

Judgment reserved on 16.07.2025
Judgment delivered on 14.08.2025
Neutral Citation No. - 2025:AHC:138806-DB

Court No. - 45

Case :- CRIMINAL APPEAL No. - 1222 of 1987

Appellant :- Malkhan and Another

Respondent :- State of U.P.

Counsel for Appellant :- Bhanu Prakash Verma, Tej Pal, Ashutosh Dwivedi.

Counsel for Respondent :- A.G.A.

Hon'ble Salil Kumar Rai, J.

Hon'ble Sandeep Jain, J.

Per: Sandeep Jain, J.

1. This criminal appeal has been preferred by the convicted accused Malkhan and Leela against the impugned judgment and order dated 22.04.1987 passed by Sri. K.N. Singh, Special Judge, Mathura in S.T. No.365 of 1986 (State Vs. Malkhan and others) arising out of Case Crime No.231 of 1986, outpost Jait, Police Station-Vrindavan, District Mathura, whereby they alongwith Kamal Singh were convicted for offence under Section 302/34 IPC and sentenced to undergo imprisonment for life.

2. Convicted accused Kamal Singh had also filed separate Criminal Appeal No.1221 of 1987, which was abated vide order dated 01.09.2021.

3. Factual matrix is that the first informant Girdhari Singh (PW-1 at the trial) had a tubewell installed in his field which was operated by an engine. The field was towards north of the village, and for safety at night, he and his father Hetram used to sleep there. The first

informant and his father Hetram were sleeping at the engine in the night of 16/17.07.1986 and along with them, first informant's brother Ramesh was also present, who slept on the roof, then at about 05:00 AM, accused Malkhan, Leela, Kamal Singh and Gajjo, who all belonged to first informant's village and were having criminal antecedents, came at the engine of the first informant and directed Hetram to start the engine, for bathing. When Hetram refused to operate the engine, then Gajjo said "let he be killed" and acting on this exhortation, accused Malkhan and Leela who were armed with spear(*ballam*) and accused Kamal Singh, who picked up a spade(*fawda*) from there, began assaulting Hetram, who collapsed, due to the injuries suffered by him. The first informant and his brother Ramesh raised alarm, then the villagers, who were working in nearby field namely Tularam (PW-2 at the trial), Leela s/o Vasudev, Dharampal, etc. arrived shouting, who also witnessed the incident. After arrival of those persons, all the accused fled towards Chomuha, assuming that Hetram was dead.

4. The first informant Girdhari Singh gave a written application (Ex.Ka-1 at the trial) on 17.07.1986 at outpost Jait, Police Station Vrindavan, District Mathura, on the basis of which FIR regarding the incident was registered on 17.07.1986 at 08:15 AM, initially as Case No.80, later on assigned Case Crime No.231 of 1986, under Section 302 IPC against all the accused persons and a corresponding entry in

the G.D. was also made. The investigation of the case was assigned to S.I. Som Dutt Sharma (PW-5 at the trial) who collected blood stained *fawda*, from the spot, the recovery memo of which is Ex.Ka-21 at the trial. He also collected blood stained soil and plain soil from the spot on 17.07.1986, the recovery memo of which is Ex.Ka-22. He also took into possession a blood stained mattress and blood stained ropes (*baandh*) of cot, on which deceased Hetram was lying at the time of incident, the recovery memo of which is Ex.Ka-23 at the trial. *Fawda*, mattress, rope (*baandh*) of cot and blood stained soil were sent to the Forensic Science Laboratory(FSL) Agra, for examination. The FSL report dated 27.01.1987 is available on the record, according to which, on all the above objects, except *fawda*, human blood of 'B' group was found, but the blood group of human blood found on *fawda*, could not be ascertained.

5. The *Panchayatnama* of deceased Hetram was also prepared on the direction of S.I. Som Dutt Sharma (PW-5 at the trial) on 17.07.1986 between 08:45-10:30 AM, in the presence of Panch witnesses Jaswant Singh, Tularam, Jawahar Singh, Girraj, Tulla. The *Panchayatnama* is Ex.Ka-20 at the trial.

6. The autopsy of deceased Hetram was conducted by Dr. M.K. Srivastava (PW-3 at the trial) on 17.07.1986 at 06:40 PM. The following ante-mortem injuries were found on his dead body:-

“1. Incised wound 14 cm x 1 cm x bone deep extending from Rt. Side and back of head upto Rt side Zygomatic process transversely zygomatic bone and occipital bone cut. Large vessels of neck jugular and carotid cut.
2. Incised wound 8 cm x 2 cm x bone deep on Rt side cheek and angle of mandible 2 cm below injury no.1 transversely mandible cut;
3. Incised wound 5 cm x 2 cm x bone deep on Rt side chin Ramus mandible cut oblique;
4. Incised wound 2 cm x 1 cm x muscle deep on Rt side neck, upper part; transversely.
5. Incised wound 3 cm x 1 cm x trachea on front of neck transversely;”

7. According to doctor, Hetram died about half day prior to autopsy, due to shock and haemorrhage, caused by ante-mortem injuries. The autopsy report is Ex.Ka-2 at the trial.

8. After completion of investigation, charge sheet against accused Malkhan, Leela, Gajjo and Kamal Singh was submitted by S.I. Som Dutt Sharma PW-5, under Section 302 I.P.C., on which cognizance was taken by the lower court. The charge sheet is Ex.Ka-27 at the trial. The trial court framed charges on 12.11.1986 against accused Malkhan, Leela, Gajjo and Kamal Singh under Section 302/34 IPC to which they pleaded not guilty and claimed trial.

