

**(1996) 08 AHC CK 0017**

**In the Allahabad High Court**

**Case No : Government Appeal No. 1100 of 1980**

State of U.P.

APPELLANT

Vs

Balzora and Others

RESPONDENT

**Date of Decision : 08-08-1996**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313  
Penal Code, 1860 (IPC) — Section 141, 147, 149, 302, 307  
Uttar Pradesh First Offenders Probation Act, 1938 — Section 4

**Citation : (1996) 20 ACR 781**

**Hon'ble Judges : N.L. Ganguly, J;B.K. Sharma, J**

**Bench : Division Bench**

**Advocate : A.G.A, for the Appellant; B.M. Zaidi and Kamal Krishna, for the Respondent**

## **Judgement**

B.K. Sharma, J.—All the above three appeals arise out of the judgment and order dated 12.2.1980 passed by Sri G.R.S. Tandon, the then IInd Additional Sessions Judge, Muzaffamagar in State of U.P. v. Balzora and 15 Ors. S.T. No. 370 of 1978 Accused Balzora, Balwant, Omi, Hukum Chandra, Kripa, Gokul, Jai Prakash, Rakam, Panni, Amar Singh, Niadara, Gyani, Tilak Ram, Prem, Pulloo and Gajay were tried before the Additional Sessions Judge for the offence under Sections 147, 302/149 and 307/149, I.P.C. Accused Balzora and Balwant were real brothers inter se, accused Omi, Amar Singh and Hukum Singh were real brothers inter se, being sons of Niadara, accused Gyani was the son of accused Balzora, accused Balzora and accused Niadara were samdhi inter se, accused Tilak Ram is the son-in-law of Kundan (brother of accused Niadara), accused Prem is son of accused Tilak Ram, accused Pulloo is brother-in-law of accused Tilak Ram, accused Gajay is son of accused Pulloo, accused Kripa and Gokul are khandani brothers of accused Balzora. Accused Jai Prakash is the nephew of accused Niadara. Accused Rakam and accused Panni are grandsons of accused Naidara.

2. All the three appeals have been heard together and are being disposed of by this common judgment.

3. The prosecution case was that Khacheru, father of the deceased Raghuvir has lodged a report against Tilak Ram and others for the offence of dacoity u/s 395, I.P.C. in which they were being prosecuted, that the present occurrence took place on 25.3.1978 at 2.30 p.m. which was the day of holi phag, that the informant Baljeet was sitting with Mohabbat Pradhan near the Gher of Yasin, Inayat and Quadir were also there, that he found Vijai, Jatti, Roop Chandra, Balvir, Vishnu and Raghuvir were coming from the Western side, that when they approached in front of the door of the Gher of Yasin, the aforesaid accused persons came from the house and Kundan and Niadara came from North East side, that Kripal, Gokul and Prem accused were armed with gandasa while rests of the accused were armed with lathis, that all the 16 accused surrounded the aforesaid 6 persons and gave out that they would teach a lesson to them for lodging a false report as none could take notice of the events on the phag day and started assaulting them, that Vijay caught hold of a danda from the house of Mohabbat Pradhan while Roop Chandra had a danda with him and used the same in self defence, that Roop Chandra and Vijay received injuries on the spot while Jati died on the spot due to the injuries and Raghuvir became unconscious due to the injuries received by him. The prosecution case further was that iron wires were affixed in the lathi of Roop Chandra. The accused persons are said to have left the spot after the Marpit. The F.I.R. (Ex. Ka-1) was got scribed by Balzora informant from Surajmal and lodged at the police station Miranpur. Raghuvir injured died on his way to the hospital. The usual Investigation followed.

4. The post-mortem examination of Jati was made by doctor A.K. Gupta P.W. 6 on 26.3.1978 at 8.35 a.m. He found following ante-mortem injuries on the body of Jati deceased:

1. Lacerated wound 1 1/2" x 1/2" x bone deep on the right side front of the head 3 1/2" above the right eye brow. Anterior posteriorly placed. There was found clotted blood.
2. Contusion 8" x 1" on the right side of the front of the chest and abdomen obliquely placed, 4" below the right nipple.

On internal examination, the doctor found clotted blood in the scalp with fracture of bone under Injury No. 1. The clotted blood was found in the membranes and brain under injury No. 1.

The death of the deceased was caused due to shock and haemorrhage as a result of the injuries sustained by him and the duration of the death was about "a day" before the post-mortem examination.

