

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.55 of 1995**

Arising Out of PS. Case No.-16 Year-1979 Thana- SIWAN MUFFASIL District- Siwan

1. Sheo Bachan Choudhary, son of Gullu Choudhary, Resident of Village - Markaw ke Tola , P.S.- Siwan (M), Distt.- Siwan. (abated vide order dated 05.04.2022).
2. Harishankar Choudhary @ Hulas Choudhary, Son of Late Sheo Bachan Choudhary, Resident of Village - Markaw ke Tola, P.S.- Siwan (M), Distt.- Siwan.
3. Madan Choudhary, Son of Late Sheo Bachan Choudhary, Resident of Village - Markaw ke Tola , P.S.- Siwan (M), Distt.- Siwan.

... .. Appellants.

Versus

The State of Bihar

... .. Respondent.

Appearance :

For the Appellants	:	Mr. Rajesh Kumar Singh, Senior Advocate. Mr. Prashant Kumar, Advocate
For the State	:	Dr. Mayanand Jha, A.P.P.

**CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)**

Date : 20-05-2022

This appeal is filed by the appellant/accused no.1 Sheo Bachan Choudhary and his two sons, namely, appellant/accused no.2 Harishankar @ Hulas Choudhary and appellant/accused no.3 Madan Choudhary, challenging the Judgment and Order dated 12.04.1995 and 17.04.1995 respectively passed by the learned Additional Sessions Judge-I, Siwan, in Sessions Trial No.77/84 arising out of the Police Station-Siwan Muffasil Case No.16(11)/79. By this impugned



Judgment and Order, appellant/accused no.1 Sheo Bachan Choudhary came to be convicted of the offence punishable under Section 302 of the Indian Penal Code for committing murder of Ramanand Choudhary. He was sentenced to suffer imprisonment for life. By the same impugned Judgment and Order, his son Appellant/accused no.2 Harishankar Choudhary alias Hulas Choudhary also came to be convicted of the offences punishable under Sections 302, 324 and 323 of the Indian Penal Code for committing murder of Ramanand Choudhary, for causing hurt by a dangerous weapon to P.W.5 Saryug Choudhary and for causing simple hurt to P.W.8 Sawaru Choudhary. He was sentenced to suffer imprisonment for life, rigorous imprisonment for two years and rigorous imprisonment for one year on each count respectively. Similarly, by the said Judgment and Order, appellant/accused no.3 Madan Choudhary came to be convicted of the offences punishable under Sections 302 read with 34 and 307 of the Indian Penal Code for committing murder of Ramanand Choudhary and for attempting to commit murder of P.W.8 Sawaru Choudhary. He was sentenced to suffer imprisonment for life as well as rigorous imprisonment for four years on each count respectively. The learned trial court had directed that the substantive sentences



imposed on the appellants/accused shall run concurrently. For the sake of convenience, the appellants shall be referred to in their original capacity as “the accused”.

2. Facts in brief leading to the prosecution of the accused persons projected from the police report can be summarized thus:

(a). First informant/P.W.8 Sawaru Choudhary along with his father P.W.5 Saryug Choudhary used to reside at village-Markan Ka Tola falling under the jurisdiction of Police Station-Siwan Muffasil in District-Siwan. Ramanand Choudhary (since deceased) was brother of First Informant P.W.8 Sawaru Choudhary and son of P.W.5 Saryug Choudhary. P.W.5 Saryug Choudhary and deceased Ramanand Choudhary were working as the Train Driver and the Second Fire Man respectively with the Indian Railways. Deceased Ramanand Choudhary and his wife P.W.4 Anjoria Devi were also residing with P.W.5 Saryug Choudhary. P.W.3 Indrasan Choudhary, who is brother of P.W.5 Saryug Choudhary, was also residing at the same village-Markan Ka Tola.

(b). First Informant/PW 8 Sawaru and his deceased brother Ramanand had purchased 8 Katha of land at Markan Ka Tola about one year back from Abdul Manan and Abdul Mastan



of village-Hathora. Appellant/accused no.1 Sheo Bachan Choudhary was also desirous of purchasing of very same land but he could not. Therefore, he was harbouring an ill will against the prosecuting party. Due to this enmity, at about 11.00 A.M. of 18.11.1979, accused no.1 Sheo Bachan Choudhary and his sons accused no.2 Harishankar Choudhary and accused no.3 Madan Choudhary dashed at the door of P.W.5 Saryug Choudhary while being armed with spear, Bhujali (sickle) and stick. Then accused no.3 Madan Choudhary gave two blows of spear on right side of back of P.W.8 Sawaru Choudhary. Accused No.2 Harishankar @ Hulas Choudhary gave blows of stick on neck and waist of P.W.8 Sawaru Choudhary. Thereafter, accused no.2 Harishankar alias Hulas Choudhary went back to his house and brought a Bhujali (sickle). At that time, P.W.5 Saryug Choudhary and Ramanand Choudhary (since deceased) came there. Accused No.2 Harishankar alias Hulas Choudhary then gave blows of Bhujali (sickle) on hands of P.W.5 Saryug Choudhary. Accused No.1 Sheo Bachan Choudhary and his son/accused no.2 Harishankar alias Hulas Choudhary then gave blow by spear and Bhujali (sickle) on neck, abdomen and chest of Ramanand Choudhary. Ramanand Choudhary suffered serious injuries in this murderous assault.



The incident of assault on the members of the prosecuting party came to be witnessed by villagers, namely, Briksha Sah, P.W.2 Motilal Sah, Nagina Sah and Sheo Bachan son of Khilawan Choudhary.

(c). Injured P.W.5 Saryug Choudhary, P.W.8 Sawaru Choudhary and Ramanand Choudhary were then taken to the Sadar Hospital, Siwan, for medical treatment, where they were treated by P.W. 9 Dr. D. N. Shrivastava from 12:45 PM of 18.11.1979. P.W. 3 Indrasan- brother of P.W. 5 Saryug accompanied them to the hospital.

(d). P.W.10 Ramadhar Singh, Police Sub-Inspector of the Siwan Muffasil Police Station received the O.P.D. slip from the Sadar Hospital, Siwan, at about 02.15 P.M. of 18.11.1979 mentioning admission of the injured at the said hospital for medical treatment. By taking entries in the station diary, P.W.10 Ramadhar Singh reached the hospital at about 03.00 P.M. of 18.11.1979 itself. At the said hospital, he recorded the F.I.R. (Ext.4) lodged by P.W.8 Sawaru Choudhary. His statement under Section 161 of the Code of Criminal Procedure was also recorded thereat. P.W.10 Ramadhar Singh noted injuries on persons of P.W.3 Indrasan Choudhary, P.W.5 Saryug Choudhary and Ramanand Choudhary. He prepared injury



reports, which were collectively marked as Ext.5. Then P.W.10 Ramadhar Singh recorded dying declaration of Ramanand Choudhary. Another dying declaration of Ramanand Choudhary was also got recorded by the Judicial Magistrate on 18.11.1979. At 6:10 PM of 18.11.79 itself Ramanand Choudhary succumbed to the injuries and at about 07.20 P.M., P.W.9 Dr. D.N. Shrivastava of Siwan Hospital informed this fact to P.W.10 Ramadhar Singh. Accordingly, P.W.10 Ramadhar Singh instructed the concerned to add Section 302 of the Indian Penal Code in the case diary of the subject crime.