9. During trial, the prosecution examined the following witnesses who proved the following documents/objects:-

S.No.	Witnesses.	Document proved.
1.	Girdhari Singh, the first informant, examined as PW-1.	Proved the <i>tehrir</i> as Ex.Ka-1 and the mattress lying on the cot on which his father was lying at the

		time of the incident as material Ex-1.
2.	Tularam, eye-witness, examined as PW-2.	Not proved any document.
3.	Dr. M.K. Srivastava, examined as PW-3.	(i)proved the autopsy report of deceased as Ex.Ka-2. (ii)proved the prosecution papers received with the dead body for conducting autopsy as Ex.Ka-3 to Ka-10.
4.	Vijendra Pal Singh, Head Moharir, examined as PW-4.	(i)proved the FIR as Ex.Ka-12 and the carbon copy of G.D. entry No.15 dated 17.07.1986 as Ex.Ka-16, (ii)proved G.D. entry No.16 time 08:40 AM regarding dispatch of special report as Ex.Ka-17 and the receiving back of above report, which is G.D. No.26 time 18:35 PM as Ex.Ka-19
5.	S.I. Som Dutt Sharma, I.O., examined as PW-5.	(i)proved the <i>Panchayatnama</i> of deceased Hetram as Ex.Ka-20 (ii) the recovery memo of <i>fawda</i>

		as Ex.Ka-21, blood stained soil and plain soil as Ex.Ka-22, blood stained mattress and blood stained rope as Ex.Ka-23 (iii)the G.D. entry No.15 as Ex.Ka-24, G.D. entry No.19 as Ex.Ka-24A, G.D. Entry No.31 time 21.05 hours as Ex. Ka-25. (iv) site plan of the spot of occurrence as Ex.Ka-26 (v)charge sheet against accused as Ex. Ka-27. (vi)the blood stained <i>fawda</i> as material Ex-1A, blood stained soil and plain soil as material Ex-2 & 3, blood stained mattress and rope as material Ex-4 & 5 and the clothes of the deceased, as material Ex-6 & 7.
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10. The accused-appellants in their statement under Section 313 Cr.P.C. denied prosecution story and submitted that they have been

falsely implicated due to enmity. They also stated that previously, witness Tularam instituted a case under Section 435 IPC against them, in which they were acquitted, hence a false case has been registered against them.

11. The first informant Girdhari Singh (PW-1) deposed in examination-in-chief that his engine was installed, towards north of the village, at which a room was also constructed, and at the time of incident he was sleeping on the roof along with his brother Ramesh, whereas, his father Hetram was sleeping below. The incident took place in the morning of 17.07.1986 at about 05:00 AM, he woke up suddenly and saw the four accused Gajjo, Leela, Malkhan and Kamal Singh. Malkhan and Leela were armed with spear(*ballam*) and Kamal Singh was holding a spade(*fawda*), Gajjo was unarmed. Malkhan told his father to start the tube-well for bathing. On his father's refusal, accused Gajjo said "beat him". At this, the accused assaulted his father with *ballam* and *fawda*, causing injuries to his father, who died. This incident was also witnessed by Dharampal, Leela s/o Vasudev, Tulla, etc. He further deposed that the '*tehrir*' was written by him and given at the Police Station. He proved the written application given at the Police Station as Ex.Ka-1. He also proved the mattress lying on the cot on which his father was killed as material Ex-1.

12. PW-1 deposed in cross-examination that his engine is of diesel, which is at a distance of 2-2½ furlong from the village and for its safety, he and his father slept every day there. But Ramesh had only slept that night. The implements used for farming also remained there. He clarified that they slept there, so that, their farming implements and engine, may not be stolen. He admitted that he was not sleeping near the engine. He admitted that he was sleeping on the roof and he also admitted that, in the FIR he mentioned that they were sleeping at the engine and his brother Ramesh was sleeping on the roof, but, he clarified that it meant both of them, were sleeping on the roof. He further clarified that they were sleeping on the floor of the roof, whereas his father was sleeping on cot, on a mattress. He further deposed that Giriraj, Gopi, Kishori Lal, etc., had also arrived, at the time of the incident, who witnessed the assault. He further deposed that they had not snatched the *ballam* and *fawda* from the accused, because of fear. He further clarified that when his father was assaulted, then at that time, his father was sitting on the cot and they were sitting on the roof and were preparing to attend the call of nature. He disclosed that the cot of his father was about three paces away from the room, in which the tube-well was installed. He further clarified that only Malkhan directed that the engine be operated but he admitted, that in the First Information Report he had mentioned, all the accused had directed to operate the engine. He further

clarified that it has been correctly mentioned in the FIR that all the four accused ordered the engine to be operated and it is wrong that Malkhan alone ordered the engine to be operated. He also denied the suggestion that the accused had not said that they wanted to bath.

13. PW-1 further deposed in cross-examination that he obtained pen from Premo and paper from a person nearby the Railway line, folded the paper and kept it in his pocket and went to Jait. He wrote the application at the tubewell, using a piece of glass as a pad, which was kept in an almirah at the tube-well. He further deposed that the conversation regarding the operation of engine, took place for about a minute. He further clarified that when Gajjo exhorted “beat him”, he did not think they would fight. He stated that even after seeing them coming armed, he had not anticipated that they would fight, because the villagers kept weapons. He further clarified that there was no stair case for going to the roof, which was about 9 feet high, and they climbed it through bricks. He further clarified that even after hearing the accused are going to assault his father, he had not descended from the roof, because they were afraid of being beaten. He deposed that firstly, both the accused having spear(*ballam*) assaulted his father and then subsequently, the person having spade(*fawda*) assaulted his father with spade. Both the accused had inflicted a single stab blow of spear(*ballam*) and the accused having spade(*fawda*) had also inflicted a single blow of *fawda*. Thereafter,

they all fled and while fleeing, about 40-50 persons rushed to the spot, who also had not chased the accused. On that day, there was no *lathi* at the tube-well. He admitted that at the time of incident they had no means to defend themselves.