5. Dr. A.K. Gupta also conducted the post-mortem examination on the dead body of Raghuvir. He found the following ante-mortem injuries on his dead body:

1. Lacerated wound 1 1/2" x 1/2" x bone deep on the right side of the head 5" above the right ear.
2. Lacerated wound 3/4" x 1/2" x bone on the top of the middle part of the head.

3. Lacerated wound 1/2" x 1/4" x bone deep on the left side of the head 5 1/2" from the left ear.

On internal examination, the doctor found clotted blood in the scalp under injury Nos. 1 to 3 and fracture of bone was also found under injury Nos. 1 and 2. Clotted blood was also present on the surface of the membranes under Injury Nos. 1 and 2 and further clotted blood was present in the brain under injury Nos. 1 and 2.

In the opinion of the Doctor, the death of the deceased was caused due to shock and haemorrhage as a result of the injuries sustained by him. The duration of death was about one day.

6. Injured prosecution witness Vijay was medically examined by Dr. S.C. Gupta on 26.3.1978 at 3.40 a.m. The following Injuries were found on his person:

1. Incised wound 2 1/2" x 1/4" x scalp on right forehead Just above the eyebrow obliquely placed, Margins sharp out and tailing below.

2. Abrasion 3 1/4" x 1/10" on the top and outer aspect of left shoulder.

Dr. Gupta proved the injury report Ex. Ka-8 and according to him, the said injuries were simple and injury No. 1 could be caused by sharp cutting weapon and injury No. 2 could be caused by friction. They were about half a day old.

7. The same day Dr. Gupta examined Roop Chand at 3.50 a.m. and found the following injuries on his person:

1. Incised wound 2 1/2" x 2/10" x skin on the outer aspect of lower 1/3rd of left arm. It was placed vertically, margins were sharp cut. Tailing upwards.

2. Abrasion 1/2" x linear on outer aspect of left arm 3/4" below injury No. 1.

3. Incised wound 3/4" x 1/10" x skin on front of lower 1/3rd of right thigh placed vertically. Margins were sharp cut. Tailing downwards.

Dr. Gupta proved the injury report Ex. Ka-9 and according to him, all the injuries could be caused by same sharp cutting weapon. The injuries were about half a day old in duration.

8. The prosecution tendered certified copy of the report lodged by Khacheru at 8.05 p.m. on 3.3.1978 at P.S. Miranpur against Prem, Omi, Gyani, Balzora, Gaja and Vilash Ram.

The prosecution also got proved the injury report of Kripa accused Ex. Ka-20 through D.W. 3 Dr. N.C. Sharma.

9. In their statement u/s 313, Code of Criminal Procedure, the accused persons admitted the relationship. They also admitted their prosecution but claimed that it was for assault and that they were not inimical on account of the same.

10. Accused Balzora claimed that he was witnessing the phag day outside the

house of Kundan, that Raghuvir, Jati, Vijay Pal, Roop Chand, Baljeet and others armed with gandasa and lathis, assaulted them and Omi, Gayani, Tilak Ram, Amar Singh and Kripa wielded lathis in self defence. Accused Balwant Singh stated that he did not know anything about the case and he carried on his business at Miranpur. Rest of the accused made statements similar to Balzora and supported the statement of Balzora accused.

11. The defence got proved the F.I.R. Ex. Kha. 1 G.D. entry Ex. Kha. 2 through P.W. 5 Daulat Ram which shows that the report of the cross case was lodged at 9.30 p.m. on 25.3.1978 at the aforesaid police station. The defence further got proved the injury report of Omi and Kripa. Ex. Kha. 4 and Kha. 5 through P.W. 8 Dr. S.C. Gupta who examined the above noted two persons at 3.25 a.m. and 3.10 a.m. on 26.3.1978. According to Ex. Kha. 4, the following injuries were found on the person of Omi:

1. Incised wound 2 1/2" x 2/10" x muscle and on the front left hand 3/4" below the wrist. Trans. Margins were sharp out tailing on inner side.
2. Abrasion 3/4" x 1/4" on inner aspect of lower 1/3rd of right forearm.
3. Abrasion 3" x 1/4" on inner aspect of middle 1/3rd of right forearm.
4. Lacerated wound 3/4" x 1/4" x muscle on the front of lower 1/3rd of left leg with swelling 4" in circumference. Advised X-ray.
5. Contusion 3 1/2" x 1" on right hip. Reddish.
6. Contusion 3 1/2" x 3/4" on the back of lower 1/3rd of right thigh, reddish.
7. Contusion 3" x 1 1/2" on the outer aspect of upper one third right leg.

