

(1997) 08 AHC CK 0100
In the Allahabad High Court
Case No : Criminal Appeal No. 676 of 1980

Vijai Bahadur Singh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 05-08-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 8

Penal Code, 1860 (IPC) — Section 147, 149, 302, 304, 304(1)

Citation : (1998) CriLJ 2358

Hon'ble Judges : R.K. Singh, J;G.S.N. Tripathi, J

Bench : Division Bench

Advocate : Keshav Sahai, A.D. and H.N. Singh, for the Appellant; Dy. G.A., for the Respondent

Final Decision : Partly Allowed

Judgement

G.S.N. Tripathi, J.—Accused Vijai Bahadur Singh, Udai Bhan Singh, Indra Bahadur Singh, Pratap Singh and Gulab Singh were convicted and sentenced by the IIIrd Addl. Sessions Judge, Mirzapur in S.T. No. 194 of 1978, State v. Vijai Bahadur and 4 others, under Sections 302/149, 452/149, 323/149 and he passed various sentences. All the sentences were ordered to run concurrently.

2. The prosecution case started on the basis of a F.I.R. (Exhibit Kal) lodged by Munif Shan at police station Chowki Churk on 6-8-1978 at 13.30 p.m. The incident is said to have taken place on 5-8-1978 at about 5. p.m. The distance of police station from the place of occurrence is, 2 miles. He has alleged that he had some quarrel with accused Vijai Bahadur Singh, a month earlier, which had caused a lot of annoyance and anger to the accused. On that basis, on 5-8-1978 at about 5 p.m. the accused Vijay Bahadur Singh, Udai Bhan Singh, Indra Bahadur, Pratap Singh and Gulab Singh, all appellants came armed at the house of the complainant and started abusing him. The complainant and his son Islam (deceased), his wife Smt. Sabira, Smt. Alimun and Smt. Butuli daughter of

Maqdoom, came to their rescue. They too were assaulted with lathies by the accused. They tried to run away. But the accused entered their house and assaulted them also and severely assaulted Islam, deceased and the complainant Munif Shan as well. Several persons, including PWs Kesari and Tulla, apart from others, saw the incident and after their intervention, the accused escaped. Due to night intervention, the report was lodged on 6-8-1978. All the injured persons, including the deceased Islam, Smt. Sabira, Smt. Batuli and other injured persons were also brought to the police station. Constable Clerk Shyam Narain Pandey, PW 11 registered the case on 6-7- 1978 in the G.D. He also examined the injured Islam (deceased) and others and sent the injured persons for medical examination.

3. Dr. R.A. Mishra, PW 6, examining the injured persons, on 6-8-1978 and found the following injuries, namely Smt. Sabira, Smt. Alimun, Smt. Noor Jahan, Munif Shal and Islam (deceased) between 6-6.30 p.m. :-

Injuries of Smt. Sabira :-

(1) Contusion with swelling, 6 cm x 3/2 cm on lateral side of left leg, 12 below knee joint.

Injuries of Smt. Alimun :- PW 7

(1) Contusion 4 cm x 3/2 cm on the back of left thigh, 17 cm on above knee-joint.

(2) Contusion 3 cm x 2 cm on back of left palm.

Injury of Smt. Noorjjahan alias Jauhara alias Butuli:- PW 4

(1) Contusion of 6 cm x 3/2 cm on lateral side of left leg 8 cm below the knee-joint.

Injuries of Sri Munif Shan :- PW I

(1) Contused abrasion 2 cm x 1/2 cm on right side of head 10 cm from the ear.

(2) contused abrasion, 1/2 cm x 1/2 cm on left forehead, 2 cm above left eye brow.

(3) Contused abrasion, 1/2 cm x 1/2 cm on lower lid of left eye.

(4) Contusion 4 cm x 1/2 cm on right forearm, 4 cm below elbow-joint.

(5) Contusion with swelling, 4 cm x 3 cm on the left forearm on its back, 6 cm above writ joint. There was cracking seen and present. X-Ray of forearm was advised.

(6) Contusion, 14 cm x 3 cm back of right side from 10 cm below lowest part of scapula.

