

it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi vs. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P.P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O.C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O.P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi."

22. In view of the above, and for the reasons stated above, the Court is of the considered opinion that the continuation of the criminal proceedings against the applicants is an abuse of process of the Court and ends of justice requires that the said proceedings be quashed.

23. Consequently, invoking the inherent powers under Section 482 Cr.P.C., the entire criminal proceedings of Complaint Case No.4859 of 2002 (Deep

Chand Vs. Bhupendra & others) (Renumbered as 91 of 2007) under Sections 506, 386 IPC, Police Station Turkpatti, District Kushinagar pending before the 2nd Additional Civil Judge (Jr. Division)/ Judicial magistrate, Kasaya, Kushinagar is hereby quashed.

24. The application stands **allowed**.

(2022)011LR A447

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 10.01.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.

Criminal Appeal No. 423 of 1995

Lot Prasad

...Appellant

Versus

State of U.P.

...Respondent

Counsel for the Appellant:

I.B. Singh, Janardhan Singh

Counsel for the Respondent:

G.A., Kapil Kumar Bhargava, Neeraj Kumar Tiwari, S.K. Singh Kalhans, Shikha Srivastava, Vijat Kr. Tiwari

Criminal Law – Indian Penal Code, 1860 – Section 302/34 - Session Judge acquitted three co-accused-convicted Appellant u/s 302/34 IPC-Ante –mortem injuries shows injuries of laathi and danda have not been found on the person of deceased as alleged in the FIR-no attempt made by the informant & ors. family member-to save the deceased-cast doubt upon prosecution case-enmity on record-possibility of false implication cannot be ruled out. All other co-accused acquitted giving benefit of doubt-Appellant entitled for benefit of doubt.

Appeal allowed. (E-9)

(Delivered by Hon'ble Ramesh Sinha, J.)

(A)

BACKGROUND/INTRODUCTION

(1) Four persons, namely, **Sadhu Prasad, Talluqdar, Lot Prasad (the appellant), and Shital**, were tried by the Sessions Judge, Gonda in Sessions Trial No. 73 of 1992: State Vs. Sadhu Prasad and others, arising out of Case Crime No. 145 of 1990, under Section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as "I.P.C. "), Police Station Wazirganj, District Gonda.

(2) Vide judgment and order dated 20.07.1995, the Sessions Judge, Gonda acquitted accused Sadhu Prasad, Talluqdar and Shital from the charge of murder levelled against them, however, convicted the accused/appellant Lot Prasad under Section 302/34 I.P.C. and sentenced him to undergo life imprisonment. Against the aforesaid order of conviction and sentence dated 20.07.1995, accused/appellant **Lot Prasad** has filed the instant appeal before this Hon'ble High Court.

(3) The instant appeal then came up for hearing before a Division Bench comprising Hon'ble Satyendra Singh Chauhan and Hon'ble Virendra Kumar-II, J.J. (as they then were). After hearing of the instant appeal, vide separate judgment and order dated 09.08.2017, Hon'ble Satyendra Singh Chauhan, J (as he then was) was of the opinion that appellant Lot Prasad was liable to be acquitted from the charges levelled against him under Section 302/34 I.P.C. by giving him the benefit of doubt and, as such allowed the criminal appeal, and set-aside the judgment and order dated 20.07.1995 passed by the Sessions Judge, Gonda and acquitted him from the charges levelled against him,

whereas Hon'ble Virendra Kumar-II, J. (as he then was) was of the opinion that the appellant/Lot Prasad was rightly convicted for the offence under Section 302 I.P.C., however, since co-accused persons were acquitted by the trial Court for offence punishable under Section 302 read with Section 34 I.P.C., hence mention of Section 34 in the impugned judgment is not so material and accordingly, dismissed the instant appeal.

(4) In view of aforesaid difference of opinion, the Division Bench has formulated following points of difference vide separate order dated 09.08.2017 and directed the office to place the record of the instant criminal appeal before Hon'ble the Chief Justice under Chapter VIII Rule 3 of the Allahabad High Court Rules for nomination of Bench :-

"(1) Whether the witnesses were in a position to identify the accused persons in the moon light from the distance as indicated by them in their statements.