According to Ex. Kha. 5, the following injuries were found on the person of Kripa:

1. Lacerated wound 1/2" x 1/10" x muscle on inner part of the dorsum of left foot.
2. Abrasion 1/8" x 1/8" on the outer apart of the dorsum of left foot.

Complained of pain of right arm and right side skull but there was no mark of injury.

The doctor was of the view that injury No. 1 of Omi could hardly be attributed to the touch of gandasa yet the possibility of the same cannot be ruled out. Rest of the injuries of both the injured could have been caused by lathi/danda. They were half a day old in duration.

12. D.W. 1, D.C. Mobar proved the injury report Ex. Kha-6 of Gyani and according to the said report the following two injuries were found on the person of Gyani:

1. Lacerated wound 2 1/2" ? 1/4" ? on the top of head 5" above the left ear.

2. Lacerated wound 3/4" x 1/8" x scalp on the left side of front of head 3" above the left eye below.

3. Contusion reddish blue 4" x 1/4" on the outer aspect of right shoulder Joint.

According to the doctor Mobar, the injuries could have been caused between 2 and 3 p.m. on 25.3.1978.

The same doctor D.C. Mobar conducted the X-ray examination of injury of Omi on 28.3.1978 and proved his report Ex. Kha-7. He found communitied fracture left leg lower one third.

13. D.W. 3 Dr. N.C. Sharma, was the Medical Officer, District Hospital, Muzaffarnagar on 26.3.1978 and he examined Tilak Ram at 4.50 p.m. when he was consigned to the District Jail and proved the injury report Ex. Kha. 8 and according to the said injury report the following injuries were found on his person:

1. Contusion 4" x 1 1/2" on the back of left shoulder.
2. Contusion 5 1/2" ? 1" on the left scapula middle.
3. Contusion 6" x 3 1/2" on the upper part of right scapula.
4. Contusion 6 1/2" x 1" on the lower part of right scapula.
5. Contusion 2 1/2" ? 3/4" on the back of right upper arm middle.
6. Contusion 3" x 3/4" on the right leg 4 1/2" below the knee.

Dr. Sharma further examined Amar Singh at 9.00 p.m. on 26.3.1978 and proved the injury report Ex. Kha-9 and according to the said injury report, the following injuries were found on the person of Amar Singh:

1. Contusion 3 1/2" x 1/2" on the upper border of left scapula.
2. Contusion 3 1/2" ? 1 1/2" on the left side back of chest 1/2" below the scapula.
3. Contusion 3" x 1/2" on the outer side of the left buttock.
4. Contusion 4 1/2" x 1" on the outer side of the left thigh upper part.
5. Contusion 2 1/2" x 1" on me back of right leg upper part of the column of contusion. Bluish red.

Dr. Sharma stated that these injuries were caused by blunt weapon and were simple and could have been caused between 2 and 2.30 p.m. on 25.3.1978.

14. D.W. 2 Uday Ram supported the defence version of the occurrence. According to him, between 2 and 2.30 p.m. on the date of occurrence, he alongwith Balwant, Chetu were witnessing the fair in front of the house of Kundan. All the sixteen accused came there and gave out that they would take revenge of Khacheru and immediately assaulted Niadara and others. Raghuvlr was armed

with a gandasa while rest of the accused were armed with lathis. Amar Singh, Kripa, Gyani, Omi and Tilak Ram wielded their lathis in self defence. Kripa, Omi and Gyani were injured from the side of Niadara. They raised alarm.