(7) Contusion, 8 cm x 3 cm on right buttock, 2 cm below illiac crest.

- (8) Contusion 9 cm x 1 cm on the right thigh, 12 cm above knee-joint.
- (9) Contused abrasion, 3 cm x 1/2 cm on front of right leg, 8 cm above ankle-joint.
- (10) Lacerated wound, 2 cm x 1/2 cm x 1/3 cm deep left leg front 14 cm below knee-joint. X-ray of left leg was advised.
- (11) Contused abrasion with swelling, 6 cm x 2 cm on left leg, lower part. There was deformity and swelling around the injury. X-ray of lower part of left leg and ankle-joint was advised.

Injuries of Islam :- (Deceased)

- (1) Lacerated wound, 2 cm x 1 cm x 1/2 cm on the back of left fore arm, 5 cm below left elbow-joint. There was swelling. X-ray examination of left forearm was advised.
- (2) Contused abrasion, 2 cm x 1 cm on left arm 5 cm above elbow joint.
- (3) Contusion with swelling, 3 cm x 2 cm on back of left palm on its middle.
- (4) Contused abrasion, 1/2 cm x 1/2 cm on left cheek, 3 cm below left eye.
- (5) Lacerated wound, 2 cm x 1/2 cm x 1/4 cm on back of (sic), left side, 5 cm from left ear.
- (6) Contused abrasion, 5 cm x 2 cm on left chest, 2 cm below left clavicle.
- (7) Contused abrasion, 10 cm x 2 cm x 4 cm below nipple longitudinal.
- (8) Multiple contusion on back of left shoulder joint, reddish blue of size ranging from 2 cm x 1 cm x 1/2 cm, overlapping each other.
- (9) Contusion, 5 cm x 2 cm on back of left chest, 4 cm below the scapula.
- (10) Lacerated wound, 4 cm x 3/2 cm x 1 cm on left leg on its front, 22 cm below knee-joint.
- (11) Contusion with swelling, 4 cm x 2 cm on left ankle joint.
- (12) Lacerated wound, 5 cm x 1 cm x 1 cm on front of right leg, 8 cm (sic) above ankle-joint.
- (13) Lacerated wound, 2 cm x 1/2 cm x 1/2 cm on front right leg, 2 cm below the injury No. 12.
- (14) Lacerated wound, 3 cm x 1/2 cm x 1/2 cm on left leg, 3 cm medial to injury No. 3.

All the injuries of all the injured persons, in the opinion of the Doctor, were caused by lathi or fraction (abrasions) and they could have been possible on 5-8-1978 at about 6 p.m. The injuries of Islam (deceased) were per se dangerous to life. However, if best medical aid had been provided, he could have

been saved.

4. Islam died on the following day and the post-mortem was conducted by Dr. G.D. Barnwal, PW 10 on 8-8-1978, who found the following injuries on his person :-

He had 14 ante-mortem injuries on the body of Islam, his left radius bone and left fibula bone were broken in lower parties, his second and fourth left ribs were also broken, his left lung was infected with tuberculosis; both the heart chambers contained clotted blood and Islam died due to shock of injuries, septicemia and lung infection.

Further, he has stated that the T.B. of the deceased was in an advanced stage. Had proper treatment been made available to the deceased after injuries, he could have possibly been saved also.

5. The I.O., PW 8 Sri Ram Kirat Singh has stated that the F.I.R. was registered in his presence. The documents were sent to him on the same day and he reached the hospital Robertsgang and interrogated Sri Munif Shan, complainant, Islam, deceased Smt. Sabira, Smt. Butuli, Smt. Alimun and Sri Mahendra Pratap Singh on the same night. On the following day, i.e. 7-8-1978, he reached the spot and prepared the site-plan and found that Shri Kesari was suffering from fever but witness Tulla could not be traced. He collected blood-stained and simple earth from the spot and after keeping them in different containers, he sealed them and prepared the memo for them. He interrogated the accused Vijai Bahadur Singh in the Robertsganj Hospital. After the death of Sri Islam, an information was received at the police station and the case was converted into one u/s 304, IPC. On 27-8-1978, he interrogated Sarvashri Kesari and Tulla, PWs. In the night intervening after the occurrence, it had rained a lot. He submitted the charge sheet on 27-9-1978.