(2) Whether the incident took place at the alleged time in view of the fact that pasty material was found in the stomach, which could not have been possible at 5:30 a.m. in the morning.

(3) Whether the conduct of the accused as contemplated under Section 8 of the Evidence Act requires consideration.

(4) Whether the prosecution has come out with true version of the incident.

(5) Whether the enmity on record was enough to implicate the appellant in accordance with law.

(6) Whether the appellant could have committed the offence single handedly.

(7) Whether the injuries tally with the manner of assault as alleged by the prosecution.

(8) Whether the case was improved after the postmortem report was received.

(9) Whether the initial case setup in the FIR was wholly changed in the statement recorded under Section 161 Cr.P.C. and in the Court.

(10) Whether PW-1 and PW-4 have stated the correct facts and whether there is contradiction in their statements."

(5) Subsequently, the aforesaid Division Bench of this Court has recalled the aforesaid points of consideration vide order dated 30.01.2018 in the manner as stated hereinbelow :-

"Heard learned counsel for the appellant and learned AGA.

Attention of the Court has been drawn towards Chapter VIII Rule 3 of the Rules of the Court and Section 392 of Cr.P.C.

We have gone through both the provisions and we find that the portion of the order dated 09.08.2017 by means of which, points for consideration were framed, requires to be recalled. Accordingly, the said portion of the order dated 09.08.2017, indicating the points for consideration is recalled. The order passed on merit will remain as it is.

In view of difference of opinion between the members of the Bench, let the papers of this appeal be placed before Hon'ble the Chief Justice for nomination of Bench."

(6) The record further shows that vide order dated 06.03.2018, the Hon'ble the Chief Justice nominated the instant appeal to Hon'ble Vikram Nath, J. (as he then was). Thereafter, on appointment of Hon'ble Vikram Nath, J. as Chief Justice of Gujrat High Court, Hon'ble the Chief Justice, vide order dated 16.09.2019, nominated the instant criminal appeal to Hon'ble Rekha Dikshit, J. (as she then was). After retirement of Hon'ble Rekha Dikshit, J., Hon'ble the Acting Chief Justice, vide order dated 19.08.2021, nominated the instant appeal to me. In this backdrop, the instant appeal has now been placed before this Court under Section 392 of the Code of Criminal Procedure, 1973 (in short, "**Cr.P.C.**").

(7) As stated here-in-above, the instant criminal appeal has been filed by the accused/appellant, **Lot Prasad**, against the judgment and order dated 20.07.1995 passed by the Sessions Judge, Gonda in Sessions Trial No. 73 of 1992, convicting him for the offence under Section 302 read with Section 34 I.P.C. and sentencing him to undergo a rigorous imprisonment for life.

(B) FACTS

(8) Shorn off unnecessary details the facts of the case are as under :-

The informant Jagdish (P.W.1) son of Ram Tej, is the resident of Niyamatpur. A civil case was going-on

between the informant Jagdish (P.W.1) and co-villager Sadhu Prasad Pandey (accused) in respect of a land, which was lying barren. A day before yesterday from the date of incident i.e. on 30.11.1990, the said land was got ploughed by a tractor by the brother of the informant, namely, Jai Prakash (deceased), whereupon Sadhu Prasad (accused) son of Ram Bihari, resident of Niyamatpur stopped him from ploughing the field and after threatening him, went away from there.

(9) In the morning of 01.11.1990, at about 5:30 a.m., accused Sadhu Prasad, Taluqdar, accused/appellant Lot Prasad son of Ram Bihari and Sheetal (accused) son of Bachhu, resident of the same village, armed with lathi and danda, came at the door of the informant Jagdish (P.W.1) and started assaulting the brother of informant, namely, Jay Prakash (deceased) and while assaulting him, he was dragged to the groove. On hearing the alarm raised by the brother of the informant Jay Prakash (deceased), informant Jagdish (P.W.1) and his brother Ambika and his family members ran to save him, whereupon the accused persons ran away. The informant Jagdish (P.W.1) saw his brother Jay Prakash (deceased) lying injured. He took his brother Jay Prakash (deceased) to Wazeerganj Hospital, however, on the way, his brother Jay Prakash (deceased) died. P.W.1 Jagdish (informant) has further stated that apart from him, other persons of the village, namely, Hira son of Aafat, Ram Deen son of Shankar and other persons also saw the accused persons assaulting his brother Jay Prakash (deceased).

