
(1987) 08 AHC CK 0032
In the Allahabad High Court
Case No : Criminal Appeal No. 341 of 1978

State of U.P.

APPELLANT

Vs

Matadin & Ors.

RESPONDENT

Date of Decision : 11-08-1987

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 302, 307, 96, 97

Citation : (1987) 08 AHC CK 0032

Hon'ble Judges : K.Nath, J and B.L.Loomba, J

Final Decision : Dismissed

Judgement

Kamleshwar Nath, J.—This is an appeal against acquittal of respondent No. 3, Balram for offences under Sections 302, 307 and 148, I.P.C. simpliciter, and of the rest of the respondents for offences under Sections 302, 307 both read with Section 149, I. P. C. and under Section 147, I. P. C.

2. Two persons, namely, Jagannath and Teji Lal both residents of Kala Kanker, P. S. Sangramgarh, district Pratapgarh died of gunshot wounds, while 5 persons Gazi Din (P.W. 3), Sheo Kumar (P. W. 4), Shyam Lal, Suraj Pal and Satan, all residents of the same village, sustained injuries. Deceased Jagannath is the brother of informant, Mool Chand (P. W. 1).

3. The respondents 1 to 10 belong to one family of the same village. Respondents Matadin and Shyam Lal are own brothers. Respondents Balram, Umesh Chandra, Gopal, Vinod Kumar and Udai Kumar are sons of Matadin. Respondents Ishwar Lal and Phool Chandra are sons of Banshi Lal. Respondent Shanker Lal is the sons of Ganesh Din ; Banshi Lal, and Ganesh Din are brothers of Respondents Matadiu and Shyam Lal Ayodhya, Respondent No. 11 is the neighbour of the accused respondents and is said to have had some common business interest with them.

4. In the night between 29/30th June, 1974 a function of marriage of Kumari Malti, the sister of informant Mool Chand (P. W. 1), son of Babu Lal, was held in

the same village and the people of the bride's place had erected a welcome gate in front of the door of their house. The house is situated towards east of village rasta proceeding from south towards north. It would appear from the siteplan that at a distance of 198 steps from the house of the informant, there is a road crossing towards north. Beyond this road crossing, the house of respondent Balram is situated at a distance of 22 steps towards north of the crossing.

5. The prosecution case is that when certain marriage ceremonies were going on inside the house of Mool Chand, on 30/6/1974 at about 7.30 a. m., respondent Umesh Chandra arrived driving a truck and knocked against the welcome gate, on account of which the gate broke down. Mool Chand's brother, Raja Ram, protested to Umesh Chandra which led to an altercation. Raja Ram and his brother Lalit then proceeded to the house of one Lal Suresh Singh, an ex-Zamindar residing in the locality, and complained against Umesh Chandra. Lal Suresh Singh called Umesh Chandra, scolded him and asked him to repair the gate. They all came away from the house of Lal Suresh Singh but Umesh Chandra neither repaired the gate, nor paid compensation. Deceased Jagannath, then, held up the truck.

6. Shortly thereafter, all the respondents carrying lathis and dandas arrived at the house of Mool Chand and challenged the informant and others for having held up their truck. The informant's brothers Lalit and Raja Ram protested. Thereupon the respondents are stated to have given a beating to them and to Jarnna Prasad. Babu Lal, father of Lalji and Raja Ram, wielded a stick causing injury to Matadin. The respondents then went away after extending threats.

7. Thereafter Raja Ram etc. again went to the house of Lal Suresh Singh and spoke to him and others. It was about 8.30 a. m. when Lal Suresh Singh along with Mangai Kori, Nagji, Shanker Pasi, Satan alias Bhandari, Mool Chand informant and others went to the house of the respondents to plead with them (HINDI WARD). It is stated in the F. I. R. that all the respondents were found outside the house of Balram, that exchange of the words followed, and that respondent Matadin received a beating by some one in the crowd. The F. I. R. goes on to say that, in the meantime, respondent Balram entered into his house and reached the roof of the house along with his gun and started firing upon the informant's people. It is stated that the remaining respondents also went over the roof of Balram's house and challenged the informant's people. The firing by Balram respondent hit informant's brother Jagannath who died at the spot Teji Lal, who was returning after a bath in the Ganges also received firearm injury on his chest ; he fell down near the door of the house of Shyam Lal In the firing by Balram, besides Satan alias Bhandari 4 persons passing that way, namely, Suraj Pal, Shyam Lal, Sheo Kumar (P. W. 4), Gazi Din (P. W. 3) also sustained injuries. It is thus that respondent Balram was charged for the offences simpliciter, while the other respondents were charged with the offences read with Section 149, I P. C.

8. The first information report of this incident was lodged the same day

(3061974) at 9.55a.m. at Police Station Sangramgarh, 10 miles away by Mool Chand. All the names mentioned above are indicated in this report. The F. I. R. was recorded by Constable Nagendra Bahadur who registered the case, Constable Jagannath Pandey (P. W. 1) proved the record prepared by Constable Nagendra Bahadur. Investigation of the crime was entrusted immediately to S. I., R. P. Dubey. It appears that S. I., R. P. Dubey arrived at the spot on the same day and prepared Panchayatnamas of both the dead bodies, recorded statements of some witnesses, made some recoveries and prepared the biteplan. Constable Ram Abhilakh (P.W. 5) has spoken about the preparation of the Panchayatnamas by S. I. R. Dubey and of the entrustment of the dead bodies to him between 12 noon and 4 p. m. the same day (3061974) in sealed condition with connected papers for being taken to the District Hospital for postmortem examinations.