6. The prosecution has examined the following witnesses to prove its case against the accused.

7. PW 1 Sri Munif Shah is the complainant. He narrated the entire story as contained in the F.I.R. and also regarding the factum of enmity, he had with the accused. Accused Udai Bhan Singh and Pratap Singh are the brother-in-laws of Vijai Bahadur Singh, accused. Accused Indra Bahadur is the Bhanja of Vijai Bahadur Singh, accused. Accused Gulab Singh is a friend of Vijai Bahadur. Additionally, he has said that while exercising the right or private defence, Islam wielded a sword and the witness himself a Danda. He has said, after initial examination, Dr. opined that Smt. Butuli as well as Islam, should be taken to the Distt. Hospital as their injuries were very serious and while he was taking Islam to the Distt. Hospital, he died on the way. Panchayatnama and other documents were prepared in his presence by the I.O. He was X-rayed in the Distt. Hospital, Mirzapur where he remained confined for 3 months. There were fractures in his left leg and hands.

8. PW 3 Sri Kesari was supposed to be a witness of fact. But he turned hostile and stated that he did not see the accused committing the crime.

9. PW 4, Smt. Noorjahan alias Butuli has narrated the entire prosecution story as done by other witnesses. She is an injured witness also. She has said that the accused were aggressors

10. PW 5, Sri Rabmatullah Shan alias Tulla is also a witness of fact. But he also turned hostile and said that everything was over when he reached the spot and he did not see the accused committing any crime.

11. PW 7, Smt. Alimun an injured witness, has stated about the facts as noted above.

12. Other evidence is formal in nature, for instance, PW 2, S.I. Sri Shiv Ram Singh prepared the panchayatnama and relevant documents and sent the dead body for post-mortem examination, PW 6, Dr. R. A. Mishra had examined the injured persons and found the injuries as noted above, PW 10 Dr. G.D. Barnwal, performed the postmortem examination on the dead body and gathered the contents as noted above; PW 8 Sri Ram Kirat Singh is the main I. O. and PW 11 Sri S.N. Pandey constable clerk has proved the preparation of G.D. and other documents at the police station.

13. The accused, normally, denied the allegations against them u/s 313, Cr.P.C. Accused Vijai Bahadur Singh, had, additionally stated that Islam, Barasati and Munsif Shah had assaulted him first, therefore, he assaulted them in his self-defence. He lodged the F.I.R. and got himself medically examined. Accused Indra Bahadur Singh also followed the same line So is the case with Udai Bhan Singh. He additionally said that at the time of occurrence, he was not present in the village.

14. Accused Vijai Bahadur Singh was examined by PW 6 Dr. R.A. Mishra on 6-8-78 who found the following injuries on his person :-

(1) Incised wound, 3 cm x 1/4 cm x 1/4 cm on right side of head, oblique, 8 cm above right eyebrow with clean margins,

(2) Lacerated wound, 3/2 cm x 1/4 cm x 1/4 cm on left thumb on front and its tip.

(3) Incised wound, 3/2 cm x 1/4 cm below knee-joint, oblique, lateral to medial.

(4) Abrasion, 5 cm x 1/5 cm on right arm front, 1 cm above elbow-joint.

(5) Contusion, 3/2 cm x 5 cm on left arm, oblique, 5 cm below shoulder joint.

(6) Contusion 5 cm x 2 cm on back of right chest, 5 cm below lowest part of scapula.

In his opinion, injuries 1 and 3 were caused by some sharp-cutting weapon. Others were caused by Danda-Lathi or friction. Injury No. 1 of Vijai Bahadur

could be dangerous to life, had best possible medical aid not been provided in time.

15. Accused Pratap Singh has denied the occurrence and said that on account of enmity, he has been falsely implicated. Accused Gulab Singh has also denied the allegations.