(10) The informant P.W.1-Jagdish himself wrote down the F.I.R. (Ext. Ka.1), put his signature thereon and along with it reached to the Police Station Wazeerganj,

District Gonda at a distance of 9 Km. and at about 12:15 p.m on the date of incident i.e. on 01.11.1990 handed over the handwritten report (Ext. Ka 1) to P.W.3-H.C. Ram Narain Yadav.

(11) The evidence of P.W.3-H.C. Ram Narain Yadav shows that on 01.11.1990, he was posted as Head Moharrir at Police Station Wazeerganj, Gonda and at about 12:15 p.m., informant Jagdish (P.W.1) had lodged the written report of the case, on the basis of which, he prepared a chik F.I.R. (Ext. Ka.3) and made its entry in the general diary and registered a case, bearing Case Crime No. 145 of 1990, under Section 302/34 I.P.C against accused persons Sadhu Prasad, Taluqdar, Lot Prasad and Shitla and the entry made in the general diary is Exhibit Ka.4.

In cross-examination, P.W.3-H.C. Ram Narain Yadav deposed before the trial Court that police station Wazeerganj is situated 2.7 kms away from Gonda in Gonda-Faizabad State Highway and from there, 24 hours conveyance is available and truck, bus etc. are plying. He had sent special report of the case at about 13:30 hours through Constable Mahendra Yadav by making an entry of it in GD Report No. 23 and except this, he had not given any work to Constable Mahendra Yadav. However, Constable Mahendra Yadav did not return on 01.11.1990 after serving the special report.. He further deposed that he could not say that Constable Mahendra Yadav returned on 02.11.1990 at 18:05 hours by the GD Entry No. 33 because the G.D. of 02.11.1990 was not with him. He denied the suggestion that special report was sent in the morning of 02.11.1990 and to strengthen the case, he showed the departure of Constable Mahendra Yadav on 01.11.1990. He further deposed that the

corpse of the deceased Jay Prakash was not brought to the police station. He denied the suggestion that the corpse of the deceased Jay Prakash was lying, whole night at the police station and also all the documents of the case were belatedly prepared on 1/2.11.90 and the same was detained and also the F.I.R. was also made ante-time.

(12) The investigation of the case was conducted by P.W.5-S.I. Shri Mahendra Nath Sharma, who, in his examination-in-chief, has deposed before the trial Court that he was posted as Station House Officer, Wazeerganj between 01.11.1990 to 15.11.1990 and in his presence, the written report of the case was lodged by P.W.1-Jagdish on 01.11.1990 at about 12:15 p.m. at police station. After lodging the case, he started to conduct the investigation on the date itself and on the very same day, he, after taking police force, reached at the place of occurrence at 13:50 hours and prepared panchayatnama of the dead body of the deceased Jai Prakash (Ext. Ka. 2) , which was lying beneath the trees of Aamla and Imali situated nearby the groove of the house of the deceased at Niyamatpur. Thereafter, the deadbody of the deceased Jai Prakash was sealed and prepared photo lash (Ext. Ka.6), challan lash (Ext. Ka. 5), letters to the authorities (Ex-Ka-7 to Ka-8) and memo of recovery (Ext. Ka.9) for conducting postmortem of the dead body and handed over the dead body of the deceased Jay Prakash and other documents to Constable Ram Khelawan, with a direction to deliver it to mortuary, doctor and police line. Thereafter, he recorded the statement of informant P.W.1-Jagdish and on his pointing out, he inspected the place of occurrence and prepared the site-plan (Ext. Ka.10). He further deposed that blood stained was found on the earth near the

dead body, from where he collected blood stained earth and empty earth and kept it in separate containers under recovery memo (Ext. Ka. 11).

