
(2003) 09 RAJ CK 0024

In the Rajasthan High Court

Case No : Criminal Appeal No's. 77 and 381 of 1997

Rang Lal and Others

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 09-09-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 300, 302, 303, 304

Citation : (2004) CriLJ 316 : (2004) WLC 245

Hon'ble Judges : Shiv Kumar Sharma, J;Khem Chand Sharma, J

Bench : Division Bench

Advocate : A.K. Gupta, Alka Bhatnagar, Priyanka Pareek and Mahesh Gupta, for the Appellant; B.M. Sharma, Public Prosecutor and A.K. Gupta, for the Respondent

Judgement

Khem Chand Sharma, J.—Both the criminal appeals, one by 8 accused-appellants against their conviction and another by the State Rajasthan against acquittal of accused-respondent Ghasi arise out of judgment and order dated 26-8-1997 thereby acquitting accused-respondent Ghasi of the offence under Sections 148, 323, 324, 325 and 302/149, I.P.C. and convicting and sentencing the accused-appellants in Appeal No. 381/97 in the manner stated below :

1. Accused-appellant Ranglal

Under Section 302, IPC Life imprisonment with a fine of Rs. 5000/-, in default of payment of fine, to further undergo six months simple imprisonment.

Under Section 324/149, One month's rigorous im- IPC prisonment with a fine of Rs. 1000/-, in default thereof, to further undergo one month's simple imprisonment.

Under Section 323/149, One- month's simple impri- IPC sonment.

Under Section 148, IPC One month's simple imprisonment.

2. Accused-appellant Kanhaiya Lal

Under Section 302, IPC Life imprisonment with a fine of Rs. 5000/-, in default of payment of fine, to further undergo six months" simple imprisonment.

Under Section 324, IPC One month's rigorous imprisonment with a fine of Rs. 1000/-, in default thereof, to further undergo one month's simple imprisonment.

Under Section 323/149, One month's simple impri- IPC sonment.

Under Section 148, IPC One month's simple imprisonment.

3. Accused-appellant Jansi alias Netram & Smt. Gulab

Under Section 302/149, Life imprisonment with a 1PC fine of Rs. 5000/-, in de fault of payment of fine, each to further undergo six months" simple impri sonment.

Under Section 324, IPC One month's rigorous imprisonment with a fine of Rs. 1000/-, in default thereof, each to further undego one month's simple imprisonment.

Under Section 323/149, One month's simple impri- IPC sonment to each.

Under Section 148, IPC One month's simple imprisonment to each.

4. Accused-appellants Mando alias Malya. Smt. Kaushalya, Smt. Nahani and Dhanpal

Under Section 302/149, Life imprisonment with a IPC fine of Rs. 5000/-, in de fault of payment of fine, each to further undergo six months" simple impri sonment.

Under Section 324/149, One month's rigorous im- IPC prisonment with a fine of Rs. 1000/-, in default thereof, each to further undergo one month's sim ple imprisonment.

Under Section 323, IPC One month's simple imprisonment to each.

Under Section 148, IPC One month's simple imprisonment to each.

All the substantive sentences were ordered to run concurrently.

2. As per the prosecution case, PW-10 Jagdish Prasad Sharma, ASI, Police Station, Rajgarh recorded the Parcha Bayan (Ex. P3) of injured Dhanna S/o Sedu Ram in Referral Hospital, Rajgarh on 12-11-1993 at 9.00 p.m. The injured in his Parcha Bayan alleged that on the day of incident at about 4.00 pm. when he and his brothers Ganesh, Chuttan and Ram Kishan were present at their house, all of a sudden accused Kanhaiya, Ranglal, Dhanpal, Ghasi, Bodha, Mst. Kaushlya, Gulab w/o Dhanpal, Shanti w/o Kanhaiya, Nahni w/o Ranglal and one more lady (wife of one Netram) came there duly armed with Lathis and Barchi. Soon their reaching, accused Kanhaiya inflicted an axe (Tanchya) blow on his head, as a result thereof, blood oozed out from his head. Accused Dhanpal struck lathi blow on the upper part of his left elbow. He also sustained injury on the left palm in

the course of saving himself from axe blow; Accused-Ranglal inflicted Barchi blow on the head of Chuttan, while accused Kanhaya struck axe blow. Accused Ghasi and the lady accused also belaboured his brother Chuttan by lathis. Chuttan succumbed to injuries on the spot. The injured alleged that Neta s/o Kanhaiya had also participated in the incident. According to Parcha Bayan, the incident was a result of some land dispute between the parties.

3. On the basis of above Parcha Bayan, police registered a case vide FIR No, 127/ 93 for offence under Sections 147, 148, 149, 302, 323, 307, 324 and 452, IPC and proceeded with the investigation.