16. Both the aforesaid accused did not lead any oral evidence. But the statement of accused Vijai Bahadur Singh recorded on 5-3-1980 in Criminal Case launched on his F.I.R. aforesaid, Exhibit Ka 20, has been filed, in which he has mainly alleged that on the date of occurrence, while he was sitting under a Neem tree, the accused Islam (deceased) came there and started abusing him and went home. But again after half an hour after that, he arrived there along with Sri Munif Shah and Barsati. Munif Shah and Barsati had lathies and Islam had a sword. They started assaulting Vijai Bahadur Singh with their weapons and after the intervention of witnesses they ran away. He lodged the report soon thereafter and got himself medically examined as noted above.

17. After perusal of the entire evidence and circumstances on the record, the learned trial Court found that the prosecution case was proved to the hilt and he convicted the accused and sentenced them as noted above.

18. We have heard learned Counsel for the parties and gone through the record. We find some force in this appeal and it deserves to be allowed to that extent only.

19. The incident in this case is said to have taken place on 5-8-1978 at about 5 p.m. The accused who have arrayed, are the appellants in this case. The place of occurrence is the Sehan Darwaja of the complainant. The injured witnesses are Islam (deceased), complainant himself, Smt. Sabira, Smt. Alimun and Smt. Butuli. The weapons used are lathies. The accused had entered the inner side of the house also and the lady inmates aforesaid were belaboured. The injuries received by each one of the persons, including the accused Vijai Bahadur Singh, have been noted above.

Vijai Bahadur Singh was PW 1 in his case, which was started on his complaint. His statement in that case is Exhibit Ka 20. The question No. 21 was put to the accused Vijai Bahadur Singh in the trial Court and he has admitted that the statement Exhibit Ka 20, had been correctly given by him. The time of occurrence in this incident, is about 5.30 p.m. The participation of Munif Shah, complainant, Islam (deceased) and Barsati has been alleged by Vijai Bahadur Singh in paragraph 4. Out of them Munif Shah and Barsati had lathies and Islam had a sword and he had wielded the same upon him. The place of occurrence is slightly different from that given by the prosecution in this case i.e. towards the south of the house of Murah Singh near the Neem tree. These three persons noted above, according to Vijai Bahadur's statement, assaulted him. Thereafter, he lodged the report. He stated that he wielded his weapon in his self-defence, that is he used the lathi vide paragraph 4 of Exhibit Ka 20.

20. He has admitted in paragraph 9 that a murder case in 1971, had been launched against P.W. 1 Munif Shah, complainant. In that case, Vijai Bahadur Singh and one Mohan were the witnesses for the prosecution. In paragraph 10, he admits that about one month prior to the present incident, Islam deceased and Munif Shah, complainant had assaulted him. Therefore, he was treating them as his enemies and thereafter, his talking terms with Munif Shah and Islam had stopped. In cross-examination, in para 13, he says, in all, he assaulted 10-12 lathi blows causing injuries to Islam also, who died. But according to him, he died not on account of injuries caused by him. He has hardly used his lathies twice or thrice upon him. But he did not fall down. But he further says that none else than him assaulted Islam. In para 14, he says that Smt. Butuli, Smt. Sabira and Smt. Alimun were not present nor they were injured by him. He himself had fallen down as he had received 5-7 lathi blows and 2 sword blows upon his person. His clothes were blood-stained. There might have blood-stains upon the cot, upon which he had been brought.

21. From this statement, of Vijai Bahadur Singh, accused, the date, time and place and the weapons used in the incident, are admitted. Further he has no explanation for the injuries received by the lady inmates of the house of complainant.

22. Not only this, the place of occurrence suggested by him, has not been proved. The site-plan of that case, if at all prepared by the I.O., has not been filed. What happened to that case, which he had launched against the prosecution witnesses, is also not clear. Therefore, we treat that these facts have not been proved by the accused Vijai Bahadur.

23. As against it, the I.O. has prepared a site-plan showing the place of occurrence, which is near the house of the complainant. He had, collected the blood-stained and simple earth from the spot. Some blood stains were also spread over the wall of the complainant and this way, without much difficulty, after reading the statements of the PWs and I.O., we come to an irrespectible conclusion that the place of occurrence, as suggested by the prosecution is correct, whereas that suggested by accused Vijai Bahadur is not correct.