9. However, one of the respondents Vinod Kumar lodged a cross F.I.R. the same day (3061974) at 10.10 a. m. at the same police station for offences under Sections 307, 323, 147, 148, 149, I.P.C; (Ex. Kha11) against Lal Suresh Singh, Babu Lal, Mool Chand, Raja Ram, Nagji, Jamuna, Mangal Kori, Shanker Pasi, Satan, Ram Chandra, Lalji along with 4 or 6 other persons stating. inter alia, that at 8.30 a. m. the same day Lal Suresh Singh armed with a gun and rest carrying lathis arrived at the house of respondent Vmod (brother of respondent Balram) and that Lal Suresh Singh prompted his companions to strike the respondents. It was added that the people of Lal Suresh Singh's side started striking Vinod Kumar's father, Matadin, with lathis and slapped him while Balram ran into the house due to fear and shut the door of the house from inside. Balram climbed over the roof of the house, whereupon Lal Suresh Singh gave a call to strike and to loot the respondent and fired at Balram and then Balram also fired in selfdefence. The reason for this action of Lal Suresh Singh and his companions was mentioned to be the breakage of the welcome gate of Babu Lal.

10. S. I., R. P. Dubey of P. S. Sangramgarh who took up the investigation arrested Balram and Matadin on the F. I. R. of Mool Chand and arrested Mool Chand on the cross F. I. R. of accused respondents Vinod Kumar, interrogated some persons and prepared a siteplan. The investigation was withdrawn from him and S. I., Special Investigation Staff, Pratapagarh namely, Rameshwar Prasad (P. W. 14) received an order dated 271974 from S. P. of Pratapgarh directing him to investigate the cases on the basis of the two cross F. I. R.s Rameshwar Prasad (P. W. 14) went to the spot on 271974 and made spot inspection and further investigation.

11. However, in the meantime the postmortem examination of Teji Lal was done on 171974 at 3.30 p. m. and of Jagannath on the same day at 4.15 p. m. by Dr. R. K. Jain, Medical Officer, in the mortuary of District Hospital, Pratapgarh. One gunshot wound as follows was found on the person of Teji Lal :

Gun shot wound of entry 1cm x 1cm on the front of the right side chest 1" below the clavicle without blackening and charring.

A lead was extracted from the right chest just below the scapula. The upper lobe in the right lung was lacerated. The cause of death was shock and haemorrhage due to the injury. The time of death was estimated to be from 24 to 36 hours before the examination.

12. The dead body of Jagannath had 5 gun shot wounds of entry and 4 gun shot wound of exit. The wounds of entry with their serial numbers are as follows :

1. Gun shot wound of entry 1 cm X1 cm on the front of the neck in the midline upper part.

2. Gun shot wound of entry 1"x3/4" on the left side of head 2" above the eye brow.

3. Gun shot wound of entry 1"x3/4" on the right side forehead just above the eye brow.

4. Gun shot wound of entry 1/4" x 1/4" on the top of the left shoulder.

5. Gun shot wound 1/4" x 1/4" on the middle of the pinna of left ear.

13. It is not necessary to describe the gun shot wounds of exit at serial numbers 2, 6, 7 and 8. Right parietal and right side frontal bones were fractured. Anterior base of scalp was fractured on right side. 6th cervicle vertebra was fractured. Cause of death was shock and haemorrhage due to injury ; the time since death was estimated to be between 24 and 36 hours.

14. Dr. A. K. Srivastava, Medical Officer of Sangramgarh Dispensary examined the injuries of the victims between 3.15 p.m. & 5.40 p.m. on 3061974,

15. Gazidin had a gun shot wound 1/4"x1/4"x 3/4" on right thigh, with fracture of the shaft of femur.

16. Satan had 2 gun shot wounds 1/4"x1/4"x 1/2" and 1/4"x 1/4"x 1/4" on the left leg one lacerated wound 3"x3/4" on the left dorsum of foot.

17. Shyam Lal had a lacerated wound 1/4" X1/4" X 1/2" deep on left ankle joint.

18. Suraj Pal had one gunshot wound 1/4"x1/4"x1" on right side of the leg.

19. Sheo Kumar had 1 gun shot wound 1/2"x1/4"x1/4" on right iliac fossa.

20. The duration of the injuries of these persons, namely, Gazidin, Satan, Suraj Pal, Sheo Kumar and Shyam Lal was estimated to be between 7 and 9 hours with reference to the time of examination, they were all considered to have been caused by firearm.

21. Jamuna Prasad had 1 swelling 1"x1" on the back of right shoulder.

22. Lalji had 3 abrasions 1/4" x 1/4" on left elbow joint, 1/10" x 1/10" on the left elbow joint end 1"x 1/4" on the left side of same part,

23. Raja Ram had 1 swelling 2"x 1" on the left side of forehead.

24. The duration of injuries of these 2 persons was stated to be about 12 hours ; all of them were considered to have been caused by a blunt weapon.

25. Respondents Matadin and Vinod Kumar were also medically examined by Dr. A. K. Srivastava the same day at 5 p. m. and 5.10 p. m., respectively. Matadin had following injuries on his person (vide Ex. Ka34) :

1. Contused wound 1 1/4" x 1/4" skin deep on skull 3" above right eye brow.
2. Contused wound 1 1/4" x 1/4" skin deep on occipital bone 3" above to right ear.
3. Swelling 2" x 1" on right hand.
4. Contused wound 1" x 1" skin deep on left hand.

26. Vinod Kumar had 1 abrasion 1" x 1" on the neck on trachial side (vide Ex, Ka35).

27. The duration of injuries of Matadin, and Vinod Kumar was estimated to be about 9 hours and were considered to have been caused by blunt weapon.

28. Smt. Vidyawati, the mother of Balram, was medically examined on 7/7/74 at 12 noon by Dr. H. L. Gupta (D. W. 1) who found the following injuries on her person :

- (1) Contusion 3" x 1" on the left shoulder blade.
- (2) Contusion 4" X 1" on outer side of the left upper arm.
- (3) Contusion 2" X 1" on the back of the left forearm.
- (4) Contusion 3" x 1" on the back of the left palm.
- (5) Abraded contusion 1" x 1" on the left wrist.

29. The duration of all these injuries was stated to be 7 days including a possibility of their being caused on the morning of the offence in question.