15. At the trial, the learned Additional Sessions Judge, held that it cannot be denied that there had been admittedly an incident on the date and time alleged by the prosecution and also that the accused persons had participated in it, that it is also proved beyond any reasonable doubt that Jati and Raghuvir deceased received injuries and they died as a result of the injuries sustained by them in the occurrence, that the defence had not challenged the injuries to the other injured of the prosecution side, that there were injuries on the person of the accused as well. The learned Additional Sessions Judge further held that in the versions of both the sides, the place of occurrence is practically common, that admittedly a large number of persons were involved in this case from both sides and, therefore, the place of incident cannot be confined to a particular spot and in natural course would extend to a large area so minor discrepancy in admission here and will not affect the merits of the case of either party and that the fact remains that the place of incident was virtually admitted. He further held that it is proved beyond any reasonable doubt that both the sides were present at the police station when the F.I.R. was lodged from either side and that the possibility of both the version being reported simultaneously to the police could not be ruled out from the prosecution evidence itself and that consequently, much importance could not be attached to the times of the report and further that the possibility of consultation and deliberation before the lodging of the F.I.R. was not ruled out. He further found that it is proved beyond doubt that there had been ill feeling between the two groups since before the incident and there had been an immediate report from the defence side against the prosecution, that the fact remains that the defence was apprehensive of the prosecution side and had lodged a report earlier and in any case, it cannot be said that there was absence of motive in the present occurrence. Further that both parties must have been alert on the date of occurrence. He further held that the witnesses on behalf of the prosecution were in any case interested witnesses. He further held that from the statement of P.W. 1 Baljeet informant read with the defence version it becomes an admitted fact that it was a holi phag day and that if it was a holi phag day in the ordinary course, the villagers would have enjoyed the Holi and that the learned Counsel for the defence was perfectly Justified in his comment that the version of the prosecution that the accused came from inside the house of Kundan and Niadara accused cannot be accepted beyond reasonable doubt and that it atleast creates a reasonable doubt and the version of the accused would have been possible that they were enjoying holi phag day. The learned Additional Sessions Judge also held that possibility of the use of gandasa alleged in the version of either (each) side was remote and that this showed that both the parties had not placed the true facts of the incident and in any case, the use of gandasa from either side is not free from suspicion and cannot be accepted. He further held that in the circumstances of the case, participation of those who

are said to be armed with gandasa could not be doubted and that they might only be armed with kdhis. He also held that the claim that the lathi of the Roop Chandra was affixed with iron wire and that Vijai took out his lathis from the house of Mohabbat Ali and wielded it in self defence are belied by the prosecution F.I.R. as well as by the statement recorded by the Investigating Officer. The learned Additional Sessions Judge held that it is true that in the prosecution story plea of (all the prosecution witnesses acting in) self-defence has come in the first time at a belated stage in the statement recorded u/s 161, Code of Criminal Procedure and the medical evidence related to the use of gandasa did not support the eye-witness account and that there had been delay in the interrogation of the eye-witnesses, the Investigating Officer had given an explanation for it. He further held that the version of the prosecution side that the accused came from the Eastern side cannot be accepted as it is contradicted by the other prosecution witnesses and that it is proved that the accused side was already there and were witnessing the holi fair. He further held that it appears that there being some dispute between the two groups on spot due to previous ill-will between the two parties and both the parties apprehended incident on that day and as such, the fight took place between the two groups all of a sudden when they came across each other at the place of occurrence and that both the parties have used the lathis freely. He further recorded that 16 persons had participated in the incident from each side and thus it was the result of free fight between two groups all of a sudden on any point on the holi phag day without any premeditation and further that it is not proved that this was pre-planned. He also proved that the participation of the accused in the occurrence was proved beyond any reasonable doubt.

16. After arriving at the aforesaid findings, the learned Sessions Judge have placed on record that Jati deceased had received two injuries which could be attributed to lathi and Raghuvir deceased had received 3 injuries which also could be attributed to lathi and that both the deceased have fracture of bone which has resulted in their death and that Vijai (from the prosecution side) received two injuries and Roop Chand (from the prosecution side) received three injuries which were simple. He further held that it cannot be ascertained from the evidence on record as to who is responsible for causing fatal blows to the deceased nor it can be ascertained as to who had actually caused the injuries to these other two injured. He reiterated his earlier findings that there was no premeditation for this incident and there was free fight between two groups on the holi phag day due to old ill-will and held that in these circumstances none of the accused persons can be held guilty for the offence u/s 302, I.P.C. and at the best, they can be held guilty for the offence of causing grievous hurt to the two deceased Jati and Raghuvir with the aid of Section 149, I.P.C. and, therefore, held all the accused to be guilty of the offence u/s 325 read with Section 149, I.P.C. and in regard to the injuries of Vijai and Roop Chand of the prosecution side, he on the same reasoning held that they are guilty for the offence u/s 323 read with Section 149, I.P.C. as only simple injuries were caused and it was not

accepted that sharp edged weapon was used. He further held all the accused persons guilty for the offence u/s 147, I.P.C. and convicted all the accused persons for the said offences accordingly. On the point of sentence, he after considering the age factor of Tilak Ram, Gokul, Omi, Niadara, Pulloo, Rakam, Gyani, Prem, Gajai, Jai Prakash and Amar Singh, accused were extended the benefit of Section 4 of U.P. Probation of First Offenders Act, 1938 and required them to furnish personal bonds with two sureties each for a period of 3 years in the usual terms.