24. One thing further is clear that Vijai Bahadur Singh, accused had no explanation for the injuries caused to the three lady witnesses, who had received injuries at the same time.

25. As against it, the prosecution has taken a consistent case right from the stage of the F.I.R. that the lady inmates were inside the house, when they were belaboured. Whereas, the males were be laboured outside the house. The learned trial Court analysed the evidence very critically and has come to the conclusion that the place of occurrence suggested by the prosecution, is correct and that suggested by accused Vijai Bahadur Singh, is not correct.

26. In this background since the incident is admitted, the date, time and place are also admitted, the injuries on the person of Vijai Bahadur Singh accused

have also been admitted by the PWs. as we shall be stating in subsequent paragraphs. So the main point for consideration is as whether the prosecution side was the aggressors or Vijai Bahadur Singh, and other accused .were the aggressors. The number and nature of injuries received by either side, are clear indications of the fact as to which party was the aggressor. Even when we compare the injuries, we find that the injuries received by the prosecution side are far mere outnumbered than the injuries received by Vijai Bahadur Singh. It also shows that whereas the accused had made advanced preparation, the prosecution witnesses were taken a back by sudden assault, which was launched against them. This points out that the accused were the aggressors.

27. Another important point is that nobody says from the side of defence that ladies had caused any injuries to any one of the accused persons nor they had protested even orally by abusing the accused. Therefore, the fact of assault upon the ladies goes unexplained from the side of the accused. This is a sole indication of the fact that they were at the receiving end while they were inside the fortress of their huts, when they were assaulted. In the site plan point X indicates that blood had sprinkled on then wall i.e. eastern wall of the house of the complainant. At point C inside the house, the accused had assaulted the ladies. Therefore, this factum explicitly indicates as to which side was the aggressor in this case i.e. the accused.

28. Now in this background, we proceed to analyse the prosecution evidence.

29. PW 1, Shri Munif Shah is the complainant. He has stated that all the accused were related to each other i.e. Udai Bhan Singh and Pratap Singh are the brothers-in-law of Vijai Bahadur Singh accused. Indra Bahadur Singh is the real Bhanja of Vijai Bahadur Singh and Gulab Singh and Vijai Bahadur are his friends. This fact has not been seriously contested Therefore, this closeness of relationship could enable the other accused to join Vijai Bahadur Singh on one platform and act against the PWs. because there was a background of prior enmity between the two sides, which is not disputed. Then he describes the way in which the accused assaulted him and the weapons used by them. Therefore, he used his lathi in his self-defence and Islam had used his sword, causing injuries to Vijai Bahadur Singh. This way, these two persons used the weapons in their self-defence. Once it is established that the accused were aggressors, the deceased Islam and the complainant Munif Shah, PW 1 had a right of self-defence. Whereas, the accused had none because, the law is that the aggressor cannot have a right of private defence.

30. Factum of clear self-defence was not taken in the F.I.R. But it has been stated on oath by them and the preponderance of probabilities also indicate that this witness is telling the truth on the point of exercise of right of self-defence. Thereafter, he states that he lodged the F.I.R. on the following day because on account of excessive rains in that night, he could not dare to proceed to the police station in the same evening. It appears quite natural because the number and nature of injuries received on the side of prosecution, were too much. As

many as 6-7 persons were injured from the side of the prosecution. After lodging the report and primary medical examination at Robertsganj, the complainant was taking Islam in a Taxi. But Islam died on the way. In the cross-examination in para 15, he admits the enmity. He admits in this para that there was a case of murder launched against Fateh Bahadur (Vijai Bahadur) and Nissar, in which his two brothers had been murdered. Again in 1973, the complainant was involved in a criminal case u/s 325, IPC as an accused. Vijai Bahadur Singh was a witness. In para 16, he admits that in the murder of Bindeshwari Koiri, he was involved as an accused and Vijai Bahadur had appeared as a prosecution witness against him. in that case. In para 17, he admits that his wife and daughter were injured about a month earlier. Meanwhile Vijai Bahadur Singh and Viswanath Singh came there and assaulted him. He also wielded lathi against him and, thereafter, he made an application to the S.P. for prosecuting the culprit. But nothing materialised. So there was a bitterness and of recourse between the parties. That is an undisputed fact. On the point of F.I.R., he admits that he got it written by Mahendra Pratap Singh, who took the injured persons in his tractor to the police station. But he denies that the F.I.R. was prepared at the behest of the police people at the police station itself.