30. It is noticeable that the F. I. R. of Mool Chand, Ex. Ka1 and the cross F. I. R. of accused Vinod Kumar were in the hands of the police of the police station Sangramgarh at 9.55 a. m. and 10.10 a.m. on 30/6/74 but while informant Mool Chand had been arrested in connection with the cross F. I. R. of Vinod Kumar on that very day, none of the accused of the F. I. R. Mool Chand except Balram and Matadin was arrested till 12/7/74. When Mool Chand was released from jail on 4/7/74, he made a complaint dated 5/7/74, Ex. Ka2 to Superintendent of Police, Pratapgarh stating, inter alia, that the Constable clerk and the SubInspector of Police R. P. Dubey of Police Station Sangramgarh had colluded with the accused party and for corrupt motives had got him and his companions arrested. The prosecution did not examine either the Constable Clerk Nagendra Bahadur or SubInspector R. P. Dubey to whom Nagendra Bahadur had entrusted the investigation ; S. I. R. P. Dubey prepared the 2 panchayatnamas and recorded the statements of Mool Chand (P. W. 1), Gazidin (P. W. 3) and Sheo

Kumar (P. W. 4) on 3061974, and of Jamuna Prasad (P. W. 2) on 171V74 as stated by Dy. S. P. Hira Mani Tripathi (P. W. 12) with the aid of the case diary. R. P. Dubey is stated to have taken in his possession the gun of accused Balram along with some fired cartridges (surrendered by Balram himself) on 3061974. He recovered 9 tiklies and a cork of a fired cartridge and bloodstained and plain earth from the 2 places where Jagannath and Teji Lal deceased had fallen down on the same day. It has been stated by S. L Rameshwar Prasad (P. W. 14) who took up the investigation on 271974 at 11 a. m. from R. P. Dubey that R. P. Dubey had prepared a siteplan but he did not receive the siteplan from Dubey. Even S. I. Rameshwar Prasad (P. W. 14) did not act promptly. He only recorded statements of some witnesses and prepared the siteplan on that date, he seized the guns of accused Ayodhya and Pbool Chandra, he claimed to have searched for the accused but could not arrest any till 1271974. After 1271974, the investigation was entrusted to Ram Naresh Misra of C. I. D. ; the prosecution did not examine Ram Naresh Misra but relied upon the statements of S. I. Hira Mani Tripathi (P. W. 12) to prove the writings of Ram Naresh Misra in the case diary.

31. It is in this state of the conduct of the investigation and the prosecution that this case has proceeded. The guns of Balram and Ayodhya and the fired cartridges recovered from the spot were sent to the Ballistic Expert Radhey Shyam Misra (P. W. 7) for examination. The Ballistic Expert found 3 of those cartridges, marked as E. C. 38, 41 and 42, to have been fired from the gun of Balram. Of the 9 fired cartridges found at the spot one, marked E. C. 43, was found to have been fired from the gun of accused Ayodhya. The remaining cartridges marked E. C. 38, 40, 44 and 45 were not decipherable.

32. The chargesheet, Ex. Ka12 dated 8121975 is said to have been signed and submitted by S. I. Ram Naresh Misra against the respondents.

33. All the respondents pleaded not guilty. Respondent Balram, having denied the prosecution case like other accused persons, admitted the arrival of Mool Chand, Jagannath, Mangal, Satan, Nagji, Shanker, Kanhai, Lalji, Babu Lal, Hira Lal, Suresh Singh, Jamuna, etc. in the locality of his house when he and his companions were present. at the door of his house, but denied the remaining version of the events at his house as given of the prosecution. He said that he had been falsely implicated and the witnesses were falsely deposing against him due to enmity and pressure of Lal Suresh Singh. He added that Lal Suresh Singh and others made a raid of his house, prompted the companions to attack and plunder, and fired his gun. He said that the companions of Lal Suresh Singh attacked his brother Vinod and his father (Matadin). He said that he went over the roof of the house where upon Lal Suresh Singh fired at him, in consequence of which he also area in selfdefence.

34. Accused Matadin took the same case as Balram and added that the companions of Lal Suresh Singh struck him, his son Vinod and his wife Smt. Vidya Devi. He added that 011 receiving injury, he became unconscious.

35. Accused Vinod Kumar (the maker of the cross F. I. R.) stated that Lal Suresh Singh etc. struck him, his brother, mother and father and that Balram fired in selfdefence. He admitted having lodged the cross F. I. R.

36. The prosecution examined P. W. 1 Mool Chand, P. W. 2 Jamuna Prasad P. W. 3 Gazidin and P. W. 4 Sheo Kumar to prove the facts of the case. Radhey Shyam Misra (P. W. 7) is the Balistic Expert who spoke about the firing of 3 of the recovered cartridges from the gun of Balram. P. W. 5 Constable Ram Abhilakh, P. W. 6 Ukhlandra Singh, P. W. 8 Constable Hausila Prasad, P. W. 9 Constable Kashi Prasad, P. W. 10 C. M. O.'s Clerk Sheo Narain Singh, P. W. 11 Ram Krishna Shukla, S. I. Hira Mani Tripathi, P. W. 12 Constable Jagannath Pandey and (P1 W. 13) S. I. Rameshwar Prasad, one of the Investigating Officers, provide the formal evidence.

37. The genuineness of the postmortem examination reports and of the injury reports of persons on both the sides were admitted by both the parties ; their formal proof was dispensed with. The accused examined D. W. 1 Dr. H. L. Gupta to prove that on 771974 (i.e. one week after the commission of the offence) he had examined Smt. Vidya Devi the wife of Matadin when he found 4 contusions and one contused abrasion on her limbs.

38. The learned Additional Sessions Judge accepted the prosecution evidence and case in respect of demolition of the welcome gate by accused Umesh Chandra while driving a truck, the complaint made to Lal Suresh Singh by Raja Ram and the subsequent beating of Lalji, Jamuna Prasad and Raja Ram at the informant's house by the some of the accused. The learned Additional Sessions Judge observed that the version of the prosecution that all the accused, 11 in number, had attacked Lalji, Jamuna Prasad and Raja Ram, could not be believed because the total number of injuries sustained by them are only 5 ; and since it was not clear who of the two persons among the accused had caused injuries to the these 3 victims, none of the accused could be held to be guilty of causing injuries to the said 3 victims.