(13) P.W.5 S.I. Mahendra Nath Sharma has further deposed that on the date of incident i.e. on 01.11.1990, he also searched the accused persons but he did not get them. He stayed at the place of occurrence in the night. On 02.11.1990, he recorded the statements of family members of the informant Jagish Prasad, namely, Ambika, Poonam and other persons. He also searched the accused persons but he did not get them. He was staying at the place of occurrence. On 03.11.1990, the Circle Officer also came at the place of occurrence and inspected the place of occurrence. On 03.11.1990, he arrested accused Taluqdar and took him to jail. On 04.11.1990, he recorded the statements of other witnesses of the incident. He also searched other accused persons but they were all absconding from their respective houses. On 07.11.1990, he came to know that accused Shital had surrendered before the Court. Similarly, he came to know that accused/appellant Lot Prasad had surrendered before the Court on 12.11.1990 and accused Sadhu surrendered before the Court on 15.11.1990. On 15.11.1990, after completion of investigation, he submitted charge-sheet (Ext. Ka. 12) against the accused persons.

In cross-examination, P.W.5 S.I. Mahendra Nath Shrama has deposed that maximum witnesses of the case belong to the house of deceased and on 01.11.1990, when he reached on the spot, the witnesses were in the village. On 01.11.1990, he did not record the statement of other witnesses except the informant Jagdish Prasad

(P.W.1) because they were all in grief because of the murder in their family. But as without recording the statement of the informant, no action was possible, therefore, his statement was recorded immediately after reaching there. He denied the suggestion that on 01.11.1990, he did not record the statement of any witnesses and on 02.11.1990, after receipt of post-mortem report, he wrote the statement of the witnesses on its own.

(14) P.W.5 SI Mahendra Nath Sharma has further deposed that he did not find any means to transport the dead body, therefore, deadbody was sent from the spot by loading on cot. He further deposed that he could not tell that who else had gone with the corpse other than Constable Ram Khilawan. He had a Government Jeep at the spot but as the dead body could not be transported in it, therefore, he could not use it for transporting the corpse. He further deposed that he could not tell whether Constable Ram Khilawan took the deadbody from the cot to where and whether he had used any conveyance to take the deadbody to Gonda. There is no entry in the case diary that the deadbody was transported by cot from the spot. He denied the suggestion that the deadbody of the deceased was transported to mortuary with undue delay and to hide this, it is said that the deadbody of the deceased was taken by cot from the spot. He further stated that he did not write as to when the deadbody reached the mortuary. He did not record the statement of Constable Ram Khilawan during investigation. After returning, Constable Ram Khilawan did not give information that on account of some unavoidable circumstances, the deadbody of the deceased had reached the mortuary with delay. He denied the suggestion that to hide the delay in reaching the deadbody of

the deceased to the mortuary, he did not record the statement of Ram Khilawan. He denied the suggestion that on 01.11.1990, the deadbody of the deceased was brought from the village to police station Wajirganj and the deadbody was lying at police station in the night and it was sent from police station to mortuary in the morning and in the meantime, F.I.R. and other documents were prepared. He further stated that he did not record the statement of people near the place of occurrence, namely, Wayu, Dayaram and Mohan Katiram. He further stated that he found the mark of dragging of the deceased from the door of the deceased to the place of occurrence at the door of deceased but it could not find at the grove. He did not make any endorsement to this effect in the case diary. He did not find any blood stain at the passage of dragging. He did not find the blood stain at the place where the dead body was found.

(15) Going backwards, the post-mortem on the dead body of deceased Jai Prakash was conducted on 02.11.1990, at 4:05 p.m. by Dr. P.K. Srivastava (P.W. 6), who, found on his person ante-mortem injuries, enumerated hereinafter :--

"1. Contused swelling on the Rt side of forehead extending upto Rt. temporal region in an area of 11 cm x 8 cm having few abrasions just above the Rt ear.

2. Contusion on the left upper lid in an area of 4½ cm x 2 ½ cm.

3. Swelling with deformity on the left forearm just above the left wrist, Radius and ulna fractured on the left side.

4. Deep contusion present on the left of the side

chest, lower part, in an area of 5 cm x 5 cm.

The cause of death spelt out in the autopsy report of the deceased person was shock and haemorrhage as a result of ante-mortem injuries which he had suffered.