4. In the course of investigation, police prepared site plan, Ex. P.32 and the inquest report, Ex.P4. The police seized the bloodstained clothes of deceased Chuttan vide seizure memo Ex.P.8 and collected bloodstained soil and control soil from the place of occurrence and prepared seizure memos Exs. P.33 and 34, respectively. Injured Ram Kishan, Ganesh, Dhaniya and Mangilal were medically examined and their injury reports are Exs. P.7, 17, 18 and 20 respectively.

5. P.W. 9 Dr. Mohan Lal Veerani conducted autopsy on the dead body. He found (i) incised wound 3 cm x .2 cm x bone deep with fracture of right orbit at right forehead Just near right eyebrow, and (ii) incised wound 2.5 cm x .3 cm x bone deep, right temporal region of skull with fracture of bone, right temporal. Swelling right forehead full region, full right parietal region, full left parietal region with fracture, right temporal bone of skull, fracture of right and left parietal bone of skull. In his opinion, the cause of death of deceased was due to laceration brain head injury, injury to big brain vessels and S. Haemorrhage (severe). The duration of death was stated to be within 24 hours.

6. Dr. Veerani also examined injured Ram Kishan, Ganesh, Dhaniya and Mangilal and found following injuries :

1. Injured Ram Kishan:

(i) Superficial incised wound 2.3 cm x .2 cm x 1 cm deep on right forehead (simple by sharp)

(ii) Swelling 2 cm x 2 cm on lower third right leg (simple by blunt)

2. Injured Ganesh

1. Bruise 7 cm x 5 cm on upper 1/3rd of left thigh laterally (simple by blunt)

2. Abrasion 6 cm x 4 cm Just above left side of umbilicus (simple by blunt)

3. Abrasion 5 cm x 3 cm Just above left nipple (simple by blunt)

4. Abrasion 5 cm x 2.3 cm posteriorly of right neck (simple by blunt) 3. Injured Dhaniya

1. Incised wound 5 cm x .5 cm x .7 cm deep on right parietal region of scalp (simple by sharp)

2. Incised wound 2 cm x .5 cm x .5 cm deep on dorsal side of left hand (simple by sharp)

3. Penetrating wound .5 cm x .3 cm x 2 cm deep on lower 1/3rd of right arm lateral side (X-ray advised)

4. Swelling 3 cm x 2.5 cm on left arm (simple by blunt)

4. Injured Mangilal

1. Swelling 4 cm x 4 cm radial side lower 1/3rd of left forearm (by blunt, X-ray advised)

2. Incised wound 8 cm x 1 cm x .4 cm on right renal region (simple by sharp)

3. Swelling 10 cm x 10 cm on right shoulder (by blunt -- X-ray advised)

4. Lacerated wound 2 cm x 1 cm x .2 cm deep right forehead (simple by blunt)

7. On X-ray examination (vide Ex. P. 27 and Ex.P. 29) of injured Mangilal and Dhanial, the radiologist found fracture of coracoid process of right scapula of Mangilal and chip fracture of medial end of lower 1/3rd humerus of injured Dhanial.

8. Dr. M.L. Veerani, Medical Officer, Referral Hospital, Rajgarh also examined accused Mst. Nahni, Mst. Kaushalya, Ranglal, Ghasi and Kanhaiya on 13-11-1993. He found one lacerated wound and one abrasion on the person of Mst. Nahni, two lacerated wound on the person of Mst. Kaushalya, one lacerated, swelling and an abrasion on the person of accused Ranglal and 7 injuries on the person of accused Ghasi. Injury No. 2 on right clavical region and on right forearm of Ghasi were advised to be X-rayed. Accused Kanhaiya also sustained 5 injuries, out of which one Was incised, 3 were lacerated wounds and one was abrasion. On X-ray, two fractures were found one of middle 1/3rd shaft of clavical and middle 1/ 3rd shaft of radius of injured Ghasi.

9. The accused were arrested by the police. Accused Ghasi Ram, Kanhaiya, Ranglal, Dhanpal, Mst. Kaushalya and Mst. Nahni furnished information u/s 27 of the Evidence Act, regarding recovery of respective weapon of offence. Pursuant to the information furnished by accused Dhanpal. Mst. Kaushalya and Mst. Nahni, the police recovered 3 lathis at their instance vide memos Exs. P9, 10 and 11, respectively. Pursuant to the information furnished by accused Ranglal and Kanhaiya, police recovered a Farsi and Tanchya respectively vide memo Exs. P. 13 and P. 14. The police also recovered a Farsi vide memo Ex. P. 15 pursuant to the information furnished by accused by accused Ghasi Ram.

10. Blood smeared soil, Baniyan, Dhoti and Towel of deceased and recovered weapons were sent to the Forensic Science Laboratory for examination. The FSL report, Ex.P.41 indicates the presence of "B" group blood over these articles except lathis.