39. Dealing with the 3rd part of the prosecution story namely, the occurrence at the house of the accused respondent, the learned Additional Sessions Judge noticed that in evidence prosecution witnesses tried to state that injuries to Matadin had been caused in the course of the second incident at the house of the informant where Lalji, Jamuna Prasad and Raja Ram were beaten, but in the F. I. R. itself the causing of injuries to Matadin was described to be at the house of the accused respondents. He also noticed that although the injuries to Matadin were said to have been caused by Babu Lal, the latter was not examined as a prosecution witness. He, therefore, held that injuries to Matadin were caused at the house of the accused.

40. The learned Additional Sessions Judge then observed that the participation of accused other than Balram in the 3rd part of the incident, in which Jagannath and Teji Lal were killed, was not free from doubt. He held that death of

Jagannath and Teji Lal as also the injuries to Suraj Pal, Sheo Kumar, Gazidin, Shyam Lal and Satan were caused by the gun shots fired by Balram, but the deaths and the injuries had been caused in exercise of the right of selfdefence. He further held that in causing the death and the injuries, accused Balram had not exceeded the right of selfdefence and therefore he could not be guilty. Consequently, he acquitted all the accused.

41. In this appeal against acquittal, the two incidents which took place at the house of victim Babu Lal and accused Balram have to be evaluated separately for the purposes of determining criminal liability even though there is a casual connection between them.

42. By the time the incident at the house of Babu Lai took place, a sensitive situation had developed due to the wedding ceremonies of Babu Lai's daughter, then in progress. The Additional Sessions Judge has correctly evaluated the evidence for arriving at the finding that accused Umesh Chandra driving his truck crashed the wedding welcome gate, and refused either to repair or compensate for it, for which reason Jagannath detained the truck. There is good evidence to prove that the accused, carrying lathis and ctandas, arrived at the house of Babu Lai. I he crux of the matter at this stage lies in the question as to what was the common object of this assembly of the accused.

43. The prosecution witnesses have repeated the F. I. R. version, that the accused, on arriving at the house of Babu Lai, demanded as to why they had detained the truck. That indicates that common object, till then, was to rescue the truck, and not to attack or cause hurt. The statements show that when Mooi Chand5 Lalji. etc. protested saying that over and above having caused damage, the accused had come up to attack, a beating was given to Lalji, Raja Ram and Jamuna, 2 features are noticeable. Firstly, the attack was a icsult of protest and not of premeditation. Secondly, Raja Ram, Lalji and Jamuna had received 5 injuries in all which consisted only of swelling and abrasions, obviously those injuries could not be the result of an attack by an unlawful assembly of 11 persons armed with lathis and dandas. The learned Additional Sessions Judge, therefore, did not commit any error of judgment in insisting that the prosecution should have pinpointed the particular accused who had actually made the attack and caused the injuries. Since the prosecu?tion failed to do so, the learned Additional Sessions Judge correctly acquit?ted them in respect of the offence of causing hurt which was committed at the house of Babu Lai.

44, The other incident which occurred at the house of accused Balram bears a special feature. The role of committing murder and of causing injuries is confined to Balram alone ; the role of the rest of the accused is only that of instigation. All the injuries sustained by the deceased and the persons injured there have been found on medical examination to be the result oi gun fire ; none of those injuries is the result of use of any blunt weapon like lathi or danda. The version in the F. I. R. (Ex. Ka1) by Mool Chand (P. W. i) is that when victims alongwith Lai Suresh Singh and others arrived at the house of Balram, all the appellants were there.

Conversation followed which escalated into hot exchanges, and in the meantime Balram climbed to the roof of his house with a gun and started firing at the victims. It was mentioned that the other accused also climbed over the roof and started challenging them. In his statement Mool Chand (P. W. 1), however, stated that when all the accused were still at the door of their house, they challenged that they would revenge blood by blood (khoon ka badla khoon) and then all the accused went over the roof of the house. He said that Balram and Umesh Chandra each had a gun but he did not see what weapons the rest of the accused had. He said that all the accused shouted to kill and thereupon Balram fired with his gun causing death and injuries as mentioned above. P. W. 2 Jamuna Prasad deposed similarly but did not say that Umesh Chandra carried a gun and added that Balram, referring to Jagannath as the person who had detained the truck, gave a call to kill him and fired causing his death. P. W. 3 Gazidin stated that all the accused, calling out that blood be avenged by blood, went over the roof of the house and Balram gave a call to kill. P. W. 4 Sheo Kumar, having stated that accused gave a call to avenge blood by blood, stated that accused Balram, Umesh Chandra and Udai Kumar climbed over the roof of the house and that he did not see the rest of the accused on the roof although they had also entered into the house.

45. If accused Umesh Chandra also carried a gun as mentioned by P. W. 1 Mool Chand and if all the accused resolved to kill, Umesh Chandra also would have fired but admittedly he did not. Whatever may have been the altercation between the 2 sides or the heat in the exchange of words, the initiative for mounting a gun fire seems to be an independent act of respondent Balram. At any rate the learned Additional Sessions Judge cannot be said to have committed any palpable error of judgment in concluding that the prosecution had failed to establish the community of object between Balram and the rest of the accused in committing murder or causing hurt. It may be that the informant and the witnesses for the prosecution gathered an impression from the exchange of words between the 2 sides that the accused desired to avenge blood by blood and thereby wanted to kill. That, however, is not enough to connect the conduct of Balram with that of the remaining accused to establish the vicarious liability of the latter.

46. The most important question for consideration in the appeal is whether the acts committed by accused Balram constitute murder and causing hurt or whether he can be said to have acted in exercise of his right of private defence.

