

**(2017) 03 AHC CK 0221**  
**In the Allahabad High Court**  
**Case No : 1292 of 2008**

Ram Bahadur Yadav and others

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision :** 30-03-2017

**Acts Referred:**

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused  
[Indian Penal Code, 1860](#), [Section 304](#),  
[Section 147](#), [Section 324](#), [Section 323](#), [Section 506](#), [Section 149](#), [Section 504](#), [Section 308](#) - Punishment for culpable homicide not amounting to murder - Punishment for rioting - Voluntarily causing hurt by dangerous weapons or means - Punishment for voluntarily causing hurt - Punishment for criminal intimidation - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Intentional insult with intent to provoke breach of the peace - Attempt to commit culpable homicide

**Citation :** (2017) 03 AHC CK 0221

**Hon'ble Judges :** Anil Kumar Srivastava

**Bench :** Single Bench

**Advocate :** S.K. Singh, Kapil Misra, Raj Baksh Singh, S.P. Dwivedi

## Judgement

1. Heard Shri Kapil Misra, learned counsel for the appellant, learned A.G.A., Shri S.P. Dwivedi learned counsel for the complainant and perused the record.
2. Instant appeal has been preferred against the judgment and order dated 04.6.2008, passed by learned Additional Sessions, Judge, Court No.3, Sultanpur in S.T. No.251/2004, arising out of Crime No.206/2001, Police Station Kotwali Dehat, District Sultanpur, whereby the appellants were convicted and sentenced under section 147 IPC for one year rigorous imprisonment, under section 323/149 IPC one year rigorous imprisonment, under section 324/149 IPC two years rigorous imprisonment, under section 504 IPC one year rigorous imprisonment, under section 506 one year rigorous imprisonment and under section 304/149 IPC seven years rigorous imprisonment and fine of Rs.2000/-

with default stipulation of six months.

3. According to the prosecution version, a written report was submitted by Mahabir Yadav stating that on 22.5.2001 at about 08:00 AM, he along with his wife Hubraji was cleaning the conduit at his door. Accused Ram Bahadur, Latheru, Ramesh, Ram Sumiran and Haivat Ram came armed with lathi, farsa and said that if he will try to clean the conduit they will kill him. On resistance by the complainant, all of them started beating him and his wife by lathi and farsa. When his son Premnath and grandson Sanjay came, they were also beaten. Ramesh was armed with farsa while others were armed with lathi. Rajesh Man Singh and others came at the spot. Accused ran away from the place of occurrence. On the basis of the written report case at Crime No.206/2001 was registered at Police Station Kotwali Dehat at 09:20 AM, under section 147, 323, 324, 504, 506 IPC. Investigation was handed over to S.I.D.N. Srivastava. Mahabir was brought to District Hospital Sultanpur at 11:15 AM but his injuries could not be noted as he expired during management. Hubraji was medically examined on 22.5.2001 at 10:55 AM. Following injuries were found on her body :- (i) Lacerated wound "V" shaped 4 x 2.5 cm over frontal region, 2 cm above from root of nose. Bleeding present.

(ii) Incised wound 2 x 0.5 cm x muscle deep, tailing present. Margins well defined. Bleeding just below right eye.

(iii) Linear abrasion 7 cm x 0.2 cm over back of right thigh. Colour reddish.

(iv) Contusion 5 x 2 cm over right shoulder joint.

Injury no.1, 3 and 4 was caused by blunt object and kept under observation. X-ray of skull was advised. Injury no.2 was caused by sharp edged weapon. Injury no.3 and 4 were simple in nature. All the injuries were fresh.

4. On the same day at 11:25 AM, Premnath, son of Mahabir was also medically examined at District hospital Sultanpur. Following injuries were found on his body. (i) Incised wound 8 cm x 3.5 cm over right palm. Dorsally bleeding present. Margine well defined. 4 cm below from right wrist joint. Injury is kept under observation. X-ray advised.

(ii) Abrasion 1 cm x 0.5 cm on right side face 1 cm below from right lower eyelid.

Injury no.2 was simple in nature caused by hard and blunt object. Injury no.1 was caused by sharp edged weapon. All the injuries were fresh in nature.