(16) It is significant to mention that in his deposition before the trial Court, Dr. P.K. Srivastava (P.W. 6) has reiterated the said cause of death and also stated therein that on 02.11.1990, he was posted as Medical Officer at District Hospital, Gonda and on the date itself, at about 04:05 p.m., he conducted the post-mortem of the deceased Jai Prakash. The body of the deceased was sent by Station House Officer, Police Station Wajirganj, district Gonda, which was identified by C.P. 438 H.C. Ram Khilawan, Police Station Wajirganj, District Gonda. He further deposed that at that time, blood-soaked fluid was flowing from the nose of the deceased. On the internal examination of the deceased, it was found that ribs 4, 5, 6 and 7 of the left side of the chest was broken; pleura and left lung were torn; ½ litre of blood was present in thoracic cavity; deep contusion was present on the head; right side of temporal bone was broken; the brain was torn and congested; foods in the gross of six ounces of pulp was in the stomach; some small pulp was present in the small intestine; spleen and kidney was pale; and gallbladder was blank. He also deposed that ante-mortem injuries sustained by the deceased were sufficient in the ordinary course to cause his death. Injury No.4 could not be attributed to mounting pressure upon chest of deceased and hitting him by lathi and dumb. Injuries no. 1, 2 and 3 could be attributable to lathi.

It is possible that the deceased died six hours after taking food and the deceased could have taken slight food. The deceased could have died on 01.11.1990 at 09:10 a.m. It is not possible to tell the exact time of death of the deceased.

In his cross-examination, Dr. P.K. Srivastava (P.W. 6) has stated that he received the document relating to the post-mortem as well as copy of the F.I.R. on 02.11.1990 at 01:00 p.m. It is not necessary to have weapon for causing the injury no.4. He further states that injury no.4 could be attributable by pressing knee. Except injury no.2, all the remaining injuries are dangerous to life. Injuries no. 2 and 4 could be attributable by falling big wooden boat. If the deceased have been transported after the injuries, it is possible to oozing blood from nose.

(17) The case was committed to the Court of Sessions in the usual manner where the appellant and other accused persons were charged on counts mentioned in paragraph 1. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(18) During trial, in all, the prosecution examined seven witnesses i.e. informant Jagdish Prasad (P.W. 1), who is the brother of the deceased and lodged F.I.R. of the incident, P.W.2 Heera, who is the independent witness, P.W.3-Constable Ram Narain, who is the writer of the chik F.I.R., P.W.4 Kamlesh alias Poonam, who is the daughter of the informant and eye-witness, P.W.5 S.I. Mahendra Nath Sharma, who is the Investigating Officer of the case, P.W.6 Dr. P.K. Srivastava, who has conducted the post-mortem of the deceased Jai Prakash and P.W.7 Constable

Ram Khilawan, who had taken the deadbody of the deceased for post-mortam. From the side of defence, five witnesses were examined i.e. D.W.1 Aadalat, who is the owner of the tractor, D.W.2 Shree and D.W.3-Gayan Singh, who is the co-villager, D.W.4- Lalit Prasad, who is the Petition Clerk in the officer of District Magistrate, Gonda and D.W.5 Jagnath, who is the co-villager.

(19) I would first like to deal with the evidence of informant Jagdish Prasad (P.W. 1). P.W.1 Jagdish Prasad, in his examination-in-chief, has narrated the facts enumerated in the F.I.R. and further stated that deceased Jai Prakash was his younger brother. Ram Lagan Pandey was the elder brother of his father, who died on 16.06.1978. Ram Lagan Pandey did not marry. In village Niyamatpur, Ram Lagan Pandey was having the land of 01 acre 78 dismil, which was situated 15-20 paces of eastern side of his house. After the death of Ram Lagan Pandey, his father Ram Tej has filed a mutation case for mutation of the land belonging to late Ram Lagan Pandey in his favour in the year 1978, against which accused Sadhu Prasad has filed a caveat to the effect that he had purchased the land from Ram Lagan. On this caveat, the mutation case of his father was rejected by the Tehsildar and mutation of the aforesaid land was made in favour of Sadhu (accused), against which, his father had filed an appeal before the S.D.M., Lucknow and at the time of murder of Jai Prakash (deceased), the said appeal was going on. He further deposed that his father Ram Tej had also filed/claimed in respect of mutation of Sadhu (accused) before the Munsif in the year 1978 but as Sadhu (accused) was not present before the Munsif, hence the said case was decreed *ex parte*. After 4-5 months, Sadhu (accused)