47. Balram stated under Section 313, Cr. P. C. that he fired only one shot. This is absolutely incorrect not only in the face of the direct evidence of the prosecution witnesses, but also of the medical finding that the various victims had sustained gun shot wounds of different dimensions. Teji Lal had received only 1 gun shot wound 1 cm x 1 cm, but Jagannath had received gun shot wounds measuring 1" X 1" X 3/4" and 1" x 1". Sheo Kumar had received one gun shot wound 1" x 1" ; the rest of the injured Gazidin, Satan, Shyam Lal and Suraj Pal had received

gun shot wounds ? " x ? " each. Thus, different cartridges were used by Balram. A few fired cartridges were delivered by Balram himself to the Investigating Officer ; the Ballistic Expert found 3 cartridges to have been fired from the gun of Balram.

48. The learned Deputy Government Advocate emphasized that the learned Additional Sessions Judge himself has not only, accepted the first 2 parts of the prosecution case, namely, the demolition of the welcome gate, the protest by Raja Kam against Umesh Chandra accused, the intervention by Lal Suresh Singh and the subsequent beating of Lalji, Jamuna Prasad and Raja Kam at their house by accused, but even in respect of the third part of the incident, upheld the prosecution case that it was Balram who fired and caused the injuries and deaths. He urged that even if Matadin be found to have received injuries at the hands of some of the accused at their house, Balram was not justified in causing deaths of 2 persons and injuries to 5 persons because he did not have a right of private defence in the facts and circumstances of this case.

49. The learned Additional Sessions Judge observed that the party headed by Lal Suresh Singh must have had aggressive intentions and Balram must have apprehended grievous hurt or danger to life from that party. He observed that the apprehension was reinforced by the fact that his father Matadin had received injuries at the hands of the members of the party. The injuries of Matadin, it was noticed included 2 contused wounds on his head while accused Vinod Kumar had received one abrasion. The learned counsel for the respondent Balram has reemphasized these findings of the learned Additional Sessions Judge.

50. The totality of the facts and evidence on, the record must be appreciated closely and critically. It is obvious that that the background of the occurrence at the house of Balram was sensitive. The ceremonies of the marriage of Babu Lal's daughter were going on at his house. Umesh Chandra had crushed the wedding welcomegate by his truck which had been detained by Jagannath and Lalji. Accused Umesh Chandra had refused to come to terms when called by Lal Suresh Singh on the complaint of Raja Ram. The accused went to the house of Babu Lal in order to rescue the truck at a time when the marriage ceremonies were still going on. They had not only succeeded in taking away the truck as mentioned by the learned Additional Sessions Judge but also caused hurt to 3 sons of Babu Lal, namely, Lalji, Jamuna Prasad and Raja Ram. The statement of Mool Chand (P. W. 1) and Jamuna Prasad (P. W. 2) is that while returning the accused extended a threat that they would be taught a lesson if they showed up in the market. The learned counsel for the respondent contended that the theory of threat should not be believed because it does not find mention in the first informant report. Mool Chand (P.W.I) was not specifically questioned about this omission. It may be mentioned that according to the prosecution, this F. I. R. which had been dictated orally had not been faithfully recorded by constable Narendra Bahadur Singh. We shall revert to this aspect shortly. It is enough at this stage to observe that a bare omission in an F.I.R. is not the proper basis for

disbelieving the testimony of the maker or of the prosecution witnesses. In the normal course of things, the accused, who had gone to the house of Babu Lal in numbers to force the release of the truck and had even caused hurt to 3 of the sons of Babu Lal, could very well have extended a threat to the victims for the future. It will also be appreciated that at that time wedding ceremonies were going on inside the House of Babu Lal, and if the accused had chosen that moment to force the release of the truck and to cause hurt to the members of the family of those who had detained the truck, the threat could cause a further apprehension of misbehaviour and misconduct, on their part. The victims could have felt persuaded naturally to approach Lal Suresh Singh, who had interceded in the matter of the demolition of the welcomegate by Umesh Chandra accused. Consistent with that situation, Lal Suresh Singh, his companions alongwith the members of family of Babu Lal could have decided to proceed to the house of the accused. The question is whether the purpose of these persons was aggressive or not.

51. The learned Additional Sessions Judge has not recorded reasons for his finding that the purpose of Lal Suresh Singh and his party in proceeding to the house of accused Balram was aggressive. The evidence of the prosecution witnesses is that, they had gone there in order to plead with the accused to avoid any untoward incident. The defence case is that Lal Suresh Singh carried his gun and his companions were armed with lathis, etc. The defence case has been denied by the witnesses for the prosecution. The most important circumstance on which the defence has relied in this respect is the injuries which were sustained by accused Matadin, the father of Balram, accused Vinod Kumar the brother of Balram, and by Smt. Yidyawati the mother of Balram.

52. There is no direct eyewitness evidence that Vinod Kumar and Vidyawati received injuries in this incident ; the bare suggestion made on behalf of the accused is sought to be made out by medical opinion. The solitary injury of Vinod Kumar was an abrasion 1 ? "x ? " on the neck. The suggestion made by the Doctor was that it had been caused by a blunt weapon. In the own cross F. I. R. of accused Vinod Kumar, the only method of this receiving the injury is described to be a slap. In the statement under Section 313, Cr. P. G. Vinod Kumar stated that Lal Suresh Singh and his companions caused injuries to him, his mother, father and brother. Admittedly no brother of Vinod Kumar received any injury. In these circumstances no reliance whatsoever can be placed upon the defence version that Vinod Kumar had received any injury in this incident.

53. Smt. Vidyawati had been examined 7 days after the incident. There is no explanation why she could not be examined earlier. A very significant circumstance is that the cross F. I. R. by Vinod Kumar there is no mention of any injury caused to Vidyawati, although there is a mention of the injuries allegedly caused to Matadin and Vinod Kumar. Dr. H. L. Gupta (D. W. 1) admitted in his crossexamination that all the injuries of Smt Vidyawati could be selfsuffered and were on nonvital parts of the body and that all the injuries could have been 10

days" old as well. He admitted that Smt. Vidyawati had not told him why her medical examination was delayed. On the principles of appreciation of evidence, it cannot be held, on the basis of this material, that injuries of Smt. Vidyawati were caused in the course of the incident in question.