17. These 11 accused have preferred Cr. Appeal No. 551 of 1980 against their conviction. The learned Sessions Judge sentenced the remaining accused Balzora, Balwant, Kripa, Panni and Hukum Chand to undergo R.I. for 6 months each for the offence u/s 147, I.P.C., R.I. for 6 months each for the offence u/s 323/149, I.P.C. and two years R.I. each for the offence u/s 325 read with Section 149, I.P.C. All the sentences were directed to run concurrently.

18. Being aggrieved by the conviction and sentence awarded by the learned Additional Sessions Judge, these five accused preferred Cr. Appeal No. 389 of 1980.

19. Being aggrieved by the acquittal of all the accused for the offence u/s 302/149, I.P.C. and Section 307/149, I.P.C. State Government preferred Government Appeal No. 1100 of 1980.

20. Balwant Respondent No. 2 in the Government Appeal and Respondent No. 2 in Criminal Appeal No. 389 of 1980 had died as per report of the C.J.M., Muzaffarnagar.

21. The prosecution has challenged the findings of the Sessions Judge that it was a case of free fight between two groups all of a sudden without any premeditation and claimed that there was a motive for the occurrence and further that while Vijai, Roop Chand, Balvir, Vishnu and Raghuvir and Jati deceased were coming from the western side and that when they approached in front of the door at the Gher of Yasin, the accused persons came from the house of Kundan and Niadara and while Kripal, Gokul and Prem accused were armed with gandasa, rest of the accused were armed with lathi and that all these 16 accused surrounded the prosecution party and they gave out that they would teach a lesson to them for lodging this report and immediately started assaulting. It is the claim of the prosecution that the accused had formed an unlawful assembly and that the deceased were done to death and the rest prosecution injured were inflicted injuries in prosecution of the common object of the assembly, and that consequently, the offence of murder, attempt to murder and also offence of rioting were all established against the accused persons and that the Sessions Judge was manifestly wrong in coming to the findings that it was a case of free light between the two parties.

22. We have given our anxious consideration to the submission of the learned standing counsel for the State and we find ourselves unable to accept his



contention.

23. The prosecution would succeed in bringing home the charges of murder and attempt to murder to any of the accused persons only by showing that they acted in furtherance of a common intention in the Infliction of injuries on the body of two deceased and the injured persons or that the accused party formed an unlawful assembly and that the injuries on the body of the deceased and the prosecution injured were caused by some or all of them in prosecution of the common object of that assembly. The prosecution has totally failed to show that there was any common Intention or any unlawful assembly with a common object.

24. The Additional Sessions Judge has placed on record the post-mortem report in respect of the two deceased and injury reports in respect of the two injured from the prosecution side, namely, Vijai Pal and Roop Chand. He has also considered the injury report of Kripa accused Ex. Ka-20, the injury report of Omi accused Ex. Kha-4, and his supplementary report Ex. Kha-7, injury report of Gyani accused Ex. Kha-6, injury report of Tilak Ram accused Ex. Kha-8 and of Amar Singh accused Ex. Kha-9. He also discussed the circumstances about the lodging of the F.I.R. on both the sides and concluded on the basis of these circumstances including the own admission of the informant Baljeet P.W. 1, that Amar Singh and Nladara accused were already present at the police station before the report of the prosecution was lodged. He, therefore, rightly rejected the possibility of the defence F.I.R. being lodged at the police station five and a half hours after the recording of the prosecution F.I.R. there and rightly concluded that the possibility of both the parties reporting simultaneously to the police cannot be ruled out from the prosecution evidence.

25. The prosecution has filed on record certified copy of F.I.R. lodged on 3.3.1978 by Khacheru against Prabhu, Omi, Gyani, Balzora, Gajey, Hukum Chand and Tilak Ram which is Ex. Ka-15. The defence has placed on record Ex. Kha-10 certified copy of the F.I.R lodged by Harpal against Shera, Balzora, Roop Chand and Prithi u/s 323, I.P.C. about an occurrence dated 4.7.1977 in which Tilak Ram, Sujan and Ami Chand were shown as eye-witnesses. The defence has also placed on record copy of F.I.R Ex. Kha-11 lodged by Nladara on 21.3.1978 at 11.30 a.m. against Vishnu, BaMr, Baljeet, Balzora, Jagvir, Raghuvir and Sharda. In it, an allegation was made that the said persons named in the report had threatened to Nladara that they would see him on the date of Holi. The learned Additional Sessions Judge had observed that both the sides wanted to take advantage of the report Ex. Ka-15 lodged by Khacheru u/s 395, I.P.C. against Prabhu, Omi, Gyani. Balzora, Gajey, Hukum Chand and Tilak Ram. Baljeet P.W. 1 admitted that his son Bateora and Roop Chand were arrested on the report, Ex. Kha-10. He also made reference to Ex. Kha-11 report lodged by Niadara against Kishan and others before the incident showing that he apprehended the incident on the date of occurrence but no action was taken on it by the police. He, therefore, rightly concluded against this background of facts that there was ill-