11. Having complete entire formalities, the police submitted a charge-sheet

against the accused persons in the Court of Additional Chief Judicial Magistrate, Rajgarh. The learned Magistrate having found the offence exclusively triable by the Court of Session, committed the case to the Court of Session.

12. The learned trial Court on the basis of evidence and material collected during investigation and placed before it and after hearing counsel for the parties framed charges against the accused. The accused denied the charges and claimed trial.

13. In the course of trial, the prosecution, in order to prove its case examined as many as 17 witnesses and got exhibited some documents. Thereafter the accused were examined u/s 313, Cr.P.C. In defence, the accused examined DW-1 Ghashi Ram and DW-2 Jangali and got exhibited injury reports and X-ray report and other documents.

14. At the conclusion of trial, the learned trial Judge found the prosecution case as alleged proved and accordingly convicted and sentenced the appellants as stated aforementioned. Being dissatisfied with the conviction, the appellants have preferred the appeal, while the State has preferred appeal against acquittal of accused Ghasi.

15. We have heard learned counsel for the parties and gone through the impugned judgment and the evidence and material available on record.

16. Out of 17 witnesses examined on behalf of the prosecution, PW-2 Dhanna, PW-3 Mangya, PW-4 Ram Kishan and PW-6 Ganesh are the injured eye-witnesses, while PW-5 Kishan Sahay reached at the place of incident on hearing abuses.

17. PW-2 Dhanna, who is brother of deceased Chuttan, in his examination-in-chief has deposed that the incident happened at 4.00 p.m. at the gate of his house situated in Village Sakat. Accused Ranglal, Kanhaiya, Ghasi, Budha, Dhanpal, Jansi, Kaushalya, Mst. Mando, Mst. Shanti and Mst. Gulab participated in the incident. Accused Kanhaiya and Jansi had Tanchya in their hands, while accused Ranglal, Gulab and Ghasi were armed with Farsis and others had lathis in their hands. According to the witnesses there was long standing enmity between the parties. At the relevant time, the witness along with Ram Kishan and Ganesh were present at their house and the accused duly armed with weapons came there and abused them. Having heard abuses, Mangya and Kishan also came there. All of them requested the accused not to do so, but of no avail. According to the witness, the accused Kanhaiya struck sharp side of Tanchya blow on his head, while accused Dhanpal struck lathi blow on his right elbow. Third blow by Tanchya was struck on his head by accused-Jansi. Dhanna took that blow on his hand, which resulted in causing injury on his hand. Mangya, Kishan and Ganesh managed to save Dhanna, but accused Ranglal inflicted a farsi blow on the head of Chuttan, causing injury. Accused Kanhaiya then inflicted Tanchya blow on the head of Chuttan, as a result thereof, Chuttan fell down and died spontaneously. After Dhanna fell down, Ghashi and Kaushalya

belaboured him and thereafter he succumbed to the injuries. He then stated that accused Ghasi inflicted blow on the head of Ganesh, Kaushalya inflicted lathi blow on the chest of Ganesh, Nahni also struck lathi blow on Ganesh. Accused Smt. Gulab inflicted Farsi blow on the forehead of Ram Kishan and Nahni also struck lathi blow on Ram Kishan. Chuttan was brought to Rajgarh Hospital at about 9,00 p.m. He then stated that his Parcha Bayan, Ex.P.3 was recorded in the hospital in the presence of doctor in the night itself, which bears his thumb impression at place "X".

18. In cross-examination, PW-2 Dhanna stated that complainant party and accused persons belong to the same family. He admitted that a case was also pending against them which was instituted from the side of accused party in their defence. His statement was recorded twice, firstly by the doctor and secondly by the police. The police at Tahla was informed after the dead body was brought to the hospital and thereafter the Sub-Inspector came there. According to the witness, Sub-Inspector did not make any enquiry in the night and that he had shown the dead body to the Sub-Inspector in the next morning. Thereafter he informed the Sub-Inspector that accused Kanhaiya and Ranglal have murdered Chuttan by Tanchya and Farsi.

19. PW-4 Ram Kishan and PW-6 Ganesh, both brothers of the deceased were also present at the time and place of incident and both have sustained injuries at the hands of accused. These witnesses have supported the statement of PW-2 Dhanna and have narrated the happening of incident in the same manner as has been stated by PW-2 Dhanna.