54. There is a conflict between the F. I. R. version and the prosecution evidence regarding the place where Matadin received injuries. According to the F. I. R. of Mool Chand, somebody in the crowd at the house of the accused, struck Matadin, but according to the evidence of the eyewitnesses Matadin had received injuries at the hands of Babu Lal in the latter's house when the marriage ceremonies were going on. The learned lower court has correctly noticed that the prosecution improperly did not examine Babu Lal. The statement of Mool Chand is that he had not deposed in the F. I. R. that somebody struck Matadin at the latter's house but he did not know who. As already mentioned, the F. I. R. was recorded by Constable Namendra Bahadur Singh on the dictation of Mool Chand. Investigation was taken up immediately by S. I. Raghu Nath Prasad who interrogated Mool Chand at the police station ; but the prosecution did not examine Namendra Bahadur Singh or Raghu Nath Prasad.

55. This Bench considered the desirability of examining Babu Lal, constable Namendra Bahadur Singh and S. I. Raghu Nath Prasad and passed an order on 13/10/1986 read with the order dated 6/11/1986 after hearing the learned Counsel for the parties, that Babu Lal shall be examined as a prosecution witness and constable Namendra Bahadur Singh and Raghu Nath Prasad shall be examined as court witnesses by the Sessions Judge of Partapgarh under Section 391, Cr. P. C. Consequently, Babu Lal was examined as P. W. 15, S. I. Raghu Nath Prasad Dubey and constable Namendra Bahadur Singh were examined as C. W. 1 and C. W. 2. The learned Counsel for the parties were heard again in the light of the additional evidence.

56. Babu Lal (P. W. 15) stated that accused came into his house when the marriage ceremonies were going on and protested about the detention of the bridegroom and also struck Raja Ram, Jamuna and Lalji. He said that Matadin gave a blow to the bridegroom and kicked the Kalsha (earthen pot) under the Mandap, He thereupon picked up a bamboo stick lying closely and struck Matadin. Babu Lal said that he was not interrogated by the Investigating Officer Raghu Nath Prasad Dubey ; but the latter C. W. 1. stated that he did interrogate Babu Lal. Babu Lal admitted that he had been interrogated by the Investigating Officer of the C. I. D. where he had not stated that Matadin had given a blow to the bridegroom and kicked the Kalsha. However, it is not pointed out that there is any contradiction in his statement before the later Investigating Officer on the question of his striking Matadin.

57. Constable Namendra Bahadur Singh (C. W. 2) of course denied that he had made any insertion of incorrect fact in the F. I. R. ; but there can be no doubt that there was something fishy in the conduct of Raghu Nath Prasad Dubey (C. W. 1) who took up the investigation immediately on the lodging of the F. I. R. by

Mool Chand, S. I. Raghu Nath Prasad stated that on taking up investigation immediately after the filing of the F. I. R. he went to the spot which he inspected and for which he prepared the siteplan, Ex. Cl. He did not include the siteplan in the case diary, it did not see the light of the day before 13/11/1987 when his statement was recorded under the orders of this court.

58. He said that he found no trace of the demolished welcome gate except the holes for planting to Balls. This must be incorrect because 2 ladders with the aid of which the welcome gate was erected had been produced to his successor Rameshwar Prasad (P. W. 14) by Smt. Shivakala wife of Babu Lal on 27/1/1974.

59. C. W. 1 Raghu Nath Prasad deposed to have arrested Balram and Matadin after interrogating Babu Lal etc., but the circumstances in which he arrested Mool Chand are strange. The cross F. I. R. against Mool Chand and others by Vinod Kumar was lodged at the police station the same day at 10.10 a. m. in the absence of Raghu Nath Prasad Dubey who had already left for the spot on cycles on the report of Mool Chand. He says that on the way in Sangramgarh market he got the copy of the cross F. I. R. through a constable, interrogated Mool Chand, gave him into the custody of constable and sent him back to the police station. He admitted that before arresting Mool Chand he had not recorded the statement of any witness, earlier he had already interrogated Mool Chand at the police station. There appears to have been no reasonable basis for S. I. Raghu Nath Prasad Dubey to arrest Mool Chand while he was still on the way to the post for investigating the F. I. R. Mool Chand. It is also very doubtful that when he and his party along with Mool Chand were on way from the police station to the spot, he could have been overtaken by another constable of the police station carrying the cross F. I. R. of Vinod Kumar.

60. All these circumstances leave no manner of doubt whatsoever that S.I. Raghu Nath Prasad Dubey (C. W. 1) was performing his functions in a manner hostile to the victims ; and in this background it is difficult to place implicit reliance upon the conduct of the police in connection with the registration of the F. I. R. made by Mool Chand and its initial investigation by S. I. Raghu Nath Prasad Dubey (C. W. 1).

61. Even so, the prosecution cannot entirely get away with the statement contained in the F. I. R. of Mool Chand that somebody in the crowd at the house of the accused had beaten Matadin. The observation of the learned Sessions Judge and are dealing with an appeal against acquittal that if Matadin had been struck at the house of Babu Lal in the presence of 11 accused persons, all carrying lathi and dandas who had already caused injuries to 3 sons of Babu Lal, he also could not have escaped beating cannot be said to be palpably erroneous or perverse. Admittedly Babu Lal did not receive any injury. The upshot, is that in the eyes of law, even though there is no legal evidence that Matadin had been beaten at his own house F. I. R. is not a substantive piece of evidence, and there is no defence witness the accused are not bound, on the basic principles of Criminal Jurisprudence, to prove that fact affirmatively but

may rely upon a probability flowing from the prosecution version itself in that respect. On this basis, the accused may be entitled to the benefit of the averments in the F. I. R. of Mool Chand and, therefore, the case has also to be judged in the light of the probability that Matadin may have received injuries at his own house and at the hands of the complainant party.