31. Later on he says that firstly he was assaulted. On hearing his cries, his son Islam came out bare-handed. He too was assaulted. Therefore, he picked up the sword and wielded the same in self-defence after receiving 2-3 lathi blows himself. Some blood might have come out of the injuries received by Vijay Bahadur Singh. Further, he says that after Islam had fallen down, Vijai Bahadur and others assaulted him. After he fell down, he was assaulted by Pratap Singh and Gulab Singh and others assaulted the ladies inside the house. This way, after a thread-bare analysis of the evidence of this witness, PW 1, we are of the firm opinion that his statement can be safely used as a reliable piece of evidence. He is an injured person. His presence on the spot is admitted, even by the accused. His injuries are also admitted by them. The evidence of such a person, is a very important piece of evidence in the armory of prosecution.

32. Not only that, he moved the machinery of law by lodging the report and by bringing the injured persons to the police station and hospital for medical aid without any delay.

33. The F.I.R. in this case was lodged without delay. There was very little time left for consultation and confabulation. It contains everything upon which the prosecution has built up its case, namely, the date, time and place of occurrence, names of the accused, names of the weapons used by them, motive for the accused to commit the crime, prior background of enmity and so on. Such a beautiful. F.I.R. drafted in the village background by an illiterate villager, promptly without consultation and assistance from any other corner, becomes a valuable asset to the prosecution for corroborating other evidence on the record. If the statement of Munif Shah is read with the aid of the F.I.R. which supports him to the hilt and also in the background of the statements of injured persons,

who had received several injuries in the same incident, it corroborates the prosecution case. We think that the learned trial Court has come to a correct conclusion that the solitary evidence of Munif Shah, duly corroborated by the other documents on the record, and the evidence available, is sufficient for basing a conviction of the accused and we ditto his approach.

34. PW 4, Smt. Noorjahan is another injured witness. She has given a robust support to the prosecution case. She is an illiterate witness. Her presence has not been disputed even in the suggestions made to this witness in the cross-examination. We find that her injuries were genuine and caused at the same time when the prosecution suggests. She has also been taken to the; Hospital, where her injuries were examined and she has further stated that during the passage itself, Islam died in the taxi. In para 9, she admits that she had been married earlier in village Bhatwa. Her second marriage was performed with the another son of complainant Imaman. As observed earlier, a relation witnesses cannot be rejected simply on the ground that they are relation-witnesses. Rather much credence should be attached to the statement because, firstly, they are injured witnesses. The incident took place in day-light and there was no difficulty in identifying the real culprits, who were known from before, in the light of the background of anterior enmity between the parties. In para 2 of her statement, she states that when Islam and Munif Shah were injured outside, they were at the outer door of their house (all the three injured ladies). Accused Gulab Singh Pratap Singh and Vijai Bahadur Singh were assaulting Munif Shah and Islam even after Islam fell down and accused Indra Bahadur and Udai Bhan Singh enter the house in the Dalan and there they assaulted the ladies. Minor and useless contradictions have been highlighted in this case forgetting the fact that she is an illiterate witness and as a village lady, she cannot be expected to be well-acquainted to answer all the questions put by the learned Counsel for the accused, in the cross-examination. In para 15, she states that the lady witnesses came out upto the door when Munif Shah and Islam were receiving injuries at the hands of the accused. In her presence, Islam fell upon the ground. Since the accused were assaulting Islam and Munif Shah, the ladies could not dare to come near them to save the males of their house. All the three lady-witnesses were injured in the Dalan, vide her statement in para 15. In para 17, she clearly stated that after Islam had been severely belaboured, he picked up the sword and used the same in his self-defence. She has deposed that Islam was the first man to fell down as a result of injuries and Munif Shan followed him. She states that the I.O. had not interrogated her. Thus on a critical analysis of the statement of this lady-injured witness, we come to the conclusion that the prosecution case has been ably and robustly supported by her. Her statement can be banked upon for convicting the accused.

