sudama also threw bricks. Therefore, we are of the view that on the basis of said new statement made by these three witnesses namely P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Gulabi it would not be proper to disbelieve the whole testimony of these witnesses.

71. We have gone through whole statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi. There appears no material contradictions in their statements regarding occurrence or manner of occurrence. Their statements may not be disbelieved on the ground of minor contradiction or

trivial discrepancy.

72. In the case of Sampath Kumar Vs. Inspector of Police, Krishnagiri, Hon''ble Apex Court held that," minor contradictions are bound to appear in the statement of truthful witnesses as memory sometimes plays false, sense of observation differs from person to person."

73. In the case of State of U.P. Vs. Krishna Master and Others, Hon''ble Apex Court held that," The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof."

74. In the case of State of U.P. Vs. Krishna Master & others (supra) Hon''ble Apex Court further held that," the basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole."

75. Admittedly blood stained earth has not been taken from place of occurrence by I.O.. I.O. P.W.-8 S.I. Ram Chandra Mishra has stated in cross-examination made by defence on Page 8 (Page 40 of paper book) that no blood was found on place of occurrence. Therefore, he did not collect blood stained earth. But P.W.-3 Smt. Gulabi has stated in cross-examination made by defence on Page 21 (Page 30 of paper book) that blood was on the land where daughter has fallen after having injuries. She, her husband and son had shown blood to Darogaji. Learned trial court has considered the issue of no recovery of blood from place of occurrence. Learned trial court placed reliance upon pronouncement of Hon''ble Apex Court rendered in the case of Ram Autar Rai Vs. State of U.P. reported in 1985 Criminal Appeals Reporter 121 in which Hon''ble Apex Court has held that merely because S.O. fails to recover blood stained earth from the place of occurrence, it cannot be inferred that occurrence has not taken place on that place.

76. We have also given our anxious thought on the point. We are of considered opinion that merely because of no recovery of blood, place of occurrence may not be disbelieved. Place of occurrence may be decided on the basis of other evidence available on record.

77. Perusal of statement of I.O. P.W.-8 S.I. Ram Chandar Mishra as well as recovery memo of particles of bomb and pieces of bricks Ext. Ka-10 shows that pieces of bricks and particles of bomb have been recovered by I.O. from place of occurrence. Site plan Ext. Ka-10 prepared by I.O. P.W.-8 S.I. Ram Chandar Mishra shows that mark of bomblast was found on wall of ahata of complainant. Construction of new wall in alleged disputed land has also been shown in site plan by I.O.. P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Gulabi have also fully supported place and manner of occurrence in their statements on oath.

78. Defence has given suggestions to P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi in cross-examination that dacoity was committed in night at the house of complainant and bomb was blasted at that time. Thus, it is apparent that place of occurrence has not been denied by defence rather it has been admitted by defence.

79. In view of discussion made above, we are of the view that place of occurrence is fully proved by evidence on record. Conclusion drawn by trial court regarding place of occurrence does not require interference.

80. In view of conclusion drawn above, it is apparent that version of F.I.R. and statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi are fully corroborated by site plan Ext. Ka-10 and statement of I.O. P.W.-8 S.I. Ram Chandar Mishra.

81. In F.I.R. Ext. Ka-1 it has been specifically mentioned that bomb was thrown by accused appellant Ram Bachan and rest accused appellants Sudama, Chandrika and Hari Lal were throwing bricks. In F.I.R. Ext. Ka-1 it has also been specifically mentioned that P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi suffered injuries of bricks thrown by accused appellants while Smt. Radhika daughter of complainant sustained injuries from explosion of bomb. P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi all of them have supported version of F.I.R. that accused appellant Ram Bachan thrown bomb while rest accused appellants Sudama, Chandrika and Hari Lal thrown bricks. All the three witnesses have also stated that P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi suffered injuries of bricks and Radhika suffered injury from explosion of bomb.

82. Description of injuries of P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi mentioned above shows that the injuries of both these injured may be caused by blunt object and pieces of bricks are also blunt object.

83. Statement of P.W.-5 Dr. S.G. Tekariwal as well as post mortem report of deceased Radhika Ext. Ka-2 shows that the ante mortem injury found on the dead body of Smt. Radhika may be caused by explosion of bomb.

84. In view of above, it is apparent that version of F.I.R. Ext. Ka-1 as well as Statements of P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi are fully corroborated by medical evidence.

85. It is relevant to mention at this juncture that the suggestions given by defence to P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi in cross-examination shows that the version of defence is that a dacoity took place at the house of complainant in night in which bomb was thrown. Thus, it is apparent that indirectly defence has admitted use of bomb and occurrence but according to defence the time of occurrence is night and not 8.00 A.M. as alleged by prosecution.

86. Perusal of post mortem report Ext. Ka-2 shows that in small intestine of deceased pasty material was found at the time of post mortem. This condition of

small intestine supports version of prosecution that occurrence has taken place in morning at about 8.00 A.M. and the version of defence that the occurrence took place in night is incorrect.

87. Considering the whole facts and circumstances of the case as well as evidence on record, we are of the view that P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi are trustworthy witnesses and there is no reasonable ground to disbelieve them.

88. In the statement u/s 313 Cr.P.C. none of the accused has taken plea of alibi. But defence has given suggestion to P.W.-1 complainant Kharpattu that accused appellant Ram Bachan was on duty in Army on the date of occurrence. P.W.-1 complainant Kharpattu has negatived this suggestion of defence and has stated that Ram Bachan had come on leave. There is no evidence on record to show that accused appellant Ram Bachan was on duty in Army on the date of occurrence.