5. At 11:50 AM on the same day Sanjay Kumar was also medically examined at District Hospital Sultanpur and following injuries were found on his body. (i) Lacerated wound 2.5 cm x 5 cm x scalp deep over left side head. Bleeding present. 9 cm above from left eyebrow.

(ii) Linear abrasion 14 cm x 0.2 cm over left arm. Slight bleeding present. Reddish in colour.

(iii) Abrasion 1.5 cm x 0.5 cm over left thumb dorsally.

(iv) Abraded contusion over left forearm, 2 cm above left wrist joint 2.5 cm x 1 cm.

All the injuries were fresh and simple in nature, caused by hard and blunt object.

6. After the death of Mahabir inquest proceedings were conducted on 22.5.2001 at District Hospital Sultanpur. Thereafter postmortem was done on 22.5.2001 at 05:00 PM by Dr. R.K. Arya. Following antemortem injuries were found on the body of the deceased. (i) Incised wound 5 cm x 1.5 cm x bone deep on left shoulder.

(ii) Contused abrasion 15 cm x 3 cm at outer aspect of left upper arm just below shoulder.

(iii) Incised wound 9 cm x 3 cm x muscle deep on back of chest left side scapula region.

(iv) Incised wound 10 cm x 2.5 cm x muscle deep, left side of chest.

(v) Multiple abrasion on left side chest.

(vi) Incised wound 9 cm x 5 cm on medial side of left thigh, 7 cm above left knee.

(vii) Incised wound 4 cm x 2 cm on lateral side of left sole.

(viii) Incised wound 2 cm x 0.5 cm on lateral side of left foot.

7. According to the Doctor, cause of death was antemortem injuries. Injury no.2 and 5 could have been caused by lathi while other could have been caused by farsa.

8. Investigating officer prepared the site plan. Collected the plain and blood stained earth. After investigation, charge sheet was submitted against accused Ram Bahadur Yadav, Latheru, Ram Sumiran, Haivat Ram and Ramesh.

9. Accused Latheru died during the trial and his case was abated by the trial court vide order dated 23.7.2004. Accused Ramesh was declared juvenile and his case was separated and sent to Juvenile Justice Board for trial.

10. Accused-appellants were charged under section 147, 323/149, 324/149, 504, 506, 308/149, 304/149 IPC who denied the charge and claimed trial.

11. Prosecution has produced PW-1 Hubraji, wife of the deceased Mahabir, PW-2 Premnath son of the deceased, PW-3 Dr. Ramakant Arya, who has conducted the postmortem, PW-4 Dr. C.P. Tiwari, who has medically examined the injured, PW-5 S.I. Dharamnath Srivastava Investigating Officer, PW-6 Constable Rajendra Prasad formal witness PW-7 S.I. Zaki Ullah Farooqui formal witness.

12. In the statement under section 313 Cr.P.C. it is stated by the accused that accused Ram Sumiran has lodged a cross case against Prem Nath, Sanjay,

Balwant, Mahabir and Indrajeet regarding an incident of the same date time and place. In the incident Ram Sumiran and Haivat Ram sustained grievous injuries. They were medically examined. Haivat Ram used the lathi in self defence and in defence of Ram Sumiran. Ramesh snatched the farsa from Sanjay and saved himself. It is further stated that there is an old conduit adjoining the house of the accused Ram Bahadur and deceased Mahabir. Civil litigation is pending. Stay order was in force at the time of incident. Premnath was cleaning the conduit when Ram Sumiran asked them not to do it. Premnath abused him and between by lathi and exhorted the other accused Sanjay, Balwant Mahabir and Indrajeet started beating Ram Sumiran and Haivat Ram by farsa and lathi.

13. On hearing the noise Rajpati, Dinesh Kumar and other villagers came at the spot. In defence DW-1 Dr. CPN Tiwari was produced who has proved the discharge certificate of Ram Sumiran.

14. DW-2 SI Rajendra Prasad is a formal witness, who has registered cross case at Crime No.206 A/1, under section 147, 323, 324, 504, 506 IPC. DW-2 has proved the first information report and the charge sheet in the cross case. DW-3 Dr. C.P. Tiwari has medically examined Haivat ram on 22.5.2001 at 12:40 PM and found following injuries on his body. (i) Lacerated wound 5 cm x 0.5 cm scalp deep at right side of head. 10 Cm above from right ear. Bleeding present.