and others filed recall application, which was rejected in the year 1979. In the meantime, his father Ram Tej died. Thereafter, he and his brothers had filed applications for substitution in the appeal as well as in Munsifi, which was allowed. Thereafter, Sadhu (accused) and others had raised objection that the case would not be maintainable before the Munsif but the Munsif did not pay any heed to the objection, however, the revision or appeal filed by Sadhu (accused) was allowed, against which, he and others went to High Court, where the litigation was going on.

(20) P.W.1-Jagdish has further deposed that his brother Jai Prakash, prior to two days ago from the date of murder, ploughed the land in dispute by tractor and at that time, Sadhu (accused) and Lot Prasad (accused) came and asked his brother Jai Prakash not to plough the land in dispute and told him that forcefully farming the land is not a good thing. On this objection, the amount of land that was left to be ploughed was not ploughed and the tractor was taken away by the owner of the tractor. He further stated that accused Shital was the witness of the said mutation which was stated to be made through Ram Lagan Pandey by Sadhu (accused). He further deposed before the trial Court that on 01.11.1990, at about 5:30 a.m., he was sleeping inside his house. His brother Jai Prakash (deceased) was sleeping in the thatch in front of his house. On hearing the noise, he got from his sleep and he recognized the voice of Jai Prakash and came outside the house and saw that four accused Sadhu, Taluqdar, Lot Prasad (the appellant) and Sheetal were assaulting his brother Jai Prakash (deceased) with fists, lathi and danda and further by assaulting him, they dragged his brother Jai Prakash (deceased) towards East-South direction.

He further deposed that where they brought his brother, was the barren groove. On his hue and cry and on gathering of witnesses, the accused slammed his brother Jai Prakash under a tree and accused Lot Prasad climbed on the chest of Jai Prakash (deceased) and assaulted him with fists and lathi. He further deposed that Shital (accused) gave a lathi blow upon Jai Prakash on his wrist and other two accused were standing there and when persons gathered there, then, accused fled away from the scene of occurrence assuming that Jai Prakash had died. Thereafter, he went nearer to Jai Prakash and saw that blood was oozing out from his nose and mouth, which was on earth and wrist of the deceased was broken. He also stated that on hearing hue and cry, apart from him, the wife of the deceased Shakuntla Devi, his wife Gangotri Devi, his daughters Poonam, his mother and his brother Ambika also came out from the house. He stated that Ambika had now died. In addition to him, other villagers, namely, Hari, Ramdin, Ram Sahaj, Ram Ujagar and others also came there. He further stated that the place where his brother was murdered by slamming was 5-10 steps away from his house. He stated that after seeing his brother Jai Prakash in injured condition, he was taken away by him on charpai (bed) to Wazirganj Hospital and while they were taking away Jai Prakash and had reached one kilometre in South direction from his house, his brother succumbed to injuries near the village Niyamatpur. He also stated that after the death of his brother Jai Prakash, they had taken the body of the deceased Jai Prakash to his house and after leaving the deadbody of Jai Prakash at his house, he went to lodge the report at Police Station Wazirganj, where he submitted the written report (Ext. Ka.1). He further stated that he

had given the written report and copy of the chik report was taken by him. He further stated that at the police station, he also met the Inspector, who took him at his house by Jeep. At his house, the Inspector saw the deadbody of his brother and prepared pachayatnama in the presence of witnesses. He also got the Inspector inspected the place of occurrence.