20. PW-3 Mangya came to the place of occurrence after he heard abuses. He stated that incident took place at about 3-4 p.m. in front of the house of PW-2 Dhanna. He stated the name of the accused as Ghasi, Kanhaiya, Ranglal, Dhanpal, Jansi, Budha, Mst. Gulab, Mst. Kaushalya, Mst. Nahni, Mst. Mando and Mst. Shanti. According to this witness, all the accused came together. Accused Ghasi, Ranglal and Gulab, were armed with Farsis, while Kanhaiya and Jansi had Tanchya and others had lathis with them. He stated that he reached the place of incident while accused were abusing Dhanna, Ganesh, Chuttan, Ram Kishan and Kishan Sahay and then he and others made the accused to understand. Accused Ghasi and Kanhaiya asked him as to why he came there. They (accused) would belabour them (members of the complainant party). Thereafter Kanhaiya inflicted Tanchya blow on the head of Dhanna and Dhanpal inflicted lathi blow on the right elbow of Dhanpal. The third blow on the head of Dhanna by Tanchya was aimed by accused Jansi, but Dhanna took that blow on his hand, as a result thereof, Dhanna sustained injury on his hand. The witness stated that they managed to save Dhanna. Accused Ranglal inflicted a Barchi blow on the centre of head of Chuttan. The second blow by Tanchya was struck by accused Kanhaiya on the head of Chuttan. Thereafter Chuttan fell down and died. Accused Ghasi, Mst. Kaushalya and Gulab belaboured Chuttan while he was lying on the earth. Accused Gulab struck farshi blow on the head of Ram Kishan. Accused Nahni

inflicted lathi blow on Ram Kishan. Accused Ghasi inflicted a farshi blow on the head of Ganesh. Accused Mst. Manda and Kaushlya also struck lathi blows on Ganesh. According to this witness, accused Budha told that one has died let others be killed and thereafter all the accused ran away. The witness could not state as to what was the cause of incident. He also sustained injury and was medically examined at Rajgarh Hospital. He stated that he sustained injuries on his shoulder and hand at the hands of accused Ghasi, Dhanpal and Budha.

21. In cross examination, the witness stated that they brought Chuttan to the hospital at Rajgarh at about 10-11 pm. He had seen the Sub Inspector in the hospital at 8.00 a.m. in the next morning. At the time of preparation of Inquest Report, he had disclosed him that accused Kanhaiya and Ranglal have murdered Chuttan by Farshi and Tanchya. He sustained in all 4 injuries. He then stated as to which of the accused inflicted injuries on his person. At the first instance, the witness stated that he had disclosed to the doctor the names of the accused who inflicted injuries on his person, but did not disclose this fact to the Sub Inspector. Then he stated that he had disclosed the names of the accused who inflicted injuries on his person. The witness stated that skull of deceased Chuttan had divided in two parts. He reached the place of incident on hearing the cries and none came to call him. Kishan Sahay met him at the place of incident. First of all Dhanna was belaboured and then deceased Chuttan was belaboured. The witness stated that he along with Dhanna, Ram Kishan Sahay were present there at the time when Ganesh was being belaboured and all of them were trying to save themselves. The witness stated that they stayed at the place of incident and did not escape from scene. The incident took place in front of the house of Dhanna. At the time of his reaching the place of incident, the members of the complainant party were present there. According to the witness, the members of the complainant party had neither lathi, nor tanchya nor barchi in their hands.

22. PW 5 Kishan Sahay is yet another chance witness who came at the place of incident on hearing the abuses. He has deposed about the happening of incident in the same manner as has been deposed by PW 3 Mangya. In cross examination, the witness stated that at the time of incident, he was present at his house, which is situated at the distance of two fields from the place of incident. He had heard the sound of abuses at his house. He waited for 2-5 minutes and then rushed to the place of incident. Mangya reached first. He denied that he and Mangya reached the place of incident duly armed with lathis. Accused persons were standing in the chowk outside the house of Dhanna. The distance between the complainant party and the accused was 5-6 steps and that members of the complainant party were unarmed. Dhanna and Ganesh were tormenting "HAMKO MARA HAMKO MARA" and the accused were hurling abuses. The witness stated that he did not observe any injury on the persons of complainant party at the time when they were tormenting. Ram Kishan. Ganesh and Chuttan were also present there when accused was belabouring Dhanna and they did not escape from the scene as they were trying to save their brother. According to this witness, he neither tried to hold any of the accused nor he tried

to hold the weapons of the accused. What he did to intervene was to request the accused with folded hands, but of no avail. Ganesh, Chuttan and Ram Kishan saved Dhanna from the clutches of accused. Injured Dhanna sustained injury on his head above left eye. The Barchi blow struck by accused Ranglal and Tanchya blow struck by accused Kanhaiya hit at the centre of head of Chuttan. Except accused Ranglal and Kanhaiya, no other accused caused injury to Chuttan. On a question being put to him, the witness stated that he does not remember whether he disclosed to the police the infliction of Farshi blow by accused Ghasi on the leg of Ganesh.