34A. PW 7, Smt. Alimun is another injured witness. She has given a pictorial description of the incident as it happened. Thereafter she states that Indra Bahadur and Udai Bhan assaulted the ladies inside the house. She had been specifically assaulted by Udai Bhan Singh. Smt. Sabira received three injuries at

the hands of the accused Indra Bahadur. So was the case with Smt. Butuli. A little blood was coming out. She has also been very thoroughly cross-examined. We have scrutinised the statement of this witness and we find that the learned trial Court has rightly accepted her statement, as she is not only an injured witness, but she is also a natural witness. It has not been suggested to her in the cross-examination that she was not present on the date, time and place of occurrence. Thereafter, her statement has to be accepted, after a careful analysis and scrutiny, which we have done, as done by the learned trial Court also.

35. Apart, from these witnesses, who have given ocular testimony, there is other evidence also, which is helpful to the prosecution i.e. hostile witnesses.

36. PW 3 Kesari has been named in the F.I.R. also, as a witness of the occurrence. He says that it was about 5 p.m., when he saw Vijai Bahadur, Gulab Singh, Pratap Singh, Indra Bahadur and Udai Bhan assaulting Islam with lathies and dandas. But he says that he did not see anybody assaulting, in the cross-examination. He was declared hostile by the prosecution. In the cross-examination, he says that in that incident, Munif Shan, Islam, Smt. Sabri, Smt. Butuli and Smt. Alimun had received injuries at the distance of 4-5 paces from their house. Islam had fallen down near the well of his house. At about a distance of 5-6 paces from there, Munif Shan had also fallen down. He had heard the cries of Smt. Butuli, .Sabira and Smt. Alimun and went to the spot. But he did not see the accused there. He made an immediate enquiry after the arrival and was told by Islam that Gulab Singh, Vijai Singh, Pratap Singh, Indira Bahadur and Udai Bhan Singh had assaulted him. He further said that they had assaulted him with lathies. He had seen the blood spread on the spot. Islam and Munif Shan had received injuries and were unable to move and, thereafter, it had rained. The injured persons were taken in the tractor of Sri Mahendra Pratap Singh, the scribe of the F.I.R. Vijai Bahadur Singh accused is the strong man of the village, whereas, he himself a labourer only. When his earlier statement made u/s 161, Cr.P.C. was put to him, he simply denied it. But he could not give any reason as to why I.O. had written his statement as being his own. He further stated that Tulla and the other witness, PW 5 was also present there. The incident took about 10-15 minutes only. Near the Jamun tree, Munif Shan had fallen down and towards west of him, Islam had fallen down on the ground on account of injuries received by him. The door of the house of Islam opens to the east. He had fallen down towards the south of his door, Munif Shan had partly lost his senses. But was not able to speak for sometime. Thereafter, he as well as Islam could speak something slowly. He has not explained as to whether Munif Shan and Islam had received injuries. This way, it is apparent that the witness has given more than fifty per cent corroboration to the prosecution case and apparently, he is a witness, who has turned hostile at subsequent stages. But his statement noted above, clearly supports the prosecution case. His presence on the spot is not disputed nor it has been challenged in the cross-examination. Hence we derive minimum support for the prosecution case from the statement of this witness Kesari.