14. Regarding the injuries inflicted on Hetram, PW-1 deposed that one blow of spear(*ballam*) was inflicted on the temple(*kanpati*), one blow at the chin(*thodi*) and one blow of spade(*fawda*) on the neck. No blow was inflicted below the neck. Blood was present beneath the cot.

15. He disclosed that they descended from the roof, two minutes after the accused fled. He admitted that during the assault, they remained on the roof and continuously raised alarm. When they descended, his father was lying dead on a cot, who was wearing a *baniyan* and *dhoti*. He further deposed that half an hour after the accused fled, he wrote the application in 15 minutes. The Police Station was at a distance of 5 k.m. He, Kishori Lal and one or two other persons went on foot to the Police Station and reached there at 8.00 AM. Before lodging report, he neither went to the Police Chowki nor informed them about the incident.

16. PW-1 further deposed that the field of Tulla is at a distance of about 100 paces, from his field. Leela's field was also nearby. He admitted that in the year 1975, he and witness Tulla sustained assault

injuries, regarding which, report was lodged by Tulla son of Hatti, and prior to that Gajjo son of Gajadhar had also lodged a report against them, regarding his assault. He further admitted that both the above cross-cases were tried together, which were compromised and none was convicted. He also admitted that they were not assaulted by the accused persons. He further deposed that the assault took place for about one and half to two minutes. The accused arrived from south and he saw them coming, two of them were armed and two were unarmed and the accused fled in the northern direction, towards Chomuha. He had not instructed the witnesses to chase accused. His father Hetram used to remain and sleep everyday at the engine. On the day of the incident, he reached at 6:00 – 7:00 PM at the engine. He does farming, his younger brother reached engine at 10:00 PM with meals, sometimes his father was given meals at 8:00 – 9:00 PM and he used to eat meals, as soon as it arrived. He further deposed that they were sleeping on the roof on a mattress and sheet. The police started the proceedings at 9:30 AM, which took about 1:30 – 2:00 hours to conclude. He further clarified that there are two persons of the name of Tularam. The dead body was taken in a tractor of Giriraj Mukhiya to Mathura. The post-mortem was conducted on the same day at 6:30 PM. He denied the suggestion that he was not present at the time of incident and his father was killed by unknown thieves in the night and they became aware of this, in the

morning and then on the instance of Tula and Leela s/o Vasudev, they had falsely named the accused in the F.I.R., due to enmity.

17. Tularam son of Hatti (PW-2) deposed in examination-in-chief that at the time of the incident, he was in his field, then at about 5:30 AM, he on hearing alarm of Ramesh and Girdhari, rushed towards their tubewell and saw that accused Leela, Malkhan, Kamal Singh and Gajjo, were present there. Leela and Malkhan were armed with *ballam*, Kamal Singh picked up *fawda* from there, and Gajjo said “let he(Hetram) be killed, don’t let him escape” and on the exhortation of Gajjo, the other three accused assaulted Hetram with spear(*ballam*) and spade(*fawda*), who died there. He along with Leela s/o Vasudev, Dharampal and others saw the incident. After committing the murder, the accused fled towards Chomuha.

18. PW-2 deposed in cross-examination that his field is at a distance of about 100 paces from the spot, which was lying barren at that time. He was ploughing his field with bullocks, at that time, and on hearing alarm, he rushed to the spot. He admitted that the Investigating Officer enquired from him, after about one month. He deposed that the Sub-Inspector reached at about 8:45 AM and then the inquest of the dead body was conducted and at that time he was present, who signed the *Panchayatnama*. He denied that he told the Investigating Officer that Hetram was assaulted by four persons and

he clarified that he told him, that only three persons assaulted Hetram and if, in his statement, it is mentioned, then he cannot specify it's reason. He also told the Investigating Officer that Ramesh and Girdhari had also seen the incident but, if this is not mentioned in his statement, then he cannot specify its reason. He further deposed that he had not heard the alarm of Hetram at his field. When the Sub-Inspector arrived, then the plough and bullocks were in his field, but neither this nor their fields, were seen by the Sub-Inspector. He deposed that when he arrived at the engine, then, at that time accused were assaulting Hetram, who fled later on. Hetram was sitting on the cot. He saw that Leela and Malkhan inflicted one blow each, accused Kamal inflicted one blow of *fawda*, the spear (*ballam*) blow was inflicted on neck and chin, the spade (*fawda*) blow was inflicted on neck. At the time of assault, he was at a distance of about 50 paces. Leela s/o Vasudev and Dharampal were with him. The assault took place for about one – two minutes. He further deposed that due to fear, they did not proceed towards the spot, and witnessed the incident from some distance and during the assault, Ramesh and Girdhari remained on the roof, who descended later on.

19. PW-2 further deposed in cross-examination that after accused fled, he went near the dead body, which was lying on the cot. The cot and mattress were blood stained. He further deposed that till one month after the incident, he remained in the village. He further

deposed that he, Raghunath, Girdhari, Ramesh, etc. accompanied the dead body in a tractor trolley to the post-mortem house. He further disclosed that he was not aware about the reasons of assault. The first blow was inflicted with spear(*ballam*) and then spade(*fawda*) blow was inflicted. He admitted that in the year 1983, he registered a report regarding setting fire to hut against accused Leela, Malkhan and Gajjo, which was tried and in the year 1986, all of the above named accused were acquitted and in the year 1975, he and Pyare were tried, in which Gajjo's father and Girdhari had sustained injuries. He denied the suggestion that due to enmity he had given a false testimony.