23. PW 9 Dr. Mohan Lal Veerani has deposed that at the relevant time he was posted as Medical Officer in Referral Hospital, Rajgarh and on the requisition of SHO, Tahla he conducted post mortem on the dead body of Chuttan on 13-11-1993. He noticed two injuries on the person of deceased. In his opinion the deceased died of lacerating of brain, head injury, haemorrhage and excessive bleeding. The duration of injuries was within 24 hours. The head injuries and injury No. 1 could be caused by any sharp edged weapon viz., Kulhari, Tanchya, Farshi, Sword etc. The injuries No. 1 and 2 were sufficient in the ordinary course of nature to cause death. There was every likelihood of death due to these injuries and there was no possibility to survive. He admitted to have prepared the post mortem report Ex. P. 16 and also admitted his signatures from A to B on it. The witness stated that he conducted autopsy in Rajgarh Hospital at 9.00 am on 13-11-1993.

24. On 13-11-1992 he also examined injured Ram Kishan, Ganesh, Dhanna and Mangilal on 13-11-1993. He noticed two injuries on the person of Ram Kishan which were simple in nature. Injury No. 1 was caused by sharp weapon while another was by blunt weapon. He prepared the injury report Ex. P. 7, which bears his signatures from C to D, The witness stated that he found 4 injuries, one bruise and 3 abrasions on the person of injured Ganesh. All the injuries were simple in nature and were caused by blunt weapon. He admitted to have prepared the injury report, Ex.P. 17. He found 4 injuries on the person of injured Dhanna. The witness stated that injuries No. 1, 2 and 4 were simple in nature, while injury No. 3 was advised for X-ray. He stated that injuries No. 1 and 2 were caused by sharp edged weapon, injury No. 3 was caused by pointed weapon and injury No. 4 was caused by blunt weapon. He stated that injury No. 3 described in Ex.P. 18 was found to be grievous in nature, on the basis of X-ray. The witness stated that he also examined Mangilal and found 4 injuries on his person. Injuries No. 1, 3 and 4 caused by blunt object and injury No. 2 was caused by sharp edged weapon. Injuries No. 1 and 3 were advised for X-ray, On the basis of X-ray the witness stated that injury No. 3 on the shoulder was grievous in nature.

25. The doctor also examined Nahni w/o accused Ranglal, Mst. Kaushlya, accused Ranglal, accused Ghasi and accused Kanhaiya. He noticed one lacerated and another abrasion on the person of accused Nahni. Both the injuries were the

result of blunt object. The witness stated that he examined injured Mst. Kaushlya on 13-11-1993 and found two lacerated wound both were simple in nature. The injury report Ex.D.7 bears his signature from A to B. He examined accused Ranglal and found 3 injuries. All the three injuries were simple in nature. On the person of Ghasi, the witness found 7 injuries on his person. He stated that all injuries were caused by blunt object. He then stated that injury No. 3 was caused by sharp edged weapon. Injuries No. 2 and 7 were advised for X-ray. The witness stated that he also examined accused Kanhaiya and found as many as 5 injuries on his person. Injury No. 1 was caused by sharp edged weapon, while injuries No. 2, 3, 4 and 5 were caused by blunt object. Injuries No. 1 to 4 were simple in nature and injury No. 5 was advised for X-ray. The witness stated that on the basis of X-ray report, injury No. 5 was of simple nature.

26. On a careful scrutiny of the testimony of above referred eye witnesses and the medical evidence, it is crystal clear that:

- (1) Accused Ranglal inflicted Farshi blow on the head of deceased Chuttan.
- (2) Accused Kanhaiya inflicted Tanchya blow on the head of deceased Chuttan.
- (3) Accused Kanhaiya inflicted Tanchya blow on the head of Dhanna.
- (4) Accused Jansi inflicted Tanchya blow on the hand of Dhanna.
- (5) Accused Mst. Gulab inflicted Farsi blow on the fore-head of Ram Kishan.
- (6) Accused Dhanpal inflicted lathi blow on the elbow of Dhanna.
- (7) Accused Mst. Nahni inflicted blow on the right leg of Ram Kishan.
- (8) Accused Mst. Kaushlya and Mst. Mando inflicted lathi blows on the chest and leg of Ganesh.

27. On a careful scrutiny of evidence, it could not be proved as to who caused the penetrating wound on the right hand of Dhanna. It could not also be proved beyond doubt that who caused injuries on the person of Mangya, as there was no mention of injuries of Mangya in the Parcha Bayan, Ex.P3 (FIR Ex.P.31) and the witnesses made contradictory statements on this point. That apart, witness Ganesh specifically stated that no one except Dhanna, Chuttan, Ram Kishan and he himself sustained injuries.