89. Now in above context a question arises that if on the date of occurrence accused appellant Ram Bachan was in service of Army, had criminal court jurisdiction to try him for present offence.

90. Section 70 of The Army Act, 1950 is relevant for determination of above question. Section 70 of The Army Act, 1950 is quoted below:

"70. Civil offences not triable by court-martial.-A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or (b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf."

91. Section 3(i) of The Army Act, 1950 defines active service which is as follows:-

"3. Definitions:-In this Act, unless the context otherwise requires,-

(i) "active service", as applied to a person subject to this Act, means the time during which such person--

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country;"

92. There is nothing on record to show that accused appellant Ram Bachan was at the time of occurrence on active service of Army as defined in Section 3(i) of The Army Act, 1950. Therefore, in view of Section 70 of The Army Act, 1950 criminal court is fully competent to try accused appellant for present offence. We find no jurisdictional error in impugned judgment and order of trial court.

93. According to version of F.I.R. Ext. Ka-1 at the time of occurrence all the accused appellants armed with bomb and bricks started construction of wall on the disputed land. Complainant Kharpattu and his family members forbade them, whereupon accused appellants started throwing bricks and bomb. The bomb was thrown by accused appellant Ram Bachan and bricks were thrown by accused appellants Sudama, Chandrika and Hari Lal. It is also apparent from version of F.I.R. Ext. Ka-1 that bomb caused injuries to Smt. Radhika and Smt. Radhika succumbed to said injuries. Version of F.I.R. Ext. Ka-1 has been fully proved by P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi. Thus, it is apparent from the facts and circumstances of the case as well as evidence on record that all the accused had common intention to cause injuries to opposite party and they have thrown bomb and bricks in furtherance of common intention of all. Therefore, there exists sufficient ground to believe that accused appellant Ram Bachan had thrown bomb in furtherance of common intention of all accused appellants. P.W.-5 Dr. G.S. Tekariwal who has proved post mortem report Ext. Ka-2 has specifically stated that ante mortem injuries found on the dead body of deceased Radhika might have been caused by bomb and was sufficient to cause death in the ordinary course.

94. For the sake of convenience relevant part of Section 300 I.P.C. is quoted below:-

"300. Murder.-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly.....

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Illustrations C and D of Section 300 I.P.C. are as follows:-

"(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual."

95. As concluded above accused appellant Ram Bachan had thrown bomb in furtherance of common intention of all accused appellants to cause injury to opposite parties (complainant and his persons) and bomb injuries caused to deceased Smt. Radhika were sufficient in the ordinary course of nature to cause death. Thus present case is squarely covered with thirdly as well as fourthly of Section 300 of I.P.C.. On the facts and circumstances of the case none of the exceptions of Section 300 I.P.C. is applicable.

96. In view of discussion made and conclusion drawn above, after having gone through the entire facts and circumstances of the case as well as evidence on record, we are of the view that evidence on record is sufficient to hold accused appellant Ram Bachan guilty for offence punishable u/s 302 I.P.C. and rest surviving accused appellants Chandrika and Hari Lal guilty for offence punishable u/s 302 I.P.C. read with section 34 I.P.C..

97. It is apparent from version of F.I.R. Ext. Ka-1 as well as statements of witnesses namely; P.W.-1 complainant Kharpattu, P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi that the accused appellants Sudama, Chandrika and Hari Lal threw bricks in furtherance of common intention of all to cause injuries to opposite party and bricks thrown by them caused simple injuries to P.W.-2 Muneshwar and P.W.-3 Smt. Gulabi. Therefore, we are of the view that all the accused appellants should have been convicted u/s 323 I.P.C. read with section 34 I.P.C. but the trial court has convicted accused Ram Bachan for offence punishable u/s 337 I.P.C. read with section 34 I.P.C. and rest accused appellants for offence punishable u/s 337 I.P.C.. We are of the view that conviction recorded by trial court for offence punishable u/s 337 I.P.C. or section 337 I.P.C. read with section 34 I.P.C. is erroneous but above modification shall not cause any benefit to accused appellant and no appeal has been filed by State. Therefore, we are of the view that there is no need to interfere in impugned judgment and order passed by trial court.

98. We have perused the impugned judgment and order passed by learned trial court. Learned trial court has gone through entire evidence as well as facts and circumstances of the case and has considered all relevant issues at length. The conclusion drawn by trial court is based on judicious analysis of evidence in the light of various pronouncements of Hon'ble Apex Court as well as those of this Court.

99. In view of discussion made and conclusion drawn above, we are of the view that learned trial court has rightly placed reliance upon evidence on record to convict accused appellant Ram Bachan for offence punishable u/s 302 I.P.C. and surviving accused appellants Chandrika and Hari Lal for offence punishable u/s 302 I.P.C. read with section 34 I.P.C.. Conviction recorded by trial court against

accused appellant Ram Bachan for offence punishable u/s 337 I.P.C. read with section 34 I.P.C. and against surviving accused appellants Chandrika and Hari Lal for offence punishable u/s 337 I.P.C. is erroneous but for reasons mentioned above, no interference is required in this appeal.

100. Sentences awarded by trial court are not excessive.

101. In view of discussion made and conclusion drawn above, we are of the view that no interference in impugned judgment and order is required. Appeal has no merit and is liable to be dismissed.

102. Accordingly, the appeal is dismissed.

103. Accused appellants Ram Bachan, Chandrika and Hari Lal are on bail. They shall surrender before trial court within 30 days from the date of this judgment for serving sentence awarded to them, failing which trial court shall ensure their arrest and shall send them jail for serving sentence.

104. Let a copy of this judgment be sent to trial court for securing compliance.

105. Send back records of trial court immediately.