feeling between the two groups since before the incident and that there have been an immediate report from the defence side against the prosecution and he also rightly observed that motive is double-edged sharp weapon and it could be a motive for the prosecution to assault the accused side and it can also be a motive for the defence side to assault the prosecution side and taking note of the fact that the defence was apprehensive of the prosecution side, observed that it cannot be said that there was absence of motive in the instant incident and further both sides must have been alert on that day. He has placed reliance on the statement of Baljeet P.W. 1 and the defence version and inferred that it was an admitted fact that it was a holi phag day and consequently in the natural course, the villagers would have enjoyed the Holi and accepted the defence plea that the version of the prosecution that the accused came from inside the house of Kundan and Niadara cannot be accepted beyond reasonable doubt and that it at least creates a reasonable doubt and the version of the accused could have been possible that they were rejoicing the holi phag day. He also placed on record that though gandasa was said to have been used from the accused side as per prosecution case and the defence version too had attributed gandasa to the injuries of their side. The medical evidence given by the doctor who examined the injured persons was consistent that the possibility of the injuries being caused by gandasa is remote and consequently, the use of gandasa in the occurrence was doubtful. In view of the medical evidence, he inferred that none of the injuries sustained by both the sides can be attributed to gandasa or their possibility was remote and it applied equally to both the sides and this showed that both the parties have not placed the true facts of incident.

26. The learned Sessions Judge placed on record that P.W. 1 Baljeet claimed that he joined the village Pradhan Mohabbat Ali, Inayat, Quadir in the Jhopri of Nazir (before the occurrence). His claim further was that he had told about this fact to the S.I. of P.S. Mirzapur Jukhi Singh P.W. 9 and S.I. of P.S. Jansath (Harish Chandra Sharma P.W. 7)--Both Investigating Officers. The testimony of the said Sub-Inspectors had belied him and he has not been able to furnish any explanation. He also placed on record that Baljeet P.W. 1 claimed that he would have got this fact of sitting in Jhopri recorded in his F.I.R. but it was not available there. He also placed on record that this witness claimed that he had told the scribe of the F.I.R. that the accused party had come out of the house of Kundan and that he has also told both the Investigating Officers about it but this fact was not available in the F.I.R. or in his statement recorded by the said police officers and he could not explain it. He has also placed on record that this witness was belied by the statements of the scribe as well as the Investigating Officers about his claim that he had told them that Kripal, Gokul and Prem were armed with gandasa and rest of the accused were armed with lathis. He also placed on record that the claim of this witness that lathi of Roop Chand was fixed with Iron wires and Vijai Pal took out a lathi from the house of Mohabbat Ali and wielded it in self-defence was not to be found in the F.I.R. lodged by him or in the statement given by him to the two Investigating Officers. He also referred to the

admission of this witness that he had not narrated these facts in the bail application moved by him through Sri Manphool Singh, Advocate in the cross case. Mohabbat Ali P.W. 4 was Pradhan of Gram Panchayat of which Baljeet P.W. 1 was member. Vijai Pal P.W. 2 had claimed that gandasa were affixed in their lathis and that then lathis were being raised about the head and used for giving blows. This witness had claimed that he had told both the Investigating Officers that Prem, Copal and Kripa were armed with gandasa. He was contradicted by both the Investigating Officers. He had claimed that he had seen the accused persons coming out from the Gali between Kundan Niadara and Ishaque which contradicted the statement of the other prosecution witnesses that the accused had come out from the house. The claim of Mohabbat Ali P.W. 4 that he had disclosed to the Investigating Officer that Prem, Gokul and Kripa were armed with Gandasa was belied by the statement of the Investigating Officer. His statement that he had told the Sub-Inspector of Jansath that he alongwith the witnesses was sitting in the Jhopri was belied by the statement of that Sub-Inspector. He claimed that he had stated to the I.O. that the lathi of Roop Chand was affixed with iron wires and that was belied by the statement of the investigating officer. He claimed that Vijai Pal had wielded lathi in self-defence and had told the I.O. about it. In the statement of Vijai Pal recorded by the I.O. Harish Chandra Sharma, Sub-inspector, the sentence about the use of lathi in self-defence was to be found at the fag end and the learned Sessions Judge impliedly accepted the defence claim that this sentence was introduced in the statement later on. In the state of evidence as it was before the learned Sessions Judge it was impossible for him to accept the prosecution version of the occurrence. In view of his own findings that none of the side had come out with true facts, the learned Sessions Judge was supposed to have given the benefit of doubt to all the accused particularly because, there was no explanation in the F.I.R. regarding the injuries admittedly caused to the accused persons, and the prosecution theory of self-defence had come for the first time at a belated stage in the statement u/s 161, Code of Criminal Procedure and the medical evidence related to the use of gandasa did not support the eye-witnesses' account of the occurrence and the version of the prosecution side that the accused came from the Eastern side was rejected by the learned Sessions Judge himself as it was contradicted by the other prosecution witnesses and he had observed that it appeared that the accused side was already there and was witnessing the Holi Fair.