20. Dr. M.K. Srivastava PW-3 deposed in examination-in-chief that on 17.07.1986 at 6:40 PM he performed the autopsy of the deceased Hetram. The ante-mortem injuries found on the deceased's body have already been mentioned earlier in this judgment, hence are not being repeated. He proved the autopsy report as Ex.Ka-2 and the prosecution papers accompanying the dead body as Ex.Ka-3 to Ex.Ka-10. He further deposed that Hetram died due to shock and haemorrhage, caused by ante-mortem injuries, which could have been inflicted on 17.07.1986 at 05:00 AM, by spear(*ballam*) and spade(*fawda*), which were sufficient to cause his death.

21. PW-3 admitted in cross-examination that there may be variation of 3-4 hours, on both ends, in the duration of death. He admitted that one injury was oblique and all the injuries were transverse, but he could not tell the manner in which the injuries were inflicted from the spear(*ballam*) and spade(*fawda*). He could not tell whether it was possible to inflict those injuries by spear(*ballam*) and spade(*fawda*) from three blows. He further clarified that four injuries were towards right and one injury was in front. He admitted that a stab wound would be inflicted from spear. He further deposed that after six hours of taking meals, the food is digested, and the stomach becomes empty. He further opined that the death could have occurred between 12-01:00 AM.

22. Vijendra Pal Singh PW-4 proved the registration of FIR and other entries of GD regarding registration of FIR, sending of special report to higher officials, etc. In the cross-examination he admitted that vide G.D. No.22, the check FIR of this case, was sent through Constable 535 Lal Singh to police station Vrindavan at 03:20 PM, the copy of this G.D. entry was proved as Ex.Kha-1. He further deposed that the Constable reached police station Vrindavan at 06:00 PM and a copy of this G.D. entry at 06:20 PM was proved as Ex.Kha-2. He admitted that after registration of report, a wireless was sent to S.P. and D.M.. He further admitted that S.I. Som Dutt Sharma returned at

06:30 PM, the copy of this G.D. entry was proved as Ex.Kha-3. He denied that FIR was registered ante-time.

23. The Investigating Officer Som Dutt Sharma PW-5 conducted the investigation of this case and in examination-in-chief he proved the *Panchayatnama* of deceased Hetram as Ex.Ka-20, the recovery memo of spade (*fawda*) as Ex.Ka-21, the recovery memo of blood stained soil and plain soil as Ex.Ka-22, the recovery memo of blood stained mattress and ropes(*baandh*) of cot as Ex.Ka-23, the check FIR as Ex.Ka-24, G.D. entry No.19 as Ex.Ka-24A, G.D. entry No.31 time 21:05 PM as Ex. Ka-25, the site plan of the spot of occurrence as Ex.Ka-26, charge sheet against the accused as Ex.Ka-27, blood stained soil and plain soil as material Ex-2 & 3, blood stained mattress and ropes(*baandh*) of cot as material Ex-4 & 5, clothes of the deceased as material Ex-6 & 7.

24. PW-5 admitted in cross-examination that he had not mentioned the name of the first informant, witnesses and accused in the site plan because he felt that it was not necessary. He admitted that in the site plan, there is neither any mention regarding the weapon nor of the place, at which, blood was found, because a separate recovery memo was prepared by him. He deposed that at the time of inquest, he was aware that the deceased had been inflicted injuries from spear and spade (*fawda*). He further admitted that eye witness Tularam, was

also panch witness of *Panchayatnama*, but he had not recorded his statement prior to inquest, whose statement was recorded on 26.08.1986. He admitted that during inquest Tularam remained present and since, it was necessary to send the dead body, as such, the statement of Tularam was not recorded at that time. He admitted that he had not specified in the site plan, the location of fields belonging to eye witnesses and also failed to show, whether the field was ploughed or not. He admitted that he neither saw those field nor ploughed soil but, he could not tell its reason. He admitted that Girdhari had not told him, whether his father was lying or sitting but, he found blood beneath the cot, which is mentioned in the recovery memo. He admitted that witness Tularam told him that Hetram was assaulted by four persons, who were all hardened criminals. He denied the suggestion that before the wireless, complainant had come to him, who had given another report, in which it was mentioned that the deceased had died in the night.

25. The accused examined S.S.I. Hari Singh as DW-1 in order to prove that on 17.07.1986 at 11:30 AM he received a wireless, a copy of which was proved as Ex.Kha-5.

26. Learned counsel for the appellants submitted that an ante-time FIR was registered in this case. PW-1 Girdhari Singh and PW-2 Tularam are not eye witnesses of the alleged incident, even

otherwise, they are not credible witnesses. He further submitted that, according to the prosecution, the deceased was assaulted with spear, but no punctured or stab wound was found on the dead body, as such, it was not proved that deceased was inflicted spear blows. He further submitted that according to the prosecution, two blows by spear and one blow by spade (*fawda*), in all three blows were inflicted on the deceased, but five cut injuries were found in the autopsy, which falsifies the prosecution story. He further submitted that there is material contradiction between the ocular evidence and the medical evidence, regarding the manner, in which injuries were inflicted on the deceased. He further submitted that the accused-appellants were falsely implicated due to previous enmity. The statement of Tularam PW-2, under Section 161 Cr.P.C., was recorded with considerable delay, which was not explained, as such, his whole testimony becomes doubtful. He further submitted that there is material contradiction between the testimony of PW-1 and PW-2, regarding which injury was caused by which accused, on which part of the body, which makes the presence of these witnesses doubtful. He further submitted that the time of death of the deceased proved by doctor PW-3, is not, in consonance with the time mentioned by eye witnesses because, semi digested food was found in his stomach, which proves that the incident took place in the night.