(e). All three accused persons were also found to be admitted in the very same hospital at that time by P.W. 10 Ramadhar Singh, P.S.I. Therefore, he recorded statement of accused no.1 Sheo Bachan Choudhary and accused no.2 Harishankar alias Hulas Choudhary and thereafter arrested all three accused persons at the hospital itself and kept them under the surveillance of a police constable, as P.W. 9 Dr. Shrivastava informed him that it would be dangerous to take them out of the hospital without completing their medical treatment.

(f). At about 10.00 P.M. of 18.11.1979, P.W.10 Ramadhar Singh, visited village-Markan Ka Tola. The spot of the incident was shown to him by P.W.4 Anjoria Devi. He



inspected the same and seized soil stained with blood from the spot vide seizure memo (Ext.12). Thereafter, routine investigation followed. Statements of witnesses came to be recorded. Report of post-mortem examination of the dead body of Ramanand Choudhary as well as injury certificates of the injured were collected. On completion of investigation, the accused persons were chargesheeted.

(g). The learned trial court framed the charge for the offences punishable under Sections 302, 302/34, 307 and 324 of the Indian Penal Code against the accused persons and explained the same to them. They pleaded not guilty and claimed trial.

(h). In order to bring home the guilt to the accused, the prosecution has examined in all 11 witnesses whereas defence has examined Kedar Nath Dubey, for proving by identifying the handwriting as well as the signatures of P.W.10 Ramadhar Singh, Sub Inspector on the case diary and relevant documents of the cross case. Following are the witnesses examined by the prosecution:

- (i). P.W.1 Hira Lal Choudhary-the witness, who accompanied the injured to the Hospital at Siwan.
- (ii). P.W.2 Moti Lal Prasad-an eye witness, who



turned hostile to the prosecution.

- (iii). P.W.3 Indrasan Choudhary-brother of injured P.W.5 Saryug Choudhary and uncle of deceased Ramanand Choudhary.
- (iv). P.W.4 Anjoria Devi, widow of Ramanand Choudhary-an eye witness to the incident.
- (v). P.W.5 Saryug Choudhary-an injured eye witness and father of deceased Ramanand Choudhary.
- (vi). Phuljharia Devi, wife of Indrasan Choudhary-a witness tendered for cross-examination by the defence.
- (vii). Sanehi Devi, wife of P.W.5 Saryug Choudhary and mother of deceased Ramanand Choudhary.
- (viii). P.W.8 Sawaru Choudhary the first informant as well as an injured witness and brother of deceased Ramanand Choudhary.
- (ix). P.W.9 Dr. D.N. Shrivastava, Medical Officer of Sadar Hospital, Siwan, who treated the injured prosecution witness, the accused and conducted post-mortem examination on the dead body of Ramanand Choudhary.
- (x). P.W.10 Ramadhar Singh, Police Sub Inspector and the Investigating Officer.
- (xi). P.W.11 Kamla Choudhary-a witness examined to prove agreements (Exts.15 and 15/1) in respect of land purchased from Abdul Manan by the prosecuting party.

- (i). The defence of the accused persons was that of



total denial and false implication in the case by the prosecuting party in order to save themselves from the counter case initiated vide the F.I.R. (Exts.B and C) of Police Case 17(11)/1979 dated 18.11.1979 lodged by appellant/accused no.1 Sheo Bachan Choudhary against the members of the prosecuting party.

(j). After hearing the parties, by the impugned Judgment and Order, the learned trial court was pleased to convict the appellants and to sentence them as indicated in the opening paragraph of this Judgment.

3. During the pendency of the instant appeal, appellant/convicted accused no.1 Sheo Bachan Choudhary died in the year 2010 and, as such, the instant appeal qua said appellant no.1 Sheo Bachan Choudhary stood abated vide order dated 05.04.2022 passed by this Court.

4. We heard Mr. Rajesh Kumar Singh, the learned Senior Counsel appearing for the appellants at sufficient length of time. By taking us through the entire records and proceedings, he argued that the appellants and the deceased appellant/accused no.1 Sheo Bachan Choudhary were, in fact, admitted in the Sadar Hospital, Siwan, on 18.11.1979 itself and they were injured during the course of the same incident. They were arrested while being admitted at the hospital by P.W.10



Ramadhar Singh. Injuries suffered by accused persons during the course of the incident were not at all explained by the prosecution. On the contrary, as argued by the learned Senior Counsel appearing for the appellants, all the prosecution witnesses tried to hide the fact of suffering injuries by the accused persons during the course of the same incident. All witnesses examined by the prosecution are stating before the court that no injuries were suffered by the accused persons when, in fact, the injured witnesses in this case as well as all the accused persons were examined by P.W.9 Dr. D.N. Shrivastava on the very same day of happening of the incident. It is further argued that the prosecution has suppressed the genesis of the incident. The F.I.R. lodged by P.W.8 Sawaru Choudhary makes it explicitly clear that the incident took place at the door of the house of P.W.8 Sawaru Choudhary and his father P.W.5 Saryug Choudhary whereas when the witnesses entered in the witness box after 9 years of the incident, had deposed that the incident took place at some other place. According to the learned Senior counsel appearing for the appellants, this is deliberately done by the prosecution witnesses only because P.W.4 Anjoria Devi had shown the actual spot of the incident to P.W.10 Ramadhar Singh, P.S.I. at about 10.00 P.M. of 18.11.1979 itself which was



not as mentioned in the F.I.R. Hence, according to the learned Senior counsel appearing for the appellants, the prosecution witnesses have modulated their versions to suit the record of the investigation. It is further argued that version of prosecution witnesses shows that the spot of the incident was near the Neem tree which was in the vicinity of the house of the accused persons. The accused persons had suffered serious injuries at the time of the incident and this fact shows that the prosecuting party was aggressor. It is argued that the prosecuting party had used guns for causing wounds to accused persons. As stated by the learned Senior counsel appearing for the appellants, the defence has proved the F.I.R. of the counter cases and has also placed on record and proved the case diary of the counter case containing the notes of inspection of the spot of incident from the defence witness. It is argued that therefore, the accused persons are entitled for acquittal.

5. The learned Senior counsel appearing for the appellants in order to buttress the submissions so advanced has placed reliance on the Judgments in the matters of **Mohar Rai & Another vs. The State of Bihar** reported in AIR 1968 SC 1281, **Lakshmi Singh vs. The State of Bihar** reported in AIR 1976 SC 2263, **The State of Rajasthan vs. Madho & Ors.**



Reported in AIR 1991 SC 1065, Darshan Singh vs. The State of Punjab & Ors. reported in AIR 2010 SC 1212, Salim Zia vs. The State of Uttar Pradesh reported in AIR 1979 SC 391.

6. As against this, the learned A.P.P. supported the impugned Judgment and Order by arguing that the spot of the incident is one and the same as the incident took place in a small area and, therefore, it cannot be said that the prosecution has suppressed the genesis of the incident. It is further argued by the learned A.P.P. that as the impugned Judgment and Order is based on acceptable evidence, the same is not liable to be disturbed by this Court.

7. We have carefully considered the submissions so advanced and we have also perused the records and the proceedings including oral as well as documentary evidence adduced by the parties. We have also carefully gone through the Judgment cited by the learned Senior counsel appearing for the appellants.