62. The question is whether the conduct of the complainant party and the injuries received by Matadin would give a right of private defence to Balram and whether the right could extend to the causing of the death and the injuries which have actually been caused to the complainant party.

63. That most important fact which has a very strong bearing on the subject is that after Matadin had received injuries, he and indeed all the accused retreated into their house, bolted the door of the house from inside and it is thereafter that Balram, having climbed to the roof of the double storied house fired at the complainant party. The F. I. R. mentions that all the accused including Balram climbed to the roof of the house. According to Raghu Nath Prasad Dubey (C.W. 1) it is a double storied house P.W. 1 Mool Chand stated that the accused, giving a call outside house to avenge the blood by blood went over to the roof of their house and thereafter Balram fired. P. W. 2 Jamuna Prasad deposed likewise. In cross-examination he added that when the accused entered into their house, some of them (i. e.,) the complainant party) told them that they had reached for settlement any way they were going into the house. He added that when the accused entered into the house threatening to avenge blood by blood, the complainant party did not feel scared because they did not suspect that the accused would fire. P. W. 3 Gazidin stated that all the accused climbed over the roof of the house and Balram fired. He said that outside their house the accused were bare handed, and that he did not notice whether the accused had bolted the door from inside because he was aside, from where the door of the house was not visible. P. W. 4 Sheo Kumar stated that all the accused entered into the house of Balram and that he saw Balram, Umesh Chandra and Udai Kumar on the roof of the house. He added that Balram fired thereafter. It is clearly mentioned in the cross F. I. R. of Vinod Kumar that Balram bolted the door of the house from inside In the normal course of human conduct, the accused must have bolted the door of the house from inside once they were in,

64. There is nothing in the cross-examination of these witnesses to throw any doubt upon their statement, that all the accused had entered into the house of Balram, that Balram climbed over the roof of the house and fired when the accused were in the safety of the house. These witnesses except Mool Chand (P. W. 1) are injured witnesses and their presence is fully established. The learned Sessions Judge has completely failed to consider and appreciate this evidence and its effect upon the right of private defence.

65. It may be mentioned at this stage that according to the statement of the accused under Section 313, Cr. P. C. the only accused persons who were present at the house were Balram, Vinod and Matadin the presence of the rest of the

accused was not admitted although it has been consistently deposed to by the prosecution witnesses. Further, except Balram none of the accused was armed, as already mentioned P.W. 3 Gazi Din stated that all the accused were barehanded. If the complainant party was armed not only with lathi and dandas but also with the gun of Lal Suresh Singh, and if the party was inclined to act as an aggressor qua the accused, the latter would have received tell tale injuries. The only injuries of some significance are those sustained by Matadin ; of these only 2 contused wounds were on vital parts of the body, namely, the head. One of the contused wounds was only ? " x ? " skin deep ; obviously this is very minor injury. The other contused wound was ? " x ? " skin deep on the skull. This may be treated to be slightly severe. In the totality, the 4 injuries sustained by Matadin could not be the result of the attack by the complainant party, if they were aggressors. Accused Vinod Kumar could not have been let to with a slap. The suggestion on behalf of the accused that the complainant party were giving a call to kill and to loot the house of the accused, is a bare suggestion, not borne out by any evidence or circumstance on record or by any such conduct of the complainant party. There is nothing in the evidence to indicate that the complainant party attempted to enter into the house of the accused. There are no firm features of aggression by the complainant party. The learned Sessions Judge has not referred to any evidence on the record to show that the complainant party were aggressors ; his inference is only conjectural. So far as the evidence on the record goes, the object of the complainant party only was to plead with the accused to avoid any untoward incident (as wedding ceremonies at the house of Babu Lal were still going on). The defence version is that Lal Suresh Singh fired with his gun at the accused but admittedly none of the accused received any injury. None of the 2 Investigating Officers found any marks of bullet or lead shot on the walls of the house of Balram.

66. The learned Counsel for the respondents contends that the failure of the Investigating Officers to take the gun of Lal Suresh Singh in their possession and to have it examined and compared with the fired cartridges, which were found at the spot, creates a doubt in the prosecution theory that Lal Suresh Singh did not carry a gun. The learned State Counsel refers to the testimony of the Ballistic Expert P. W. 7 Radhey Shyam Misra who examined the recovered fired cartridges marked by him as E. C. 38 to 45. The Expert found that E. C. 39, 41 and 42 were fired from the gun of accused Balram, E. C. 43 was fired from the gun of accused Ayodhya while the characteristics of the marks on E.G. 38, 40, 44 and 45 were not decipherable. There is no reason to disbelieve the testimony of the Expert and if that be so, it would not have been possible for the Expert to connect the gun of Lal Suresh Singh with undecipherable fired cartridges. It would have been better for the Investigating Officers to seize the gun of Lal Suresh Singh as well and to send it to the Ballistic Expert for comparison with the cartridges, but the mere failure to do so cannot lead to a reasonable doubt that Lal Suresh Singh must have carried a gun and must have fired his gun despite the fact that none of the accused received any gun shot injury and no marks of bullet/lead shots

were found on the house of Balram. Not every doubt enures for the benefit of an accused, the doubt must be reasonable.

67. The burden of proof in a criminal case squarely rests upon the prosecution. The accused are entitled to make out a preponderance of probabilities in favour of their defence by the prosecution evidence itself apart from such defence evidence as they may like to adduce, but where the prosecution evidence does not indicate a preponderance of probabilities in favour of defence version, the accused are expected to produce their own evidence in order to make out the defence plea in view of the provisions of Section 105 of the Evidence Act. In this case the accused have not produced any evidence on facts in their defence; they have simply relied upon the facts and circumstances appearing in the prosecution evidence. On a careful examination of the evidence and the entire material on record we are unable to find that the complainant party were aggressors or that there was a reasonable apprehension of the accused receiving grievous hurt or fatal injuries at the hands of the complainant party.