37. Another witness named in the F.I.R. is Rahmatulla alias Tulla, PW 5. He states that the incident took place in front of the door of Munif Shan when an hour was left before the sun set, After hearing the voice, he reached the house of Munif Shan at his door. Thus the date, time and place -of the occurrence have been admitted by this witness Tulla, who has although turned hostile to the prosecution he further supports the prosecution story in para 2 by saying that Munif Shan and Islam had received injuries and had fallen down in front of their house, although he did not see anybody assaulting him. Blood had spread on the spot where these two persons had fallen down, namely Islam and Munif Shan. Even on the wall of the house of Islam, some blood sprinkles were visible. Smt. Alimun and Smt. Sabri and Smt. Butuli were crying nearby. He enquired from Islam as to who had assaulted him. He said" that accused Indra Bahadur and Vijai Bahadur, Pratap Singh, Gulab Singh and Udai Bhan had assaulted him. This statement can be read as a statement under Sections 8 as well as 32 of the Evidence Act, by the prosecution against the accused. Dying declaration of Islam orally heard by this witness Rahamtulla, is a very important piece of evidence and there is no reason to disbelieve it. We think that even this solitary oral dying declaration, is sufficient to hold the accused guilty in this case. In the cross-examination by the accused, in para 7, he says that Munif Shan had received several injuries and he was semi-conscious. Islam had also several injuries. But he was conscious and was speaking slowly and audibly and one could understand his voice. He had talked to Islam. He remained at the place for about 25 minutes. Thus even the half-hearted statement given by Tulla supports" the prosecution in a major manner and we find that the trial Court has derived minimum support from the statement of this witness and there is! no reason to disbelieve it. Even the accused did not suggest that he had not gone to the spot or he had not heard Islam naming his culprits] Similarly, on the point of date, time and place also, the witness has supported the prosecution case unequivocally.

38. Apart from it, there is oral statement in support of the documents prepared by Dr. R.A. Mishra. He has proved all the injury reports,, including that of Vijai Bahadur. Despite very lengthy cross-examination, he remain unscathed. He states in para 9, during the course of cross-examination, that injury No. 1 of Islam was ipso facto not dangerous to life, provided best possible medical help has been made available to him then he could have been saved also.

39. PW 10 Dr. G.D. Baranwal, who conducted the post-mortem examination on the dead body, stated in para 4 that all the injuries of the deceased Islam had become septic. His two ribs in the chest, had been fractured. He was a patient of T.B., which had attained an advanced stage. Its infection had spread all over the body Islam died on account of injuries received and the infection caused in his left lung due to T.B and septicemia caused by injuries in this background. Had he been properly treated for T.B". or if he had not been suffering from T.B there was lesser possibility of his dying no account of injuries received by him. He has no been seriously cross-examined either by the prosecution or by the accused,

Thus, after a thread-bare analysis of the prosecution case, we find that the case of the prosecution has been fully proved beyond a shadow of reasonable doubt. The participation of the accused in this incident, has been clearly established.

40. Now the question is whether it is a case u/s 302, IPC or 304, IPC. In the teeth of the statement made by Dr. Mishra, PW 6 that the injuries of Islam were per se dangerous to his life and he could have been saved if best possible medical aid could be made available to him and after the statement of Dr. Banwaral, PW 10 that direct cause of death was that he was a patient of T.B. from a very long time, his left lung had been badly affected by T.B. and further since septicamia had developed, the poor fellow Islam had to leave the world and that he had been treated properly for the T.B. as well as Septicaemia, his life could have been saved. Thus it does not appear to be case of murder, punishable u/s 302, IPC. Rather, it is a Case covered by Section 304(1) of the I.P.C.

41. Thus the sentences award by the learned trial Court deserve to be modified to this extent only that the accused are held guilty of an offence punishable u/s 304(1), IPC and they are sentenced to undergo 10 years R.I. each on the said charge, instead of an offence punishable u/s 302/149, IPC as ordered by the learned trial Court. The learned trial Court has not properly appreciated of this legal position.

42. We, however, find that the conviction and sentences awarded to these accused persons under Sections 147, 452/149, IPC, 323/149, IPC and 325/149, IPC deserve to be upheld.

43. With the aforesaid modification, the appeal is partly allowed. The accused are on bail. Their bail bonds and surety bonds stand cancelled. They "shall be immediately taken into custody by the learned C.J.M. concerned by issuing non-bailable "warrant against them, to serve out the sentences. The C.J.M. shall further intimate to this Court within a month from today, about the compliance of this order.