8. It hardly needs to point out that it is the bounded duty of the prosecution to place before the Court the whole set of relevant facts in order to enable the Court to arrive at the correct conclusion. Way back in the year 1974, in the matter of **Jamuna Chaudhary and others Vs. State of Bihar 1974 CrI.**



L.J. 890, the Hon'ble Apex Court has held thus in this regard in paragraphs-11 and 12 of its Judgment, relevant portion of which is reproduced hereunder:

“11. The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth. It is apparent that the prosecution witnesses had tried to omit altogether any reference to at least the injuries of the appellant Ramanandan because there was a cross case in which such an admission could have been made use of to support the prosecution in that case. Dukhharan, however, made a very feeble and obviously untruthful attempt to account for the injuries of Ramanandan by saying that he had snatched a pharsa from one of the members of the crowd and had started swinging it around. He could not, however, state whether any one was injured by it. He even stated that he did not recognise the man from whom he had snatched the pharsa.....”

12. As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which



so many persons, including Laldhari and Ramanandan, were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case.”

9. With this let us not review the entire evidence adduced by the prosecution in order to ascertain whether the conviction and the resultant sentence imposed on the appellants is justified. There is no embargo on the Appellate Court in re-appreciating the evidence for the purpose of ascertaining whether it is proved that the accused has committed the offence alleged against him. In the case in hand, it is alleged that the accused had committed murder of Ramanand Choudhary and had attempted to commit murder of Prosecution Witness No.8 Sawaru Choudhary and caused injuries to the prosecution witnesses by dangerous weapons. Let us therefore at the outset, ascertain whether deceased Ramanand Choudhary died homicidal death on 18.11.1979.

10. P.W.3 Indrasan Choudhary-uncle of the deceased Ramanand Choudhary, P.W.4 Anjoria Devi-widow of deceased Ramanand Choudhary, P.W.5 Saryug Choudhary-



father of the deceased Ramanand Choudhary and P.W.8 Sawaru Choudhary-brother of the deceased Ramanand Choudhary, have unanimously stated that Ramanand Choudhary died because of injuries sustained by him in the incident on 18.11.1979 itself. P.W.10 Ramadhar Singh, P.S.I., the Investigating Officer of this case, has testified that he visited the Sadar Hospital Siwan at about 03.00 P.M. of 18.11.1979 and found that alongwith others, Ramanand Choudhary was also admitted in injured condition at the said hospital. This witness claimed to have recorded the dying declaration of Ramanand Choudhary (Ext.10) and further stated that he received information of death of Ramanand Choudhary from P.W.9 Dr. D.N. Shrivastava. As per version of P.W.9 Dr. D.N. Shrivastava on the next day, i.e., 19.11.1979, he conducted post-mortem examination on the dead body of Ramanand Choudhary and found following antemortem injuries on the dead body of Ramanand Choudhary:

- I. One incised wound 4" x 1" x 2 ½" cutting the IX rib nipple region and liver on the right side. Chest on the back injury in liver of side of 3" x 1/2" x 1" right chest cavity full of blood.
- II. One incised wound 4" x 3/4" x 1 ½" over the inter-scapular region.
- III. One penetrating injury 3/4"x1 ½" at the root of neck right side back part.



IV. One bruise injury over the back of left for arm below elbow.

V. One abrasion injury below right knee over right leg 3/4" x 3/4".

P.W.9 Dr. D.N. Shrivastava has further stated that Ramanand Chouduary died due to hemorrhage and shock due to the injuries noticed on his dead body at about 6.10 P.M. on 18.11.1979 i.e. on the day of incident itself.

The defence has not disputed this evidence adduced by the prosecution as well as the factum of death of Ramanand and as such with this evidence, which is also corroborated by the contemporaneous report of post-mortem examination, the prosecution has proved that deceased Ramanand Choudhary died homicidal death.

11. According to the prosecution case, P.W.5 Saryug Choudhary and his son P.W. Sawaru Choudhary were injured in the incident in question which took place at about 11.00 A.M. of 18.11.1979 at the door of their house at village-Markan Ka Tola. P.W.3 Indrasan Choudhary, according to the prosecution case, was not injured in the incident in question but he was found to be admitted at the Sadar Hospital, Siwan, in injured condition by the Investigating Officer. As per evidence of P.W.10 Ramadhar Singh, the Investigating Officer, at about



02.15 P.M. of 18.11.1979, he got the O.P.D. slip from the Sadar Hospital, Siwan, informing that three injured persons are admitted to the said hospital for medical treatment. He deposed that then he visited the said hospital at about 03.00 P.M. of 18.11.1979 and apart from recording the F.I.R. lodged by P.W.8 Sawaru Choudhary, he also got recorded statement under Section 161 of the Code of Criminal Procedure of the said witness. He also claimed to have inspected the injuries on the person of P.W.5 Saryug Choudhary, P.W.3 Indrasan Choudhary and deceased Ramanand Choudhary and about preparation of report Ext. 5 in that regard. Let us therefore put on record what attending Medical Officer says about the injuries on the victims of the alleged offence.

12. On this backdrop, it is in evidence of P.W.9 Dr. D.N. Shrivastava of the Sadar Hospital, Siwan, that he had medically examined P.W.5 Saryug Choudhary at about 12.45 P.M. of 18.11.1979 and had noted the following injuries on his person:

- I. One incised wound curved on the back of left hand extending from wrist to the base of middle and ring finger 4" x 3/4" x cutting the extensor tendon of the middle finger and opening the III metacarpal phalanx joint cavity. Caused by sharp weapons like-Bhujali-Grievous in nature.



- II. One incised wound back of the right forearm $2\frac{1}{2}$ " x $\frac{1}{2}$ " about 3" below elbow, caused by sharp weapon like Bhujali simple in nature.
- III. Incised wound curved across back of the left arm above elbow $4\frac{4}{3}$ " x $2\frac{1}{2}$ " bone deep caused by sharp weapon like Bhujali-opinion reserved.
- IV. One lacerated wound left side of head $\frac{1}{4}$ " x $\frac{1}{4}$ " muscle deep, simple in nature caused by hard blunt weapon like lathi.

P.W.9 Dr. D.N. Shrivastava further testified that on the same day, thereafter, he examined P.W.8 Sawaru Choudhary and found the following injuries on his person:

- I. Incised wound two inches a crossed the right side of back 2 " x $\frac{1}{2}$ " x $\frac{1}{2}$ " and $2\frac{1}{4}$ " x $\frac{1}{2}$ " x $\frac{1}{4}$ " one above the other. Opinion reserved till X-ray caused by sharp weapon like bhala.
- II. Three bruise $\frac{1}{4}$ " x $\frac{1}{4}$ " right side of back in the lower region, caused by hard blunt like lathi- simple in nature.
- III. Complain on pain neck and waist.

As per version of P.W.9 Dr. D.N. Shrivastava, at about 01.30 P.M. of 18.11.1979, he examined P.W.3 Indrasan Choudhary and noted the following injuries on his person:

- I. One lacerated wound 1 " x $\frac{1}{4}$ " muscle deep over the for hand in the middle near the hair line.
- II. One lacerated injury $\frac{1}{2}$ " x $\frac{1}{4}$ " muscle deep over the right thumb on the



middle side. Both caused by hard substance like bricks-simple in nature.

This evidence shows that soon after the incident which allegedly took place at 11 A.M. of 18.11.1979 at Markan Ka Tola, the injured were admitted to the Sadar Hospital, Siwan, prior to 12.45 P.M. and were receiving attention of P.W. 9 Dr. Shrivastava since then.