68. The best that could be said in favour of the respondents in the light of the injuries received by Matadin, if he had actually received those injuries at his own house, is that there was an apprehension of Matadin being given a beating, but that apprehension ceased as soon as Matadin and all the accused including Balram entered into the house. The effect of this situation may be examined with the aid of the rulings cited at the Bar.

69. The learned Counsel for the accused respondents referred to the case of *Amjad Khan v. State*, AIR 8952 SC 165 to support his contention that where a mob comes up to loot and plunder the premises, a right of private defence accrues which extends to the causing of death and the right cannot be weighed in golden scales. That was a case of a communal riot where the mob had not merely come up to loot a shop but had actually broken into a shop and had looted it and had started striking at the door of the accused with lathis with a view to break and loot it, in consequence of which the accused fired and caused death. The Supreme Court observed that shops of a community had earlier been looted and the members of the community had actually been killed closely and, therefore, when the mob after breaking open and looting the adjoining shop started striking at the door of the shop of the accused, the latter had a reasonable apprehension that death or grievous hurt to himself and his family would follow once the door was broken. The facts of that case have absolutely no parallel with the facts of the present case.

70. The learned Counsel next referred to the case of *Narain Singh v. State*, 1963 Allahabad Law Journal 330 (SC) where the Supreme Court observed that since the deceased was holding and pressing the neck of the accused, the latter had a reasonable apprehension of being strangled and as such he had a right of private defence extending to the causing of the death. There is no such situation in the present case. That apart, a close study of the decision would indicate that it did not really deal with the question of private defence, but with the use of a

portion of the statement of accused under Section 342 (Cr. P. C. of 1898) ignoring the other part where the portion used did not amount to a confession but was only an admission with an explanation, while the prosecution evidence failed to prove its case.

71. The learned Counsel then referred to the case of *Dev Narain v. State of U. P.*, (1973) 1 Supreme Court Cases 347 for the proposition that the mere fact that the injuries caused by the complainant party to the accused were not serious, could not deprive the accused of a right of private defence because it is not the seriousness of the injury actually caused which is material, but a reasonable apprehension of danger to body, even a real threat by the complainant party which gives right to a right of private defence and to use adequate force in exercise of that right. In that case nonserious injuries by lathi had been caused on the head of the accused and then the accused struck on the chest of the deceased with a spear causing the death. Parity is pressed for with the nature of the injuries sustained by Matadin. There is no doubt that the learned Counsel for the accused respondents is justified in his submission that it was not necessary that Matadin should have received grievous hurt on his head and that the 2 contused wounds received by Matadin could lead to apprehension that grievous injury to Matadin could accrue, but the learned Counsel has failed to notice the further observation of the Supreme Court in this case that if after sustaining an injury, there is no apprehension of further danger to body, then the right of private defence will not be available. That is precisely the position in the present case. As soon as Matadin and his companion accused entered into the safety of their house, there could be no apprehension of further danger to the body of Matadin and, therefore, even if Matadin had been given beating by some member of the complainant party outside the house, the right of the private defence of his body came to an end as soon as Matadin and his companions escaped into their house.

72. The learned Counsel also referred to the case of *Pratap v. State of U. P.*, 1976 Supreme Court 966 where it was found that the deceased was going to strike the accused with a bhala when he fired with a gun and caused the death of the deceased. It was held that the accused appellant had a reasonable, and immediate apprehension that he would suffer death or grievous hurt if he did not fire at the deceased and, therefore, he had a right of private defence. No such apprehension is brone but by the evidence in the present case as already discussed above.

73. The view of the Supreme Court in the case of *Dev Narain v. State of U. P.*, (supra) that if after sustaining a serious injury there is no apprehension of further danger to body, then the right of private defence will not be available, has been reaffirmed in the case of *Yogendra Morarji v. State of Gujarat*, (1980) 2 Supreme Court Cases 218. Dealing with the applicable principle in para 13 of the report, the Supreme Court observed that the right of private defence commences as soon as, and not before, a reasonable apprehension of danger to body from

an attempt or threat to commit an offence, that it is coterminus with the duration of the apprehension and that there must be no safe or reasonable mode of escape by retreat for the person apprehending danger except by inflicting death. We are of the opinion that the present case is covered by this principle laid down by the Supreme Court. As soon as the accused including Matadin, if he had received injuries at the spot, retreated into the house, they had adopted a safe and reasonable mode of escape and the apprehension of danger to body ceased, whereupon the right of private defence of the accused also came to an end. The subsequent firing by accused Balram with a gun from the roof of his house, causing 2 deaths and injuries to others, cannot be treated to be an act in exercise of the right of private defence, at the moment when he mounted the gun attack, there was no right of private defence. The question of exceeding the right of private defence indeed does not arise in this case in view of the facts and circumstances established as above. We are satisfied, therefore, that accused Balram is guilty of the offence of committing murder.

74. The appeal is partly allowed and the acquittal of respondent No. 3 Balram for the offences under Sections 302, 307 and 148, I. P. C. is set aside. He is convicted of all those offences, and is sentenced to undergo imprisonment for life, rigorous imprisonment for seven years and rigorous imprisonment for two years respectively for the offences under Sections 302, 307 and 148, I. P. C. All the sentences shall run concurrently. He is on bail, his bail is cancelled. He shall surrender forthwith and shall be taken into custody to serve out the sentences.

75. The rest of the appeal is dismissed and the bail bonds of respondents Matadin, Shyam Lal, Umesh Chandra, Gopal, Vinod Kumar, Udai Kumar, Ishwar Lal, Phool Chandra, Shanker Lal and Ayodhya are discharged, they need not surrender.

76. The Chief Judicial Magistrate concerned shall report compliance of the execution of the sentences awarded to accused respondent Balram within six weeks. Orders dated 131086 and 61185 shall form part of this judgment.