(ii) Lacerated wound 1.5 cm x 0.5 cm over head. 6 cm above from right eyebrow. Bleeding present.

(iii) Lacerated wound 3 cm x 0.5 cm over top of head 8.5 cm above from left ear. Bleeding present.

(iv) Lacerated wound 2 cm x 0.5 cm over right ear on top. Bleeding present.

(v) Lacerated wound 3 cm x 0.5 cm top of head. Bleeding present.

15. All the injuries were kept under observation. X-ray was advised. All the injuries could have been caused by hard and blunt object and wre fresh in nature. On the same day at 12:50 PM Dr. Tiwari examined Ram Sumiran and found following injuries on his body. (i) Lacerated wound 1.5 cm x 0.5 cm over head, 8 cm above from right ear. Bleeding present.

(ii) Lacerated wound 2.5 cm x 0.5 cm over back of head, 7.5 cm above from left ear. Bleeding present.

(iii) Abrasion 8 cm x 2 cm over top of left shoulder. Skin colour reddish.

(iv) Contusion 4.5 cm x 1.5 cm over left shoulder.

(v) Traumatic swelling 8 cm x 4.5 cm over left forearm just above left wrist joint. Advised X-ray.

(vi) Abrasion 10 cm x 2 cm over right shoulder. All the injuries except injury no.5 were simple, were caused by hard and blunt object and were fresh in nature.

16. After appreciating the evidence on record, learned trial court has recorded a finding that it is a case wherein the accused were aggressor, accordingly learned trial court recorded a finding of conviction against the accused appellant.

17. Learned counsel for the appellant submits that the prosecution has failed to prove the charges against the accused beyond reasonable doubt. It is submitted that it was a case of free fight wherein both the parties have sustained injuries. Prosecution has not explained the injuries on the body of the accused. Even the incident of causing injuries to the accused is denied by the prosecution witnesses which makes the genesis of the case doubtful. It is further submitted that the learned trial court has recorded a finding that accused have suffered injuries in the same incident but have mis-appreciated the evidence while holding that the accused were aggressor. It is submitted that accused were not the aggressor.

18. At the very outset, finding recorded by the learned trial court at para no.37 to 40 are very relevant which are as under :- "VERNACULAR MATTER OMITTED"

19. Finding has been recorded by the learned trial court that accused have also sustained injuries in the same incident which finding is not challenged by the prosecution, hence, burden lies upon the prosecution to explain the injuries of the accused as well as to prove the genesis of the incident.

20. It was held in *Puran v. State of Rajasthan*, 1976 (1) SCC 28 by three judges bench of the Hon'ble Apex Court that in a case of sudden mutual fight between the parties no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability would arise, It was held in *Mariadasan and others v. State of Tamil Nadu*, 1980 (3) SCC 68 that when the whole fight started suddenly on the spur of the moment in a heat of passion, accused could only be liable for the individual acts committed by them.

21. In *Laxmi Singh v. state of Bihar*, 1976 (4) SCC 94, it was held that where the prosecution fails to explain the injuries on the accused two results follow. (1) That the evidence of the prosecution witnesses is untrue and

(2) That the injuries probablize the plea taken by the appellants.

22. It was further held that " it seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences :- (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the

prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in *State of Gujarat v. Bai Fatima* (supra), (1975) 2 SCC 7, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and supreficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

23. In *Dashrath Singh v. State of U.P.*, 2004(7) SCC 408 it was held by the Apex Court that:- " The injuries of serious nature received by the accused in the course of the same occurrence would indicate that there was a fight between both the parties. In such a situation, the question as to the genesis of the fight, that is to say, the events leading to the fight and which party initiated the first attack assumes great importance in reaching the ultimate decision. It is here that the need to explain the injuries of serious nature received by the accused in the course of same occurrence arises. When explanation is given, the correctness of the explanation is liable to be tested. If there is an omission to explain, it may lead to the inference that the prosecution has suppressed some of the relevant details concerning the incident. The Court has then to consider whether such omission casts a reasonable doubt on the entire prosecution story or it will have any effect on the other reliable evidence available having bearing on the origin of the incident. Ultimately, the factum of non-explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non-explanation of serious injuries may prima facie make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predicate which version is true, then, the factum of non-explanation of the injuries assumes greater importance. Much depends on the quality of the evidence adduced by the prosecution and it is from that angle, the weight to be

attached to the aspect of non-explanation of the injuries should be considered. The decisions above cited would make it clear that there cannot be a mechanical or isolated approach in examining the question whether the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version."