27. Learned counsel for the appellants further submitted that Hetram was assaulted by some unknown persons in the night, PW-1 and PW-2 became aware of this, in the morning and due to previous enmity, the accused-appellants were falsely roped in the incident. With these submissions, it was prayed that the criminal appeal be allowed. He further relied on the following judgments in support of his submissions:-

“(i)*Vadivelu Thevar vs. State of Madras AIR1957 SC 614*
(ii)*Amar Singh & ors vs. State of Punjab AIR 1987 SC 826*
(iii)*State of Haryana vs. Lakhbir Singh and others AIR 1990SC 2154*
(iv)*State of Karnataka vs. Babu AIR 1994 SC 31*
(v)*State of U.P. vs. Gambhir Singh and others AIR 2005 SC 2430*
(vi)*Durbal vs. State of U.P. AIR 2011 SC 795*
(vii)*Kirpal Singh vs. State of Punjab 2024(2) Crimes 204*
(viii)*Wilayat Khan & ors vs. State of Uttar Pradesh 1951 Lawsuit(SC) 45*”

28. Learned AGA submitted that the incident took place on 17.07.1986 at about 05:00 AM and a named FIR was promptly registered on 08:15 AM on that day itself. He further submitted that the evidence of PW-1 and PW-2 is credible, which is corroborated by the medical evidence. He further submitted that a doctor cannot be absolutely sure about the time of death, as such, only on the basis of presence of semi digested food, the credible ocular evidence cannot be discarded. He further submitted that stab or punctured wound are caused only when spear blow are inflicted on abdomen, thorax or on a place, where there is a cavity. According to him, since in this case, the spear blow was inflicted on face and skull, which are bony part

having no cavity, as such, no stab or punctured wound, neither could have been inflicted nor found on the deceased. He further submitted that the prosecution proved the motive of the offence. There is no material contradiction or improvements in the testimony of PW-1 and PW-2. The spot of occurrence is proved. He further submitted that since wireless was sent by police personnel, as such, on that basis alone, it cannot be concluded that the incident took place in the night. With these submissions, it was prayed, that the criminal appeal be dismissed.

29. We have heard the learned counsel for both the parties and perused the record.

30. From the perusal of the evidence of first informant PW-1 Girdhari Singh, it appears that on the day of the incident, he was present at the spot of occurrence along with his father/deceased Hetram, then at about 5:00 AM, the accused Malkhan, Leela, Kamal Singh and Gajjo all arrived at the spot and they directed Hetram to operate the tubewell, so that, they could have a bath but, when Hetram refused, the incident took place. It is specifically proved by PW-1 that at that time, accused Malkhan and Leela were armed with spear (*ballam*), Kamal Singh was armed with spade (*fawda*), Gajjo was unarmed and on the exhortation of accused Gajjo, the other three accused inflicted spear (*ballam*) and spade (*fawda*) blows on Hetram,

as a result of which, he sustained grievous injuries and died on the spot. It is further proved that this incident was witnessed by Dharampal (not examined at the trial), Leela s/o Vasudev, Tularam (PW-2) etc. PW-1 proved that at the time of the incident, his father was sitting on the cot and he and his brother Ramesh, were on the roof, who were preparing to attend the call of nature, then they heard the conversation between the accused and his father from the roof, but they had not descended for rescuing their father, because they were afraid that they would also be killed. PW-1 further deposed that initially they were not afraid on seeing the armed accused because it was common for the villagers to keep some arms with them, but when an exhortation was given, only then, they became aware that the accused are intending to assault his father.

31. Tularam (PW-2) also corroborated the above evidence of PW-1 by proving that, at that time he was working in his field, then he heard the alarm and then rushed towards the first informant's tubewell and saw that accused Leela and Malkhan were armed with spear (*ballam*), Kamal Singh picked a spade (*fawda*) from the spot and on the exhortation of Gajjo, the other three accused assaulted Hetram, who died at the spot, due to injuries suffered by him and thereafter, the accused fled towards Chomuha. PW-2 further proved that accused Gajjo had only given exhortation to his accomplices to assault Hetram, but had not taken part in the assault. PW-2 also

corroborated that at the time of incident, Hetram was sitting on the cot and then he was assaulted by the accused, with spear (*ballam*) and spade (*fawda*). He deposed that he saw the incident from a distance of about fifty paces and he did not proceed to the spot, due to fear of the accused and after accused fled, he reached the spot and at that time, the dead body was lying on the cot.

32. Both eye witnesses PW-1 and PW-2 proved that deceased Hetram was assaulted by spear (*ballam*) and spade (*fawda*). According to PW-1, two blows of spear (*ballam*) were inflicted- one on the temple and the other on the chin of deceased, and one spade (*fawda*) blow was inflicted on his neck and no blow was given below the neck. According to PW-1, two blows of spear (*ballam*)- one blow each by Malkhan and Leela and one of spade (*fawda*)- by Kamal Singh, were inflicted on the deceased, which is, also corroborated by the evidence of PW-2. PW-2 proved in cross-examination that he only saw accused Leela and Malkhan inflicting one blow each by spear(*ballam*), one spade(*fawda*) blow was inflicted by accused Kamal Singh. Spear (*ballam*) blow was inflicted on neck and chin. Spade (*fawda*) blow was also inflicted on neck. He further proved that firstly, blows were inflicted by spear (*ballam*) and then spade (*fawda*) blow was inflicted.