28. The allegation against Ghasi in Parcha Bayan, Ex.P.3 was that he inflicted lathi blow on the person of deceased Chuttan. The injured eye witness Dhanna in his statement has deposed that Ghasi inflicted Farsi blow on the head of Ganesh. PW 4 Ganesh himself and PW 3 Mangya have also deposed that Ghasi inflicted Farsi blow on the head of Ganesh. Ram Kishan has deposed that Ghasi inflicted lathi blow on the leg of Ganesh. It is also pertinent to note that in pursuance to the information, Ex.P.35 furnished by Ghasi, a Farshi was recovered from him vide memo Ex.P. 15. There is no injury on the head of Ganesh as per his injury report Ex.P. 17. Similarly, Chuttan sustained only two incised wounds

on his head and there was no injury by blunt weapon on his person. PW 5 Kishan Sahai in his cross examination has specifically deposed that no one except Ranglal and Kanhaiya inflicted injuries on the person of Chuttan. Therefore, the prosecution, in our firm view, could not prove that Ghasi inflicted any injury either on the person of Chuttan or on the person of Ganesh.

29. Having concluded the role of each appellant in the incident, we now advert to the arguments advanced by the learned counsel for the appellants.

30. Mr. Gupta, learned counsel appearing for the appellants contended with vehemence that the prosecution has suppressed, the genesis of the incident. It is submitted that the injuries sustained by accused Kanhaiya, Ghasi, Ranglal, Mst. Kaushlya and Nahni have not been explained by the prosecution and therefore, the prosecution evidence deserves to be discarded. Learned counsel argued that the appellants had a right of private defence to their persons and property and they have not exceeded their right.

31. We have given our anxious consideration to the above argument. To appreciate the argument, we feel it necessary to have reappraisal of evidence available on record, so as to arrive at the conclusion, whether (i) the incident occurred in front of the house of Dhanna or at the field of accused and (ii) who was the aggressor, whether it was complainant party or the accused appellants and (iii) was it a case of sudden fight or free fight.

32. The learned trial Court has arrived at a conclusion that (i) the incident occurred in front of the house of Dhanna, (ii) the cases arising out of the Parcha Bayan of Dhanna and Ghasi were not the cross cases, (iii) the accused appellants were aggressors and (iv) no case of free fight is made out,

33. The site plan, Ex.P.32 drawn by PW 17 Jai Narain indicates the presence of blood at place "A" (a place in front of the house of injured Dhanna). As per the prosecution case the occurrence took place at place "A", in front of the house of Dhanna, while the defence version is that occurrence took place in the field of accused. The fact that incident happened in front of the house of Dhanna stands substantiated by the attaining circumstances and the oral testimony of eye witnesses of the incident. Blood was found at place "A" in front of the house of Dhanna. Accused Ghasi also lodged a report in regard to the alleged incident occurred at his field but has failed to get exhibited the site plan drawn by the Investigating Officer in the case instituted on his report. Therefore, it cannot be said that there were traces of blood or visible signs of violence in the field of accused Ghasi. In this view of the matter, we are of the view that the trial Judge has, on correct appreciation of evidence on record, rightly concluded that the incident occurred in front of the house of Dhanna.

34. The learned trial Court has also concluded that two cases, one instituted on the Parcha Bayana of Dhanna and another instituted on the Parcha Bayan of Ghasi were not the cross cases and that accused persons were the aggressors. On the basis of evidence the trial Court was of the view that no case of free fight

is made out PW 17 Jai Narain, Investigating Officer has deposed that since there was difference as to the time of happening of two incidents and the places where the incidents took place and therefore, the two cases were not the cross cases. However, the charge sheet, Ex.D. 13 submitted by him after investigation on the report of Ghasi indicates that case arising out of FIR No. 127/.93 for offence u/s 302, IPC on the basis of Parcha Bayan of Dhanna is a cross case of that case. The accused appellants in their memo of appeal have assailed the finding of the learned trial Judge on this point as it being perverse. As per the averments in the memo of appeal, both the incidents took place at the same time and place and both the cases were cross cases. PW 3 Mangya has categorically deposed that when he reached at the place of incident, both the parties were standing in front of the house of Dhanna and he tried to make them understand not to hurl abuses. He has deposed in specific terms that at the time of beating, both the parties were facing each other. Similarly, P.W. 4 Ram Kishan in his cross-examination has admitted that the accused persons hurled abuses for 10-25 minutes and thereafter they gave beating. P.W. 5 Kishan Sahai has also deposed that when he reached at the place of incident he found the accused standing in front of the house of Dhanna and Dhanna Ram, Ram Kishan and Chuttan were also standing at the gate of their house and that the distance between them was 5-6 steps. He also deposed that he, with folded hands, tried to persuade the accused persons not to quarrel. P.W. 6 Ganesh has also stated that when the accused arrived at the place of incident, they were sitting at the gate of their house and all the accused hurled abuses for about 10 minutes. They tried to make the accused understand not to hurl abuses. Thus, from the evidence discussed above it becomes crystal clear that accused came in front of the house of Dhanna and hurled abuses to the members of the complainant party and thereafter the present incident took place. It would be worthy to observe that both the parties are members of the same family and residing in the neighbourhood of each other. Therefore, in the facts and circumstances of the case, it can safely be inferred that it was a sudden and free fight between both the parties and hence the question to convict any of the accused with the aid of Section 149, I.P.C. does not arise and the accused-appellants are liable for their individual acts.