27. The non-explanation of the injuries of the defence side is a material circumstance in this case and it certainly shows that the prosecution has suppressed the true genesis of the occurrence. In the authority *State of Rajasthan v. Madho and Anr.* 1991 SCC 1048, the court observed that if the prosecution witnesses shy away from the reality and do not explain the injuries caused to the Respondents, it casts a doubt on the genesis of prosecution case and the High Court was (therefore) rightly of the opinion that having regard to the fact that they had failed to explain the injuries sustained by the two

Respondents in the course of the same transaction and the Respondents were given the benefit of doubt observing that it was hazardous to place implicit reliance on the testimony of the injured P.W. 2 and the apex court upheld that view. In the present case, there are as many as five injured from the side of the defence and at the trial it was admitted that these persons had received their injuries in the course of the present occurrence. It is true that the Judge has a duty of sifting the evidence and to separate grain from chaff but where the substratum of the evidence given by the prosecution witnesses was found to be false, the only prudent course in the circumstances of the case left was to throw out the prosecution case in its entirety against all the accused. If the court disbelieved the substratum of the prosecution case or material parts of it, it cannot reconstruct a story of its own out of the rest. See the case of Ugar Ahir and Others Vs. The State of Bihar, . In the authority Devi Lal and Another Vs. The State of Rajasthan, , it was held that if the pivot of the prosecution is not accepted, a new prosecution case cannot be made to imperil defence. In the authority Shubrati and Ors. v. State 1959 ALJ 423, it was held by the Division Bench of this Court that it is not permissible for the court to speculate as to what had really happened. If both the parties come to the court with untrue facts and conceal the real truth, they have themselves to blame and they cannot expect the court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. When the evidence of both the parties is thoroughly unreliable and cannot be accepted even in part with safety. In such a case, it is not open to the court to make out a third case which is different from the case set up by both the parties. In such a case the court can only say that the matter is doubtful in the extreme and it is not possible to arrive at any conclusion one way or the other. So in this case, the proper course for the learned Additional Sessions Judge was to discard the prosecution evidence and to give the benefit of doubt to all the accused persons straightaway. He; however took the stand that in the case before him, the place of incident was practically admitted to both the parties and it was also admitted that it was a Holi phag day, and that there had been ill-feeling between the parties since before the present incident. He found that the prosecution version that the accused side came from the eastern side not acceptable and held that the accused side was already there and was witnessing the Holi Fair and inferred further that it appears that there being some disputes between two groups on the spot due to previous ill-will between the parties and both the parties apprehended incident on that day and as such, fight took place between the two groups all of a sudden when they came across each other at the place of incident and that both the parties have used the lathis freely. On the basis of the findings of free fight between two groups, the learned Additional Sessions Judge has handed down the conviction in respect of all the accused persons and awarded the benefit of probation law to 11 of them and sentenced the remaining 5 to various terms using Section 149, I.P.C.