33. From the evidence of PW-1 and PW-2, it is proved that the accused came to the spot armed with spear (*ballam*) and spade (*fawda*) was picked from the spot, who inflicted blows of spear (*ballam*) and spade (*fawda*) on the temple, chin and neck of the deceased. In the autopsy report of deceased Hetram, which was proved by doctor (PW-3) as Ex.Ka-2, five incised wounds were found- on the right side back of head, which was extending to right zygomatic bone; right side cheek and angle of mandible; right side neck; right side chin and front of neck. It is also mentioned in the autopsy report that the jugular vessel and carotid vessel were found cut and right side occipital bone was also found fractured. According to the doctor, Hetram died due to shock and haemorrhage caused by the ante-mortem injuries, who could have died on 17.07.1986 at 5:00 AM from the injuries, that could have been inflicted by spear (*ballam*) and spade (*fawda*). The manner of causing injuries and the weapon used in the offence, as proved by the ocular evidence of PW-1 and PW-2, is corroborated by the medical evidence on record.

34. The Apex Court in the case of ***Gosu Jayarami Reddy & Another vs. State of Andhra Pradesh, (2011) 11 SCC 766***, while considering the evidence of eye witnesses, held as under:-

“39. It is true that PW 1 has in his deposition attributed an injury to A-3 which according to the witness was inflicted on the neck of the deceased. It is also true that the post-mortem examination did not reveal any injury on the neck. But this discrepancy cannot (sic be vital) in the

light of the evidence on record and the fact that it is not always easy for an eyewitness to a ghastly murder to register the precise number of injuries that were inflicted by the assailants and the part of the body on which the same were inflicted. A murderous assault is often a heart-rending spectacle in which even a witness wholly unconnected to the assailant or the victim may also get a feeling of revulsion at the gory sight involving merciless killing of a human being in cold blood. To expect from a witness who has gone through such a nightmarish experience, meticulous narration of who hit whom at what precise part of the body causing what kind of injury and leading to what kind of fractures or flow of how much blood, is to expect too much.

40. Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorised by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix-up or confusion. It is the totality of the evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the accused.

42. Two aspects are clear from the above. First is that Injury 6 was found over the right clavicle. The injury was bone-deep and the clavicle fractured. A witness who has a momentary view of the incident which is over within a few minutes may not have his testimony rejected only because instead of describing the injury to the clavicle he described the same to be an injury to the neck. It is not a case where the witness attributes an injury to the assailants on a vital part like the head but no such actual injury is found in that region of the body. Instead an injury is found say on the leg or any other portion of the body. It is a case where the witness describes the infliction of the injury in a region which may not be accurate from the point of view of human anatomy but which is capable of being understood in a layman's language to be an injury in an area that is proximate.

43. The other aspect is that the deposition of the doctor establishes the fact that the injuries noticed on the dead body of the deceased had been inflicted by sharp-cutting instruments like sickles. It is further stated by the doctor that in all probability the deceased might have died on receipt of the first injury itself. There is nothing in the examination of the eyewitnesses from which the Court may infer that the injuries found in the post-mortem examination of the deceased could not have been caused by sharp-edged sickles that the accused were carrying with them and are said to have used in the course of the incident. The argument that there is a material contradiction between the ocular evidence on the one hand and the medical evidence on the other must therefore fail and is hereby rejected.”

(emphasis supplied)

35. The Apex Court in the case of ***Rameshji Amarsing Thakor vs. State of Gujarat, 2023 SCC Online SC 1321***, while considering the evidence in a case where eight injuries were found on the body of the deceased, but the eye witness saw only three injuries being inflicted on the deceased, held as under:-

*“7. On being taken through the depositions and the judgment of the Trial Court, we are satisfied that the Trial Court had ignored the deposition of the prosecution witnesses and referred to very minor contradictions in support of its judgment of acquittal. **The contradiction in number of injuries was not fatal to the prosecution case. Nor can the prosecution case altogether be negated because the fatal injuries, in the opinion of the autopsy surgeon could not have been caused by the recovered knife. Eyewitness account is consistent that the deceased was stabbed by the appellant and on this count there is no inconsistency. The PW2 also described the injury spots on the body of***

the deceased. Just because there were more injuries than the ones narrated by the eyewitness cannot negate the prosecution version. Even if in the opinion of the autopsy surgeon there was mismatch of the knife with the injuries caused, the doctor's evidence cannot eclipse ocular evidence. The evidence on post-occurrence events is consistent. The other point of inconsistency pointed out by Mr. Ray is about the position in which the deceased was lying after collapsing on sustaining injuries. PW2 had stated that he fell in the supine position, whereas PW4 and PW5 stated that he was lying in prone position and was brought to supine position.”

(emphasis supplied)

36. From the law laid down by the Apex Court in the case of ***Gosu Jayarami Reddy (supra) and Rameshji Amarsing Thakor (supra)***, it is clear that a witness who has a momentary view of the incident which is over within a few minutes is not supposed to remember the exact number of blows inflicted by the accused persons and also to remember which blow was inflicted by which accused, on which part of the body of the deceased. It is further evident that if a witness describes the infliction of the injury in a region which may not be accurate from the point of view of human anatomy but which is capable of being understood in a layman's language to be an injury in an area that is proximate and which is corroborated by the deposition of the doctor, then it may not be said that there is material contradiction between the ocular evidence and the medical evidence.