13. During the course of cross-examination of P.W.9 Dr. D.N. Shrivastava of the Sadar Hospital, Siwan, we have also noticed that on the very same day at the same time, deceased appellant/accused Sheo Bachan Choudhary as well as accused no.2 Harishankar Choudhary alias Hulas Choudhary and accused no.3 Madan Choudhary were also admitted to the Sadar Hospital, Siwan, in injured condition and P.W.9 Dr. D.N. Shrivastava had also examined them on 18.11.1979 itself. Following facts are deposed by P.W. 9 Dr. Shrivastava.

Deceased appellant/accused Sheo Bachan Choudhary was examined by P.W.9 Dr. D.N. Shrivastava at 01.35 P.M. of 18.11.1979 at the Sadar Hospital, Siwan, and he was found to be having following injuries:

- (1). One lacerated wound on over the head right side anterior 1½" x ¼" x Scalp Deep.
- (2). One lacerated wound ½" x ¼" x Muscle



Deep over the upper side of head posteriorly.

- (3). Diffuse swelling back of right forearm below elbow 2" x 2".
- (4). Three bruises across the back 4" x 1/2", 3" x 1/4" and 3" x 1/2".
- (5). One lacerated wound 3/4" x 1/4" x muscle deep in the front of left leg in the middle.
- (6). One lacerated injury 1/2" x 1/4" over the back on the right side near the waist.

The Medical Officer opined that all the injuries simple, caused by hard and blunt substance.

Accused no.2 Harishankar Choudhary alias Hulas Choudhary was examined by P.W.9 Dr. D.N. Shrivastava at 01.45 P.M. of 18.11.1979 at the Sadar Hospital, Siwan, and he was found to be having following injuries:

- (1). Small lacerated wound-11 in number of size 1/10" x 1/10" to 1/4" x 1/4" and 1/4" deep. Powder burn not clearly detected. All in area of 3" x 2 1/2" on the right side of chest below and lateral to nipple. Appears to be caused by firearm, simple in nature.
- (2). One lacerated wound left side of forehead 1" x 1/2" muscle deep, also 2" above the front of left ear.
- (3). One lacerated wound in the middle of head 1/4" x 1/4" x muscle deep. Simple caused by the hard and blunt object.
- (4). Diffuse swelling on the back of both legs 2" x 2", 2 1/2" x 2 1/2" -Simple caused by hard and blunt object.



- (5). Circular lacerated wound in the back in the middle with impression of teeth. Simple in nature.
- (6). One lacerated wound $\frac{1}{2}$ " x $\frac{3}{4}$ " near the waist left side of back-simple caused by the hard and blunt object.

Accused No.3 Madan Choudhary was examined by P.W.9 Dr. D.N. Shrivastava at 01.50 P.M. of 18.11.1979 at the Sadar Hospital, Siwan, and he was found to be having following injuries:

- (1). Small lacerated wound-13 in number of size $\frac{1}{10}$ " x $\frac{1}{10}$ " to $\frac{1}{4}$ " x $\frac{1}{4}$ " and skin deep to $\frac{1}{4}$ ". Powder burn not clearly detected. All in area of 3" x $2\frac{3}{4}$ " of outer side of right arm. Appears to be caused by firearm. Simple in nature.
- (2). One lacerated injury $\frac{1}{4}$ " x $\frac{1}{6}$ " muscle deep on back of right hand near the base of middle finger-simple in nature caused by the hard and blunt object.
- (3). Two lacerated wounds over the head on the left side $1\frac{1}{2}$ " x $\frac{1}{4}$ " x muscle deep. One on the right side 1" x $\frac{1}{4}$ " x muscle deep-both simple caused by the hard and blunt object.
- (4). One lacerated wound over the head anteriorly in the middle $\frac{1}{4}$ " x $\frac{1}{6}$ " x muscle deep, simple in nature caused by the hard and blunt object-Age- within 6 hours.

Thus, it is seen that the members of the prosecuting party as well as the accused persons were simultaneously admitted to the Sadar Hospital, Siwan, for medical treatment of



the injuries suffered by them in the incident in question. This makes it crystal clear that the accused persons had also sustained injuries in the same incident. There is no possibility of their suffering injuries in some other incident in such a small gap of time nor such plea is coming from the side of the prosecution for explaining injuries on the accused persons. On the contrary, the documentary evidence at Ext.B which is the FIR of the counter case registered at the instance of the deceased appellant Sheo Bachan indicates that the accused herein were injured in the same incident. Ultimately that FIR had culminated in filing of the charge sheet and registration of the criminal case.

14. Thus we have noted that one of the members of the prosecuting party died in the incident and two of them viz. P.W. 5 Saryug Choudhary and P.W.8 Sawaru Choudhary were injured in the incident. As against this, from the evidence emerging on record, we have also noted that all three accused persons were also injured at the same time and on the same day, i.e., at about 11:00 AM of 18.11.1979 and they were simultaneously admitted to the Sadar Hospital, Siwan, for medical treatment. It needs to be noted that the principle of criminal jurisprudence requires that the prosecution must



establish its case by clear, cogent and convincing evidence. No matter how diabolic is the crime, the burden always remains on the prosecution to prove guilt of the accused beyond all reasonable doubt. The incident in question has given rise to the registration of a case and the counter case. The case has been registered on the basis of the FIR Exhibit-1 of P.W.8 Sawaru Choudhary recorded at about 3:00 PM of 18.11.1979 at the Sadar Hospital, Siwan, by P.W.10 Ramadhar Singh of the Siwan Muffasil Police Station. This FIR has resulted in registration of Siwan Muffasil Police Station Case No.16(11)/79, the charge sheet of which has resulted in registration of the sessions case giving rise the Judgment and order passed which is the subject matter of the instant appeal. Similarly, as admitted by P.W.10 Ramadhar Singh, the Investigating Officer, on 18.11.1979 itself he had also recorded the FIR lodged by Sheo Bachan Choudhary (deceased appellant/accused) and, accordingly Siwan Muffasil Police Station Case No.17(11)/79 came to be registered against the accused persons therein (who are the members of the prosecuting party in the instant case). The defence has got the relevant documents in the counter case proved through defence witness Kedar Nath Dubey.



15. The defence had produced the certified copy of the entire order sheets in respect of the counter criminal case arising out of P.S. Case No.17(11)/79 wherein the members of the prosecuting party were the accused. The FIR of the counter case upon being proved is marked as Exhibit-B by the learned Trial Court. The charge sheet filed pursuant to investigation in the cross case had resulted in registration of Trial No.879/86 on the file of the learned Judicial Magistrate, Siwan. The certified copy of the entire order sheets of that trial was placed on the record of this case which shows that the offences alleged were under Sections 147, 148, 149, 324, 323 and 379 of the Indian Penal Code as well as under Section 27 of the Arms Act. Exhibit-16 is the certified copy of order dated 06.06.1986 in the said Trial No.879/86, arising out of Police Station Case No.17(11)/79 State Vs. Saryug Choudhary and Others. It is seen therefrom that during the pendency of that case and after recording evidence of some of the prosecution witnesses including Madan Choudhary and Hari Shankar Choudhary (the accused herein), the said Trial came to be withdrawn by the prosecution by resorting to Section 321 of the Cr.P.C. with the reason that the case remained pending for more than five years.