35. Learned Counsel for the appellants has contended that it was not a case of either party that there was a free fight between the two sides and, therefore, the Court cannot construct a new theory. In support of his argument, learned counsel for the appellants has relied upon *The State of Uttar Pradesh Vs. Hari Prasad and Others*, The substratum of the prosecution case was that accused had a motive to commit murder of complainant but they mistook the deceased for the complainant and murdered him. In the above situation, the Apex Court held that it is not open to the prosecution to ask the Court to discard the very substratum of their case and to construct a new theory founded on a hypothesis presented for the first time before us. In our considered view the facts involved in the cited case are totally distinguishable with that of the facts involved in the

instant case, therefore, the above case relied upon by the counsel for the appellants has no application to the facts and circumstances of the case. In this connection we may refer to the decision of the Apex Court in the case of Mohammad Khan and Others Vs. State of Madhya Pradesh, wherein the prosecution case was that appellant came with a Bhala and gave blow on the left side of chest of Mohammad Hafiz and the defence version was that on the day of incident the deceased along with others were digging the western compound wall of khandar, which was the subject-matter of the dispute between the parties, when the respondent came and protested and he was then assaulted with lathies by the deceased and Mohammad Hadis. The respondent-Mohammad Khursheed was convicted by the learned Sessions Judge u/s 302, I.P.C. and was sentenced to death. The Sessions Judge made a reference for confirmation of death sentence. The respondent filed an appeal before the High Court. The High Court altered the conviction of convict u/s 302, I.P.C. to one u/s 304-I, I.P.C. on its finding supported by evidence that there was a clash between the respondent on the one side and the deceased on the other side near about the place and time of the occurrence. The Apex Court observed that the finding of the High Court that there was clash between the respondent on the one side and the deceased on the other side at the time and the place, of occurrence, is not vitiated as there is sortie material to support that finding and accordingly, upheld the conclusions of the High Court.

36. It is, therefore, legally permissible to arrive at the truth on the basis of appreciation of evidence adduced by the parties and for that purpose the Court of appeal has unbridled and unfettered powers. In the case at hand, having scrutinized the evidence adduced by the parties, We are of the firm view that the incident occurred suddenly and free fight ensued between the parties.

37. Though, the eye-witnesses of the incident have denied the infliction of injuries to the person of accused-Kanhaiya, Ghasi, Rang Lal, Mst. Kaushlya and Mst. Nahani at the hands of members of the complainant party. However, there are injury reports Ex. D.6 to D.10 of the accused-Kanhaiya, Ghasi, Rang Lal, Mst. Kaushlya and Mst. Nahni and X-ray report of accused-Ghasi Ex. D. 11 which indicate that the above accused also sustained injuries. But the question that emerges for consideration is, whether non-explanation of injuries on the person of accused is sufficient to discard the entire prosecution case? In this connection reference may be made to a decision of their Lordships of the Supreme Court in the case of Bhagwan Tana Patil Vs. The State of Maharashtra, In this case, their Lordships of the Supreme Court have held that there is no hard and fast rule that simply because the prosecution witnesses did not explain the injuries on the person of accused, the entire evidence should be discarded. In the case of Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, it was held by the Apex Court that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so, the prosecution case should be disbelieved. Where the evidence is clear, cogent and

creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

38. In the case at hand, there was a sudden quarrel between the parties and incident took place in front of the house of Dhanna, a common place accessible to all. The evidence of eye-witnesses regarding the version of occurrence is consistent and reliable. Therefore, non-explanation of injuries on the person of accused is not fatal to the prosecution case.

39. The defence of the accused persons was one of denial, so far as the injuries caused on the side of the complainant party are concerned, however, they pleaded that the complainant party was aggressor and it caused multiple injuries to five of the accused persons. However, accused-Ghasi in his statement on oath as D.W. 1 and Jangli D.W. 2 have deposed that Dhanna mistook deceased-Chuttan for Ghasi and inflicted farsi blow on him. Whether the deceased was assaulted through mistaken identity, is a basic question to be considered on the basis of the evidence on record. Ghasi in his Parcha Bayan (FIR Ex. D.17), which was his earliest version of the incident has not disclosed that Dhanna mistook deceased-Chuttan for him and inflicted Farsi blow on Chuttan. The incident occurred in a broad day light, therefore, assault on Chuttan by Dhanna under mistake identity was not at all probable.