It is also clear that just because more injuries were found on the body of the deceased, in comparison to the injuries that could have been inflicted from the weapon used in the offence, as disclosed by the eye witnesses, cannot negate the prosecution version.

37. In this case, according to PW-1 and PW-2 only three injuries, two by spear (*ballam*) and one by spade (*fawda*) were inflicted on the deceased Hetram, but, in the autopsy five incised wounds were found on his head, face and neck. According to PW-1, the assault took place for about 1 ½ -2 minutes. Similarly, PW-2 stated that the assault took place for about 1-2 minutes. From the statement of both PW-1 and PW-2, it is apparent that the assault occurred for a very short duration, as such, it was not easy for them to remember how many blows in all were inflicted by the accused persons and which accused inflicted the blow by a particular weapon, on which part of the body, but, still the testimony of PW-1 and PW-2 inspires confidence, since they stated that no injury was inflicted below the neck of the deceased, which is corroborated from the autopsy report. PW-1 and PW-2 proved that all the injuries were inflicted on the face, neck and skull of the deceased, which is corroborated by the autopsy report, as such, there is no material contradiction between the ocular and medical evidence and further, their presence on the spot of occurrence is proved beyond doubt.

38. It was submitted by the learned counsel for the appellants that if spear (*ballam*) injuries are inflicted, then stab/punctured wound would result, but no such wound was found in the autopsy of the deceased, which falsifies the theory of prosecution that spear (*ballam*) blows were inflicted on the deceased.

39. According to medical jurisprudence, punctured or stab wound are caused when passing through the tissues, they enter a cavity of the body, such as the thorax or abdomen. These wounds are produced by a long piercing or stabbing instrument, such as a pin, needle, knife, scissors, bayonet, spear, dagger, pickaxe, arrow, etc. The point of the instrument may be sharp or blunt.

40. It is apparent that in this case all the injuries were inflicted on the skull, face and neck of the deceased, where there is no cavity. It is not a case where injuries were inflicted on the thorax or abdomen of the deceased, where there is a cavity, as such, a punctured or stab wound would not have been inflicted on the skull, face and neck of the deceased, in the facts and circumstances of the case.

41. In view of this, the submission of learned counsel for the appellants that since no punctured or stab wound was found on the body of the deceased, the whole prosecution story becomes doubtful, is rejected.

42. It was further submitted, that according to Tularam (PW-2), he at the time of the incident, was ploughing his field nearby, but the Investigating Officer has not shown in the site plan, the location of the field of PW-2. Further if, PW-2 was ploughing his field, then there must be bullocks, plough, seeds, farming implements, etc. in his field, but neither such implements or objects were shown by the Investigating Officer in the site plan nor were seized, which proves that PW-2 was not present in his field at that time. It was also submitted that since the statement of PW-2 under Section 161 Cr.P.C. was recorded after considerable delay on 26.08.1986, it renders his testimony doubtful.

43. It is well settled that if any lapse is committed by the Investigating Officer during investigation, and if it does not materially affect the prosecution's case, then no benefit can be given to the accused, on account of these lapses. PW-2 stated in cross-examination that when I.O. came, then at that time, bullocks and plough were present in his field, but neither they nor his field, were seen by the I.O. The Investigating Officer, PW-5 admitted in cross-examination that he had neither shown the fields of eye witnesses in the site plan nor disclosed whether their fields were ploughed or not. He also admitted that he neither saw those fields nor ploughed soil. He also failed to disclose the reason, for conducting the investigation in that manner. It was also admitted by PW-5 in his cross-

examination that he recorded the statement of PW-2 on 26.08.1986. He also admitted that PW-2 was present at the time of inquest but his statement was not recorded at that time, because it was necessary to send the dead body for autopsy. PW-2 also admitted in his cross-examination that till one month after the incident, he remained in the village and the I.O. had enquired from him, after about one month and he was present at the time of inquest and had signed the *Panchayatnama*. It is apparent that the Investigating Officer failed to apply its mind to these facts. It is also apparent that PW-2 was present at the time of inquest but his statement was not recorded by PW-5, which was ultimately recorded on 26.08.1986. PW-5 was not asked during cross-examination why this delay occurred, as such, the accused cannot be permitted at this stage to plead that the delay was deliberate and unexplained and it occurred because PW-2 was not an eye witness of the alleged incident. The lapses pointed out on the part of I.O., during investigation are neither material nor they dent the credibility of the prosecution case, as such, no benefit could be given to the accused for these lapses.

44. It was also submitted by the Learned counsel for the appellants that in the autopsy, semi-digested food was found in the stomach of deceased Hetram, which is only possible if, he died within two-three hours of taking meals, which proves that Hetram was perhaps murdered around midnight of 16/17.07.1986, which falsifies the

prosecution story that he was murdered on 17.07.1986 at about 5:00 AM.

45. It is true that as per the autopsy report, semi-digested food material 8 oz. was found in the stomach of deceased Hetram. PW-1 disclosed in cross-examination, that on 16.07.1986, his brother Ramesh arrived with meals at 10:00 PM. He also stated that usually Hetram used to eat meals, as soon as it arrived. PW-1 was not cross-examined as to the food Hetram ate and the specific time, when the food was consumed that night, as such, there is no evidence on record to prove when and what food he consumed that night. In the absence of the above evidence, it cannot be presumed that Hetram consumed food that night, as soon as it arrived and, in its absence, it cannot be determined what was the time gap between his taking meals and his death. Without knowing this time gap, one cannot determine the stage of digestion of food in the stomach. According to *Modi's jurisprudence*, rate of emptying of stomach varies in men from 2.5 to 6 hours. A meal containing carbohydrates generally leaves the stomach early and the one containing protein later. The fatty food delays the emptying time while liquids leave the stomach immediately after ingestion. Even otherwise, digestion rate can vary based on factors like age, health, and the type of food consumed. Conditions like shock, injury, or certain illnesses can affect digestion. It is well settled that merely on the basis of presence of semi digested

contents in the stomach, a doctor cannot precisely determine the time of death of the deceased. In the light of this discussion, mere presence of semi-digested food in the stomach of deceased, cannot discredit the credible ocular evidence of PW-1 and PW-2.