16. It is well settled that a case and the counter case



arising out of the same incident should always be tried by the same Court. The case and counter case is required to be tried in quick succession by the very same Judge, who is not supposed to pronounce the judgment till hearing of both cases is concluded. Even one of such case is a Sessions triable case and the another one is triable by the Judicial Magistrate then also by resorting to the provision of Section 323 of the Cr.P.C., the learned Judicial Magistrate is required to commit such Magistrate triable case to the Sessions Court for trial with the another case. Evidence in both such cases is required to be recorded separately and evidence in one case cannot be read while deciding the another case. However, it is seen that instead of adopting this well established procedure, the counter case was being tried separately by the Court of the Judicial Magistrate which ultimately ended in its withdrawal by prosecution. The solitary practice of trial of the case and the counter case as stated has practical reasons for its adoption. Such course of action eliminates the danger of an accused being convicted before disposal of whole case by the Court and prevents delivery of conflicting judgments upon similar facts. This is because, for all practical purposes, the case and the counter case are conflicting and different versions of the very



same incident.

17. Be that as it may, our exercise should not be considered as reading evidence from the counter case as whatever is being relied by us is the material which is admissible in evidence and proved in the case in hand.

18. Bone of contention between the parties seems to be 8 Kathas land purchased by P.W. 8 Sawaru Choudhary and his deceased brother Ramanand Choudhary from Abdul Manan and Abdul Mastan about one year back from the date of the incident. It is case of the prosecution that because of this purchase, the accused persons were harbouring grudge, as they also intended to purchase very same land. Hence, according to the persecution case reflected from the FIR lodged by P.W. 8 Sawaru Choudhary, at about 11 A.M. of 18.11.1979, all three accused persons dashed at their door and committed murder of Ramanand Choudahry, attempted to commit murder of P.W. 8 Sawaru Choudahry and inflicted injuries on P.W. 5 Saryug Choudahry by using dangerous weapons. The cross case reflected from proved FIR (Ext. B) of Police Station Case No. 17(11)/79 lodged by deceased appellant-accused Sheo Bachan Choudahry was to the effect that Chote Lal Choudahry deliberately left his shegoat for grazing in their field and when



Hiramati – daughter of Sheo Bachan Choudhary (deceased appellant-accused) was taking that shegoat to the cattle pond, there was quarrel. Because of that quarrel, P.W. 5 Saryug Choudahry, P.W. 3 Indrasan Choudhary, Ramanand Choudahry (since deceased), P.W. 8 Sawaru Choudahry and others attacked the house of Sheo Bachan Choudahry (deceased appellant-accused) armed with sticks, spear, Farsa, country made gun and assaulted him as well as his sons Harishankar Choudhary (appellant-accused no.2) and Madan Choudhary (appellant-accused no. 3). These are the conflicting versions of the very same incident coming on record from the case and from the proved FIR (Ext. B) of the counter case. As per version of the prosecuting party in this case, the accused persons came at the door of the house of P.W. 5 Saryug Choudhary and P.W. 8 Sawaru Choudahry, murderously assaulted them and killed Ramanand Choudhary.

19. P.W. 8 Sawaru Choudhary who lodged the FIR on 18.11.1979 came to be examined as witness by the prosecution on 08.08.1988 i.e. after about nine years from the date of the incident. We noted that while in the witness box, this first informant had modulated his version to suit the case of prosecution. As per his statement before the court after nine



years from the incident, the field purchased by him and his brother Ramanand Choudhary (the deceased) one year earlier from Abdul Menan and Abdul Mastan was in front of the house of accused persons and they were not happy because of this transaction. On the day of the incident he went to that field to check germination of wheat seeds sown in that field and there the accused persons started abusing him. P.W.8 Sawaru Choudhary further deposed that he therefore wanted to return to his house but the accused persons encircled him near Neem Tree. As stated by P.W. 8 Sawaru Choudhary, the incident of murderous assault then took place at that Neem Tree in which accused no. 3 Madan Choudahry gave two blows of spear on his back and accused no. 2 Harishankar @ Hulas Choudahry gave blow of stick to him. P.W. 8 Sawaru Choudahry stated that then his brother Ramanand Choudahry (the deceased) and father P.W. 5 Saryug Choudahry came. Accused Sheo Bachan Choudahry then assaulted on neck of Ramanand Choudhary by spear, accused no. 2 Harishankar @ Hulas Choudhary gave two blows of Bhuhjali to Ramanand Choudhary - one on chest and one on back. Accused no. 3 Madan Choudahry gave blows of stick to Ramanand Choudhary and then accused no. 2 Harishankar @ Hulas Choudhary gave blows of Bhujali on right hand and left



elbow of P.W. 5 Saryug Choudhary. As deposed by P.W. 8 Sawaru Choudahry then they went on road and met P.W. 3 Indrasan Choudahry as well as P.W. 1 Hira lal Choudahry. They all then went to the Siwan Hospital where he lodged the FIR Ext. 1.

20. P.W. 8, Sawaru Choudahry in chief-examination itself had dis-owed the prosecution case regarding the mode and manner of happening of the incident as well as the spot of the incident. He changed his version by departing from the prosecution case while in the witness box. As stated, the prosecution case is to the effect that the accused persons raided the house of P.W. 5 Saryug Choudahry and P.W. 8 Sawaru Choudahry and committed the offence at the door of these prosecution witnesses. However as against this, P.W. 8 Sawaru maintained his changed version even in cross-examination by stating that the accused did not come to his door for committing the offence. He reiterated that at the time of the incident he was returning from the canal and met the accused persons beneath the Neem Tree where the incident took place. Thus, it is not in evidence of P.W. 8 that the accused persons armed with dangerous weapons came to his house and indulged in the murderous assault at his door.



21. We have also noted that P.W. 8 Sawaru Choudhary, though claims to have witness the minutes details of the incident which took place at about 11 A.M. of 18.11.1979, had blatantly stated that he had not seen wounds on person of any of the accused nor did he met them at the Siwan Hospital. He however admitted that deceased appellant/accused Sheo Bachan Choudahry had lodged the cross case in which he is on bail. Thus, it is emerged from the evidence of First Informant -P.W.8, Sawaru Choudahry that the incident in question did not take place at the door of his house and as stated by him in the FIR lodged by him at 3 P.M. at Siwan Hospital. It took place somewhere else when he was returning from the canal as well as his field and after hurling of abuses by the accused persons when he was at his field.

22. Now let us examine what P.W. 5 Saryug Choudhary, another injured witness and father of P.W. 8 Sawaru Choudahry speaks about the incident. This witness was also examined after eight years of the incident. This witness has also given a complete go by to the prosecution case as he has not stated that the accused persons come to his door and indulged in murderous assault on them. P.W. 5 Saryug Choudhary has stated that he as well as his son Ramanand Choudahry (the deceased)



left their house for joining duty at Siwan and on the way they saw all accused persons abusing P.W. 8 Sawaru Choudhary. As testified by P.W. 5 Saryug Choudahry then accused no. 3 Madan Choudhary gave two blows of spear to P.W. 8 Sawaru Choudahry and accused no. 2 Harishankar @ Hulas Choudhary assaulted him by sticks. Thereafter, deceased appellant/accused Sheo Bachan Choudahry gave blow of spear on right neck of Ramanand Choudhary, accused no. 2 Harishankar @ Hulas Choudhary assaulted Ramanandan Choudhary by Bhujali on chest and back so also accused no. 3 Madan Choudhary assaulted Ramanand Choudahry by stick. As stated by P.W.5 Saryug Choudhary he then tried to intervene but accused no. 2 Harishankar @ Hulas Choudhary gave blows of Bhujali at his hands. This witness claimed that then they went at the road and met P.W. 3 Indrasan Choudhary and P.W. 1 Hira Lal Choudahry.