40. Now we are to consider the individual acts of each of the accused-appellant. Rang Lal and Kanhaiya inflicted Farsi and Tanchya blow respectively on the head of deceased-Chuttan which proved fatal and Chuttan succumbed on the spot. There are only two incised wounds on the head of deceased-Chuttan. There is no evidence that Rang Lal and Kanhaiya repeated the blows. The incident occurred all of a sudden and free fight ensued between the parties. There is no evidence showing that Rang Lal and Kanhaiya were bent upon killing the deceased. Therefore, the act of appellants-Rang Lal and Kanhaiya in inflicting the injuries on the head of deceased-Chuttan by sharp edged weapons was done with the knowledge that it will likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death. Appellant-Rang Lal and Kanhaiya inflicted blows by sharp edged weapons on the head of Chuttan, a vital part of the body with such a force that Chuttan died on the spot. Therefore, knowledge is to be imputed to accused-Rang Lal and Kanhaiya and hence both are liable to be convicted u/s 304, Part II, I.P.C.

41. It is established from the evidence on record that appellant-Kanhaiya inflicted Tanchya on the head of Dhanna while appellant-Net Ram alias Jansi inflicted Tanchya blow on the hand of Dhanna and Mst. Gulab inflicted Farsi blow on the head of Ram Kishan. Therefore, they are liable to be convicted u/s 324, I.P.C.

42. Appellant-Dhanpal inflicted lathi blow on the elbow of Dhanna, Mst. Nahani inflicted lathi blow on the right leg of Ram Kishan and Mst. Kaushlya and Mando

inflicted lathi blows on the chest and leg of Ganesh. Therefore, they are liable to be convicted u/s 323, I.P.C.

43. As regards appeal preferred by the State against acquittal of accused-Ghasi, suffice it to say that the prosecution has not been able to prove beyond doubt that Ghasi inflicted any injury either on the person of Chuttan or Ganesh. The trial Court was fully justified in recording acquittal of accused-Ghasi. Therefore, appeal preferred by the State of Rajasthan against his acquittal fails and deserves to be dismissed.

44. The net result of our above discussion is that the appeal filed on behalf of the State of Rajasthan fails and is hereby dismissed and the appeal filed by the accused-appellants is partly allowed in the following manner :

(1) Accused-appellant-Rang Lal is acquitted of the charges under Sections 302, 324/149, 323/149 and 148, I.P.C. and appellant-Kanhaiya Lal is acquitted of the charges under Sections 302, 323/149 and 148, I.P.C. Instead, they are convicted for offence u/s 304, Part II, I.P.C. and each of them is sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 5000/- each. In default of payment of fine, each of them shall have to undergo simple imprisonment for one year.

(ii) The conviction of accused-appellant-Kanhaiya Lal for offence u/s 324, I.P.C. and the sentence awarded thereunder by the trial Court are maintained.

(iii) The conviction of appellants-Net Ram alias Jinshi, Smt. Gulab, Mando, Smt. Kaushlya, Smt. Nahani and Dhanpal for offence under Sections 302/149 and 148, I.P.C. is set aside and they are acquitted of the same.

(iv) The conviction of accused-appellants-Net Ram alias Jinshi and Smt. Gulab for offence u/s 324, I.P.C. is maintained.

(v) The conviction of accused-appellant-Net Ram alias Jinshi and Smt. Gulab for offence under Sections 323/149, I.P.C. is, set aside and they are acquitted of the same.

(vi) The conviction of accused-appellants-Smt. Mando, Smt. Kaushlya, Smt. Nahani and Dhanpal under Sections 324/149, I.P.C. is set aside and they are acquitted of the same.

(vii) The conviction of accused-appellant-Smt. Mando, Smt. Kaushlya, Smt. Nahani and Dhanpal for offence u/s 323, I.P.C. is maintained.

45. In the facts and circumstances of the case, while maintaining conviction of accused-appellant-Net Ram alias Jinshi and Smt. Gulab for offence u/s 324, I.P.C. and the conviction of appellants-Smt. Mando, Smt. Kaushlya, Smt. Nahani and Dhanpal u/s 323, I.P.C., we find that ends of justice would be met if they are sentenced to the term already undergone by them. Accordingly, appellants-Net Ram alias Jinshi, Smt. Gulab, Smt. Mando, Smt. Kaushlya, Smt. Nahani and Dhanpal are sentenced to the period already undergone by them. These six

accused persons are already on bail. They need not surrender to their bail bonds, which stand discharged.

46. The sentences passed under Sections 304-II and 324, I.P.C. against appellant-Kanhaiya Lal shall run concurrently.