46. We have also carefully considered the case law submitted by the Learned counsel of the appellants. All the cases pertain to appreciation of evidence, in the peculiar facts of that case, which cannot be deemed binding in the facts and circumstances of this case. No *ratio-decidendi* has been laid in the referred cases.

47. We are of the opinion that the spot of occurrence was proved by the ocular evidence of PW-1, PW-2 and the Investigating Officer PW-5. According to PW-1 and PW-2 there was blood on the ground, cot and mattress, on which deceased Hetram was sitting/lying at the time of the incident, which was proved from the recovery memo Ex.Ka-22 of blood stained soil, which was taken into possession by PW-5 on 17.07.1986, from the spot, after the occurrence. Further, a blood stained spade (*fawda*) was also found on the spot, which was also taken into possession by PW-5 and a recovery memo Ex.Ka-21 was prepared, and proved by PW-5, during trial. Besides this, the Investigating Officer PW-5 had also taken into possession, the blood stained mattress and the ropes (*baandh*) of the cot, on which the deceased was sitting/lying at the time of the incident, and a recovery

memo Ex.Ka-23 was prepared, which was proved by PW-5 during trial. All these objects were sent for forensic analysis to the Forensic Science Laboratory, Agra and its report dated 27.01.1987 is on record, which proved that on all the above objects, human blood was found, and on the mattress, rope (*baandh*) and soil, the human blood was of 'B' group. The above objects recovered from the spot, proved the spot of occurrence, which was also corroborated from the ocular evidence of PW-1 and PW-2.

48. It was further submitted by the learned counsel for the appellants that an ante-time F.I.R. was registered in this case, because a wireless message was sent by the police, according to which the incident occurred in the night of 16/17.07.1986, which is contrary to the prosecution case that the incident took place on 17.07.1986 at 5:00 AM. Learned counsel submitted that for proving the above facts, the accused examined S.S.I. wireless Hari Singh, as DW-1, in the trial court, but his evidence was not considered by the trial court, while passing the impugned judgment.

49. From the perusal of Ex.Kha-5, proved by DW-1 during trial, it is evident that an information was sent by Sub-Inspector Incharge outpost Jait to S.P./C.O./Inspector Vrindavan that on 17.07.1986, Girdhari gave information at police outpost Jait, that his father Hetram Thakur was murdered in the night by Malkhan etc. by spade (*fawda*) and spear (*ballam*), when he was sleeping at his engine and

on the basis of this information, Case No.80 under Section 302 IPC was registered at the police outpost Jait, and thereafter, the police force departed for the spot of occurrence for performing necessary formalities. It is evident that DW-1 is not an eye witness of the incident and he only forwarded the information regarding murder of Hetram to his superior officers, on the basis of information provided to him by the first informant. In these circumstances, it cannot be presumed that the incident took place in the night of 16/17.07.1986. In the first information report Ex.Ka-1, it is specifically mentioned that the incident took place at 5:00 AM on 17.07.1986, when the accused arrived at the engine (tubewell) of Hetram and directed him to operate the tubewell, so that they could have a bath, but when Hetram refused, then he was assaulted by spear (*ballam*) and spade (*fawda*). The time of incident has further been proved by PW-1 and PW-2 by their credible ocular evidence. Thereafter, the information of the incident was given to the police outpost Jait, falling under the police station Vrindavan, District Mathura and thereafter, F.I.R. was registered on 17.07.1986 at 8:15 AM, which itself discloses the accused, who were involved in the offence and the motive of the offence, the weapons possessed by the accused and the manner, in which the assault took place and the place of occurrence, the witnesses present at the spot, etc.

50. We are of the opinion that there is absolutely no doubt about the occurrence, the presence of eye witnesses PW-1 and PW-2 at the spot, the spot of occurrence, the manner of the assault, the weapons used in the assault, the time of the incident, the nature of injuries inflicted on the deceased and the cause of death of Hetram. There is no contradiction between PW-1 and PW-2. The time of death opined by the doctor (PW-3), also coincides with the time of death of Hetram, as proved by PW-1 and PW-2.

51. We are of the considered opinion that in the light of the above facts and circumstances, the prosecution has proved its case against the accused-appellants beyond reasonable doubt. Consequently, the appeal deserves to be dismissed.

52. **Accordingly, the appeal is dismissed.** The impugned judgment and order dated 22.04.1987, convicting the accused-appellants for committing murder of Hetram, under Section 302/34 I.P.C. and sentencing them to suffer imprisonment for life, is affirmed.

53. The accused-appellants are on bail. They are directed to surrender in the trial court within a period of one month, to undergo the remaining sentence, failing which, the trial court is directed to take coercive measures for securing their presence, in accordance with law.

54. Registrar (Compliance) is directed to send a copy of this order to the concerned trial court for compliance. The trial court is directed to submit it's compliance report within two months.

Dated: 14.08.2025
Himanshu/Jitendra

(Sandeep Jain, J.) (Salil Kumar Rai, J.)