23. In cross-examination, P.W. 5 Saryug Choudhary was questioned about the manner of assault. Though this witness denied that he as well as other members of he prosecuting party had assaulted the accused persons by going to their house, in a flow he stated that they assaulted the accused persons near the Neem Tree. He reiterated that the incident happened at the Neem Tree and then tried to cover himself by



saying that the assault was by the accused persons. However what he had stated earlier speaks volumes in respect of the incident, in the light of Judgment of the FIR of the cross case by accused Sheo Bachan Choudhary. Version of this witness coming on record from cross-examination indicates that there was assault on the accused persons at the time of the incident by the members of the prosecuting party and that assault had caused injuries to the accused persons, which were ultimately noted by P.W. 9 Dr. D. N. Shrivastava of Siwan Hospital. P.W. 5 Saryug admitted that the accused persons had filed the FIR against him and others alleging assault. Thus evidence of P.W. 5 Saryug Choudhry indicates that it was a bilateral quarrel in which both parties indulged in assaulting each other at the spot which is totally different from the spot of the incident as claimed by the prosecution. P.W. 5 Saryug Choudhary had given the description of the four boundaries of the spot where the incident took place. As per his version, on the northern side of the spot of the incident, there was a field of Kumar Ahir, on the south of the spot of the incident, there is house of the accused persons and also there is a well at a distance of 8 to 9 steps. On the western side of the spot, at the distance of 25 steps there is house of P.W. 3 Indrasan Choudahry as well as his own house



and at the eastern side of the spot, there is a well. The incident of Marpit as per version of P.W. 5 Saryug Choudahry took place under the Neem Tree. Thus, this version of the witness coming in the cross-examination unerringly points out that the Marpit did not take place at the door of the house of first informant Sawaru Choudahry and his father P.W. 5 Saryug Choudahry, as claimed by the prosecution.

24. P.W. 5 Saryug Choudhary, in his evidence has stated that he witnessed the incident right from hurling abuses by the accused persons to P.W. 8 Sawaru Choudahry till the end. He himself had suffered injuries in that incident. However in cross-examination, he stated that none of the accused persons suffered injuries in this incident. It is very surprising that even this injured eye witness so also P.W. 8 Sawaru Choudhary, who according to their own statements were present on the scene of the occurrence for the whole duration of the occurrence had not even mentioned the injuries suffered by the accused persons in the incident despite the fact that from evidence of P.W. 9 Dr. D. N. Shrivastava of Siwan Hospital, it is proved that the accused persons had suffered the injuries in the same incident. This fact is also vouched from FIR of the cross case Ext. B, certified copy of the order sheet of the cross case Ext. E and version of P.W. 10



Ramadhar Singh, the Investigating Officer who saw the accused persons admitted at the Siwan Hospital for their medical treatment on 18.11.1979 itself.

25. The third eye witness as per version of the prosecution case is P.W. 4 Anjoria Devi who is widow of deceased Ramanand Choudahry. She has also changed her version by disowning the prosecution case of murderous assault at the door of her house causing death of her husband Ramanand Choudhary. She stated that her father-in-law Saryug Choudahry (P.W.5) and her husband Ramanand Choudhary left the house for going to work and then she heard shouts. Therefore, she came out of the house went up to the well and stood at the well to see accused persons abusing P.W. 8 Sawaru Choudahry under the Neem Tree. Thereafter as per her version accused no. 3 Madan Choudhary assaulted P.W. 8 Sawaru Choudhary by spear, accused no. 2 Harishankar @ Hulas Choudahry assaulted him by stick. Thereafter as stated by P.W. 4 Anjoria Devi, deceased appellant-accused Sheo Bachan Choudhary assaulted her husband Ramanand Choudhary by spear. Accused no. 2 Harishankar @ Hulas Choudahry assaulted her husband by sickle and accused no. 3 Madan Choudhary assaulted her deceased husband by a spear. She also stated that



accused no. 2 Harishankar @ Hulas Choudahry assaulted P.W. 5 Saryug Choudahry by sickle. She claimed to have shown the spot of the incident to the Investigating Officer from where the blood mixed soil came to be seized vide the seizure memo Ext.12. Though, this witness had claimed to have seen the entire incident of assault on her husband Ramanand Choudahry and in-laws, in cross examination, she has stated that she had not seen any injury on person of any of the accused. She admitted that because of the cross case, P.W. 3 Indrasan Choudhary and P.W. 1 Hira Lal Choudahry were sent to the jail.

26. So far as spot of the incident is concerned, P.W. 4 Anjoria Devi has stated that the murderous assault took place near the Neem Tree and her evidence shows that at about 7 to 8 steps away from that spot and at the southern side, there is a well where she was standing at the time of the incident. Her evidence further shows that from that well, house of accused persons is at south-eastern direction, 40 to 50 steps away. She stated that her house is on the western side of the well at a distance of 80 to 90 steps. Thus according to version of this witness, the incident took place at a distance of 7 to 8 steps on the northern side of the well which was at the distance of about 80 to 90 steps away from the house of the members of the



prosecuting party. The location of the spot of the incident given by this witness as such is not as per the case of the prosecution.

27. It is thus clear from version of two injured witnesses viz P.W. 5 Saryug Choudhry, P.W. 8 Sawaru Choudahry and P.W. 4 Anjoria Devi, that they had not placed the whole set of relevant facts before the court. They had suppressed the injuries suffered by the accused persons during the course of the incident apart from changing the spot of the incident. This seems to be obviously done in order to modulate their version to suit the documentary evidence collected by the Investigator. Evidence of P.W. 10 Ramadhar Singh, the Investigating Officer shows that the incident took place at the western side of Neem Tree on the land of Kumar Choudhary and Zutan Choudhary. The spot of the incident was piece of land admeasuring 15 to 16 dhoors (250 square feet) and the soil thereat was found trampled. The Investigating Officer deposed that the blood was found lying below the Neem Tree and he had seized soil stain with blood from that spot vide seizure memo Ext. 12. This evidence of the Investigating Officer thus makes it clear that he could not found any soil mixed with blood in front of the door of the injured members of the prosecuting party. Rather the piece of land near the Neem Tree was showing the



signs of happening of the incident. In our opinion, these prosecution witnesses, in order to make their evidence in tune with the prosecution case, have changed their version regarding the place of occurrence.