28. The legal position is quite clear that in the case of free fight, there is no question for the prosecution to claim the right of self-defence. Further, none of

the parties can be said to have formed an unlawful assembly nor could it be called a case of common Intention operating between any of the persons participating in the Marpit. Each individual in the Marpit was liable only for the acts done by himself, i.e. to say that if the evidence established that out of the participants "A" inflicted injury on the body of "B", then he alone would be criminally liable for having caused that injury to that person. Others would not share that liability. In other words, there would be no vicarious liability of any of the participants for the acts of any of their co-participants. In such a case, the court could hand down a verdict of guilty only in case of those accused whose specific part in the fight was established as to which out of the victims was injured or deceased by his acts. In case it was not specifically established as to who inflicted which injury to whom, no accused can be legally convicted of any offence. It will be useful to refer to the authority of the Apex Court in the case of Lalji and Others Vs. The State of U.P., in that case an established fact was that the intransigence of the parties led to the free fight and consequently, none of them could, therefore, plead the right of private defence. Their Lordships observed:

There was remonstrance and counter-remonstrance which resulted in a fight. The trial court has also found that there was no premeditation on the part of Lalji or any other accused to cause Pancham's death and that the fight was a sudden affair and was the result of heated passion. In the circumstances, in our opinion it cannot be said that the Appellants who were present in front of their hut formed an unlawful assembly. An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is to do any of the acts mentioned in the five clauses of Section 141, Indian Penal Code. According to the explanation to that section, an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. The facts found by the trial court and the High Court and the circumstances of the case do not show that the Appellants formed a common object to do any of the acts mentioned in the five clauses of Section 141. Reference has been made to Clause (4) of Section 141; according to which an assembly of five or more persons would be unlawful if the common object of the persons composing that assembly is to enforce any right or supposed right by means of criminal force or show of criminal force. This clause cannot be of much avail because it cannot be said that the common object of the Appellants was to enforce any right or supposed right by means of criminal force or show of criminal force. As mentioned earlier, no party attacked the members of the opposite party at the commencement of the occurrence. There was only at that stage remonstrance and counter-remonstrance. Someone then started the fight and, according to the trial court, it could not definitely be determined as to which of the two parties struck the first blow. The circumstances of the case show that lathis were then wielded by the Appellants, other than Lalji not with a view to enforce any right or supposed right (in respect of the water channel) but because of the fact that a fight had started and the complainant's party was found to be

armed. As there was no premeditation and the occurrence as a sudden affair, each of the Appellants, in our opinion should be held to be liable for his individual act and not vicariously liable for the acts of others.

29. We have scrutinized the prosecution evidence and do not find anything in the statement of any prosecution witness to show as to which injury of the prosecution deceased and the prosecution injured was caused by which accused.

30. It has been conceded by the learned A.G.A. that it is not disclosed anywhere in the prosecution evidence as to who out of the accused persons Inflicted which injury and to whom. That being the position, none of the accused could have been convicted by the learned Additional Sessions Judge for any of the offences with the help of Section 149, I.P.C. There was no unlawful assembly in a case of free fight and so no question of conviction u/s 147, I.P.C. or with the help of Section 149, I.P.C.

Consequently, in any view of the matter, the accused Balzora, Kripa, Panni, Hukum Chand, Omi, Naidara, Gyani, Tilak Ram, Prem, Pulloo, Gajey, Gokul, Jai Prakash, Rakam and Amar Singh were entitled to acquittal.

31. Since Balwant, who was accused-Respondent No. 2 in Government Appeal No. 1100 of 1980 and accused-Appellant No. 2 in Criminal Appeal No. 389 of 1980, has died during the pendency of these appeals, the Government appeal and this criminal appeal, both abate to his extent.

32. To the extent of the remaining accused-Respondents. Government appeal No. 1100 of 1980 is dismissed. To the extent of Balzora, Xripa, Panni, Hukum Chand accused-Appellants, criminal appeal No. 389 of 1980 is allowed and all these accused are acquitted of the offence under Sections 147, 325/149 and 323/149, I.P.C.

33. Criminal Appeal No. 551 of 1980 is allowed and accused-Appellants Omi, Niadara, Gyani, Tilak Ram, Prem, Pulloo, Gajey, Gokul, Jai Prakash, Rakam and Amar Singh are acquitted of the offences under Sections 147, 325/149 and 323/149, I.P.C. out of them accused Balzora, Kripa, Omi, Niadara, Gyani, Tilak Ram, Pulloo, Gajey, and Gokul were arrested in pursuance of the non-bailable warrants of their arrest issued on orders of this Court due to their nonappearance and they have been arrested and are in custody. They be released forthwith unless required in connection with some other case or crime. Rest of the accused need not surrender to their bail. Their bail bonds are cancelled and sureties discharged.

Let a copy of this judgment be sent to the C.J.M. concerned at once for information and compliance. A copy of this judgment shall also be issued to the counsel for the accused persons in these appeals at once on payment of usual charges.