24. In *Arshad Hussain v. State of Rajasthan*, (2013) 14 SCC 104, Hon"ble the Apex Court has held that :- "It is well settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted for the offence punishable under Section 302 IPC. Inasmuch as the prosecution failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story has to be rejected."

25. In *Bhagwan Sahai and Another v. State of Rajasthan*, Criminal Appeal No.416 of 2016 (arising out of SLP (Crl.) No.2301 of 2016) decided by the Hon"ble Apex Court on 03.6.2016, it was held that once the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused including death of father of the appellants, the only possible and probable course left open was to grant benefit of doubt to the appellants.

26. In view of the above legal propositions now we have to examine the prosecution evidence.

27. At the very outset, it is finding of the learned trial court as referred above that there was a free fight between the parties. Learned trial court has held that the accused are aggressor. To substantiate the plea of free fight learned trial court has taken into consideration the first information report as lodged by the complainant as well as the first information report lodged by the accused. In both the reports date, time and place of the incident is same, i.e., 22.5.2001 at 08:00 AM. Cause of dispute is also same, i.e., cleaning of conduit which is adjoining to the house of deceased Mahabir and accused. In the site plan also Investigating Officer has found the conduit towards northern side of the house of Mahabir. Accused have also sustained injuries on their body as has been proved by Dr. Tiwari. Injuries were such which were visible by naked eyes as the injuries were on head, shoulder of accused Ram Sumiran and Haivat Ram. It cannot be said that the injuries were superficial in nature or were at a place which could not be seen by naked eyes.

28. PW-1 Hubraji is wife of the deceased who has stated that when she was cleaning the conduit along with the husband accused came and attacked her husband and herself. Premnath and Sanjay were also beaten. Specific case is taken by her that none of the member of her side has caused any injury to the accused. Her husband, Premnath and Sanjay were not armed with lathi. She has not seen any injury on the body of Haivat Ram or Ram Sumiran. Specific

suggestion was given to her on this count but she denied that any injury was caused to the accused. PW-2 Premnath is also allegedly injured in the incident who is son of the deceased. He has also stated that no injury was caused to Ram Sumiran and Haivat Ram. He has not seen any injury on their body. Accused have come and attacked his father and mother. Thereafter when he and Sanjay came they were also beaten. Specific suggestion was also given to this witness regarding cross case but she specifically denied that any injury was caused to the accused or any injury was seen by him on the body of the accused Ram Sumiran and Haivat Ram. In defence, injuries of Ram Sumiran, Haivat Ram were proved by cogent evidence then burden lies upon the prosecution to prove as to how the injuries were caused to the accused but the prosecution witnesses have specifically denied that any injuries were caused to the accused in the incident. It shows that the genesis of the incident is being made doubtful by the evidence of the witnesses. It is settled legal position that if the genesis of the incident is doubtful, benefit of the same should be given to the accused. Benefit of non-explanation of the injuries on the body of the accused would also be extended in favour of the accused.

29. Learned trial court has recorded a finding that the accused were aggressor which is also not supported by the evidence on record. Cross version was filed by the accused. Learned trial court has also recorded a finding that it was a case of free fight. Incident occurred in a spur of moment. There was a dispute between the parties. Dispute arose on cleaning of conduit wherein both parties entered into the fight but the prosecute in failed to explain the injuries on the body of the accused. Accordingly, it could not be proved that the accused were aggressor. Genesis of the incident is also not proved. Accordingly appeal deserves to be allowed and is accordingly allowed. Judgment and order dated 04.6.2008 passed by learned trial court is set-aside. Accused appellants are acquitted of the charges levelled against them. They are on bail. Their bail is cancelled and sureties are discharged.

30. Office is directed to certify the judgment to the learned lower court forthwith. Office is further directed to send the lower court record to the learned trial court forthwith. Learned trial court should send the compliance report within eight weeks.