28. Thus, it is obvious that the prosecution has not unfolded its case, rather it has indulged in suppression of genesis of the case. To reiterate, accused no.3 Madan Choudhary was having injuries caused by firearm on his right arm apart from lacerated wounds on his head and right hand, which is open portion of the human body. His brother Harishankar was having 11 lacerated wounds on chest caused by the firearm apart from lacerated wounds on his forehead and middle of head. These wounds were certainly on the open part of his body, i.e., head visible by the naked eye. Their father, i.e., accused Sheo Bachan had two lacerated wounds on head apart from other injuries. Thus, out of several injuries suffered by the accused persons many injuries were on visible parts of their body. Two of the accused had suffered numerous small lacerated wounds caused by use of firearm. Feigning ignorance to these injuries by the prosecution witnesses implies that the prosecution witnesses have suppressed the genesis of the incident. We may note that the accused generally tried to



conceal their minor and superficial injuries as those injuries become evidence of their involvement in the incident. In such cases, non-explanation of injuries on the accused may not affect the prosecution case. Similarly, the principle of doubting the prosecution case if minor injuries on their persons goes unexplained, may not apply where the evidence of the prosecution is clear, cogent, independent and trustworthy. However, in the case in hand, the situation is otherwise. All accused persons have suffered several bleeding injuries in the very same incident and they were admitted to the Hospital soon after the incident which took place at about 11.00 A.M. of 18.11.1979. After completion of medical examination of the members of the prosecuting party, in sequence P.W.9 Dr. D.N. Srivastava had examined the accused persons from 01.35 P.M. on that day. We found that the injured witnesses as well as the related witness P.W.4 Anjoria Devi have deliberately feigned ignorance about the injuries suffered by the accused persons, which were obviously visible, apart from change of the spot of the incident during the course of their evidence. In this view of the matter, let us examine what is the effect of this conduct on the part of the prosecution witnesses. In the matter of **Lakshmi Singh & Others** (supra), in paragraph-11, this aspect is



considered by the Hon'ble Supreme Court. The relevant portion there of reads thus:

“11. PW. 8 Dr. S.P. Jaiswal who had examined Brahmdeo deceased and had conducted the post-mortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22, 1966 and found the following injuries on his person:

- “1. Bruise 3” × 1/2” on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.
2. Incised wound 1” × 2 m.m. × skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.
3. Punctured wound 1/2” × 2 m.m. × 4 m.m. on the lateral side of the left thigh about 5 inches below the hip joint.”

According to the Doctor injury No.1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounded duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they



did not see any injuries on the person of the accused. Indeed if the eyewitnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most importance circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar, (1968) 3 SCR 525 = (AIR 1968 SC 1281) tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

“The trial court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W.15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence.



Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries ... In our judgement the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilitise the plea taken by the appellants.”

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In *Puran Singh v. The State of Punjab*, Criminal Appeal No.266 of 1971 decided on April 25, 1975= (reported in AIR 1975 SC 1674) which was also a murder case, this Court, while following an earlier case, observed as follows:

“In *State of Gujarat v. Bai Fatima* (Criminal Appeal No.67 of 1971 decided on March 19, 1975) = (reported in AIR 1975 SC 1478) one of us (Untwalia, J.,) speaking for the Court, observed as follows:

“In a situation like this when the prosecution fails to explain the injuries on the person of an accused depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise



of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgement. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case.”

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw



doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of Pws. 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima, Criminal Appeal No.67 of 1971 decided on March 19, 1975: (Reported in AIR 1975 SC 1478) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so



probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises.”

29. In the matter of **Madho** (supra) in paragraph-2 following are the observations in that regard made by the Hon’ble Supreme Court:

“2... If we turn to the injuries sustained by the two respondents which have been set out in paragraph 25 of the trial court judgment, we find that the respondent Kishna had sustained as many as six injuries, five of them on the skull region. The respondent Madho too had sustained six injuries, two on the skull region, two on the scapular region, one on the forehead and one on the right index finger. Thus some of the injuries were on exposed parts of their bodies and we would expect the prosecution witnesses to explain to how the two respondents sustained the said injuries. No explanation worth the name is forthcoming. The trial Court, however, brushed aside this infirmity by pointing out that in the cross case filed at the behest of the respondent Kishna the evidence disclosed that there was no farsi blow



and, therefore, the defence theory was not acceptable. Counsel for the respondents, however, questioned the admissibility of the said evidence. Be that as it may, mere acquittal of the accused (prosecution side herein) in that case does not render the defence version false. The defence version has to be evaluated on the basis of the prosecution evidence tendered in the present case. The fact remains that both the respondents had sustained injuries, Kishna mainly on the skull whereas Madho on the skull as well as scapular region. If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of doubt as it was hazardous to place implicit reliance on the testimony of the injured PW2.”

30. It is thus clear that because of non-explanation of injuries suffered by the accused persons, case of the



prosecution has incurred a manifest defect. The whole unvarnished truth has not been unfolded by the prosecution through its witnesses during the course of the trial thereby leaving this Court only to indulge in the guess work or surmises to arrive at the correct conclusion. The reasonable doubt in such situation lurks in the judicial mind as to whether really the accused persons were aggressor and they were indulged in commission of the murderous assault on the prosecuting party or whether the members of the prosecuting party had indulged in assault on the accused persons by using firearms and other weapons. Ultimately, two of the accused persons have suffered injuries caused by the firearms and the F.I.R. of the cross case which is proved in this case indicates assault by the members of the prosecuting party on the accused persons by using firearm and other dangerous weapons. One thing which can be said with certainty is that the accused persons had sustained injuries at the time of the occurrence and absolutely no reason is forthcoming from the side of the prosecution as to how the accused came to be injured at the time of the incident. The result which may follow is an inference that the accused persons might have inflicted injuries on the members of the prosecuting party in exercise of their right of self defence, as



the injuries sustained by the accused were not minor or superficial, as stated by P.W.9 Dr. D.N. Srivastava.

31. Now let us examine whether the right of private defence has to be pleaded specifically or it is open for the court to consider such plea if the same arises from the material on the record. In the matter of **Munshi Ram and Ors. Vs. Delhi Administration (19682) 2 SCR 455**, the Hon'ble Supreme Court has observed that it is not necessary to plead self defence but such plea is open for consideration if the same arises from the material available on the record. The burden of establishing such plea by the accused can be discharged by indicating preponderance of probabilities in favour of such plea. The learned Senior counsel appearing for the appellants has rightly relied on the Judgment in the matter of **Darshan Singh** (supra) on this point and in paragraph 58 of the said Judgment, this position has been vividly summarized thus:

“58. The following principles emerge on scrutiny of the following judgments:

- (i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.



(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.



(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt. (emphasis supplied)

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.”

32. In the case in hand, the defence has brought on record the circumstances which shows that by modulating their version the prosecution witnesses have changed the spot of the incident to suit it as per notes taken by the Investigating Officer and each one of them have suppressed the several visible injuries suffered by the accused persons in the incident in question. The witnesses are either related witnesses or highly interested in securing the conviction of the accused persons. P.W.4 Anjoria Devi is certainly an interested witness as well as inimical witness as her husband Ramanand died in the incident in question. As they had suppressed the genesis and origin of the occurrence and had not presented the entire set of facts leading to the occurrence, it is highly unsafe to rely on the version of P.W.5 Saryug Choudhary, P.W.8 Sawaru Choudhary



as well as that of P.W.4 Anjoria Devi to convict accused persons. In every probability, it was a bilateral transaction in which both the parties suffered injuries. The prosecuting party, in every probability, had used the firearm in inflicting several wounds on accused no.2 Hulas and accused no.3 Madan. Apart from the Fire Arms, use of other weapons is apparent on noticing the injuries on the accused. Section 100 of the Indian Penal Code justifies the killing of an assailant when an assault reasonably caused the apprehension that grievous hurt will otherwise be the consequence of such assault. Reasonable apprehension of death or genuine apprehension of grievous hurt justifies the killing of the assailant. This right of private defence is neither required to be pleaded nor is required to be proved beyond reasonable doubt. The burden can be discharged by preponderance of probability. In the instant case this has been done by the defence by establishing that the accused suffered several injuries in the incident which have not been explained by the prosecution.

33. Let us now search for other corroborating evidence if any in the matter to determine whether the charges can be held to be proved against the accused persons. One such piece of evidence is ocular evidence of P.W.10 Ramadhar



Singh-the Investigating Officer. This witness had shown extraordinary enthusiasm in supporting the prosecution case by attempting to record the dying declaration of deceased Ramanand Choudhary at the Sadar Hospital, Siwan. This witness reached the Hospital at 03.00 P.M. of 18.11.1979, recorded F.I.R. of P.W.8 Sawaroo Choudhary apart from recorded his statement under Section 161 of the Code of Criminal Procedure. He inspected the injuries on the person of P.W.5 Saryug Choudhary, P.W.3 Indrasan Choudhary and that of on persons of Ramanand Choudhary. He claimed to have prepared the injury report (Ext.5). Indeed all the acts must have consumed a lot of time of this Investigator after reaching there at 3 P.M. Then this Investigating Officer ventured to record the statement of Ramanand Choudhary which is at Ext.10. The learned trial court has placed reliance on this dying declaration by holding that it is corroborating the version of the prosecution witnesses. Perusal of the dying declaration at Ext.10 itself shows that P.W.10 Ramadhar Singh had found condition of this injured very delicate. He noted that injured was having injuries on his neck, back and waist, which were covered by the bandage. It is further noted in the dying declaration at Ext.10 that the injured was not in a position to make a statement. Still



it is written in the dying declaration that the declarant had stated that accused no.2 Harishankar had assaulted him (deceased Ramanand) by means of Bhujali. It is seen from the evidence of P.W.9 dr. D.N. Srivastava that injured Ramanand Choudhary immediately died thereafter at about 06.10 P.M. All this goes to show that the declarant was not in a fit state of mind to make the dying declaration nor the dying declaration at Ext.10 is having any endorsement of the Medical Officer certifying that the deceased was in a fit state of mind at the time of making the declaration. As such the Dying Declaration Ext.10 cannot be relied to base conviction for the capital offence.

34. During the course of cross-examination, P.W. 10 Ramadhar Singh, Investigating Officer admitted that the Police Station Case No.17(11)/79 was registered against the prosecuting party but thereafter as the Investigating Officer started answering the questions put up by the defence stating that he is not remembering the facts, his cross examination came to be deferred and the case diary of the case and the counter case was called. The Investigator was then question about the case as well as well as counter case by showing both case diaries to him. However, thereafter also, apparently on the



false pretext of weak eye sight and by refusing to use spectacles, P.W.10 Ramadhar Singh answered each and every questions put up by the defence by stating either that 'he is unable to tell' or 'he is unable to read'. He went on stating that he is unable to tell whether his earlier recorded deposition in this case contains the facts stated by him or not by or whether his earlier deposition is correct or not. He expressed his inability to state whether he had inspected the spot of the incident or not, how many were injured persons in this case and who was murdered, so also how many witnesses are examined by the prosecution. He expressed his inability to tell whether the entire chargesheet of this case was written by him in the police station and on the instructions of the Informant. This Investigating Officer by showing irresponsible behaviour has feigned ignorance in respect of the facts of the cross case which were put to him during the course of cross examination, despite the fact that he himself had investigated that cross case. Thus, even the evidence of Investigating Officer is also rendering the prosecution case highly doubtful as the Investigator does not seem to be an impartial officer. He seems to have taken the advantage of the fact that he is retired from the service at the time of recording his evidence.



35. P.W.3 Indrasan Choudhary is brother of P.W.5 Saryug Choudhary and he claimed that he was not present on the spot of the incident. Still he had suffered the injuries and he was admitted at the Sadar Hospital, Siwan, He got treatment by P.W.9 Dr. D.N. Shrivastava. He is an accused in the cross case. He has also shown his ignorance about the injuries on the accused persons though he claims that accused no.2 Hulas had assaulted him at the Sadar Hospital, Siwan at about 12.00 noon. Evidence of Dr. D.N. Shrivastava shows that accused no.2 Hulas was admitted at the hospital on that day with several injuries. Hence, it is not safe to rely on the version of P.W.3 Indrasan Choudhary and there is nothing in his evidence for establishing the charge.

36. P.W.1 Hira Lal Choudhary is a hearsay witness who accompanied the injured to the hospital. P.W.2 Moti Lal Prasad Sah was declared hostile by the prosecution as his evidence is of no assistance for the prosecution. P.W.6 Phuljharia Devi is wife P.W.3 Indrasan Choudhary, who has stated that Indrasan was taken into custody by the police in the cross case. P.W.7 Sanehi Devi is wife of P.W.5 Saryug Choudhary and her evidence is only to the effect that there is well in front of the house of the accused no.2 Harishankar and



the area surrounded by the well is owned by the accused. This probablised the defence version that the incident, in fact, took place in the vicinity of the house of the accused persons. Except this, there is nothing worth mentioning in the record.

37. In this fact situation if we perused the Judgment of the learned trial court then it is seen that the learned trial court had adopted pervers approach which has resulted in convicting the accused persons. In paragraph-13 of the impugned Judgment, the learned trial court had noted that the prosecution witnesses are stating that the assault took place near the Neem tree and then the Trial Court observed that the parties could have been driven in the course of the fight or assault and therefore deviation of the place of the occurrence to certain extent is permissible. None of the witnesses examined by the prosecution has deposed that the assault was at the door of the First Informant and then the parties were driven towards the Neem tree during the course of that assault. In paragraph 17 of its Judgment, the learned Trial Court noted that the spot was shifted from the Darwaja to a distance of 20 to 25 yards and recorded that the place of occurrence is not such a shifting is not a major shifting. In fact, the manner of the happening of the incident itself was changed by the First Informant, as noted by



us in the foregoing paragraphs of this Judgment. The learned trial court in paragraph-19 of the Judgment accepted the fact that the prosecution had not explained the injuries on the accused but noted that those injuries were simple in nature and held that there may be another version of the incident but the case of the prosecution cannot be disbelieved on that count. We are unable to endorse these observations in the light of the nature of the injuries suffered by the prosecution, suppression of fact by the witnesses examined by the prosecution and the settled legal position in this regard.

38. In the light of the foregoing discussions we are of the considered view that it will not be safe to convict the accused persons on the basis of the evidence adduced by the prosecution in the instant case and the accused persons are certainly for benefit of doubt.

39. In the result, we proceed to pass the following orders:

(I). The appeal is allowed.

(II). The impugned Judgment and Order of conviction and resultant sentence imposed on the appellants dated 12.04.1995 and 17.04.1995 respectively passed by the learned Additional Sessions Judge-I, Siwan, in Sessions Trial



No.77/84 arising out of the Police Station-Siwan Muffasil Case
No.16(11)/79 is quashed and set aside.

(III). The appellants/accused are acquitted of the
offence alleged against them. They be set at liberty forthwith, if
not required in any other case.

(A. M. Badar, J)

(Sunil Kumar Panwar, J)

P.S./-Bhardwaj/
Mkr.

AFR/NAFR	AFR
CAV DATE	25.04.2022.
Uploading Date	20.05.2022.
Transmission Date	20.05.2022.