(21) P.W.1-Jagdish, in his cross-examination, has deposed before the trial Court that Ram Lagan was not his real uncle but he was the cousin of his father. Saliq had two sons, namely, Jag Prasad and Prithi. The son of Jag Prasad was Ram Lagan Pandey, whereas the son of Prithi was his father Ram Tej. The father of accused is Bariyu, however, he did not know the name of the father of Bariyu. He stated that he is a Panchayat Adhikari and during the day when the incident happened, he was posted in Belsar Block, which is situated of a distance of 17 Kms. from Gonda Headquarter to the road of Gonda-Tarabganj road. He denied the suggestion that the death of Ram Lagan Pandey was wrongly entered as 16.06.1978 by exerting pressure upon the Panchayat Adhikari of Wazirganj. He also deposed that the eye sight of his brother Ambika was weak and was suffering from night-blindness, however, he listened the sound very well. In the morning and the night of the date of the incident, Jai Prakash (deceased) and Ambika were sleeping outside the house in a thatch. When he came out from his house on listening the noise, there was no daylight but there was moonlight and the light was enough. When his eye fell on Jay Prakash (deceased), he saw that the accused persons by holding hands of him were brought him. At that time, he was at the distance of 20-25 paces. He further stated

that accused had brought his brother Jay Prakash (deceased) by pushing and beating him but his brother Jay Prakash (deceased) was not brought by dragging. He further deposed that in the report (Ext. Ka.1), he wrote that his brother was brought by the accused persons by dragging, which means that he was brought by pushing. He further stated that to drag and hold the cksjk is called dragging. If any person has been brought forcefully, it is called dragging. He further deposed that when the accused persons brought his brother towards grove, then, he has no courage to immediately go behind them but he stood in his door and tried to gather people together by making noise by running a little bit by hiding himself. After 3-4 minutes when Hari and other persons were gathered there, then, he went towards the direction of accused persons. He and other persons of his village went towards accused by empty handed and no lathi and danda was in their hands. When they reached near to Jai Prakash, he was lying on the ground and he saw the accused persons were running from there. He also stated that the place where Jai Prakash was brought by the accused persons, was seen from his door from where he raised alarm when accused persons brought his brother. He further stated that he had not written in the Ext. Ka. 1 separately that any accused climbed on the chest of Jai Prakash and pressed. He had also not written in the report that accused Shital assaulted with danda and hand of Jai Prakash was broken. He denied that he had not seen the incident and also the murder of his brother Jai Prakash was came in the knowledge of him on 01.11.1990 in the afternoon. He further stated that he brought his brother in injured state by keeping him on cot for Wazirganj Hospital from the place of occurrence but he did not remember as to whether any

bedsheet or bed was laid on the cot or not. When Jai Prakash was put on the cot, then, blood from his nose and mouth was stopped and Jai Prakash died when they reached Virahmatpur. He also stated that when they brought Jai Prakash by putting him on cot for Wazirganj, none of the villager were found by them. He also stated that he brought Jai Prakash from Niyamatpur at about 06:00 A.M. and reached at Virahmatpur at 7:00-7:15 a.m. He further stated that the deadbody of the Jai Prakash was brought from Virahmatpur to Niyamatpur because his relatives would see him as if they brought the deadbody of Jai Prakash to Police Station, it was sent for post-mortem and it was not given to him.

(22) P.W.1, in his cross-examination, has further stated that at the time when Jai Prakash was brought from Niyamatpur, they were five persons. Because his brother was no more, therefore, on account of sorrow, they did not think that one of the person would go to lodge the report. He further deposed that they returned on bringing the deadbody of his brother at Niyamatpur at 07:30 p.m. and thereafter, 4-5 minute, he stayed at Niyamatpur and thereafter, he proceeded for police station. In the meanwhile, he wrote the report for giving it to the police. He went from Niyamatpur to police station by foot. The distance from Niyamatpur to police station is 8-9 kms. and he did not go with the paved road because he apprehended that accused persons would not met him in the way of paved road and he went through village by foot. On account of fear, he went along by hiding himself and he did not carry any weapon for his safety. About four hours was taken by him to reach Police Station Wazirganj because he used to stop from place to place and look ahead that as to whether the accused or his companion

was there in the way or not. On account of fear, he did not think appropriate to take anyone along with him because peoples told that if he consume the time, then, the accused would falsely implicate him in the murder. He reached at the police station at about 10:15 and at that time, Inspector was not present there. However, when the report was lodged and copy of the chik FIR was given to him, then, the Inspector reached at the police station and met him. At 10:15 a.m., the Inspector talked to him and thereafter, Inspector brought him through Jeep at the place of occurrence. He further stated that the Inspector did not record his statement at the police station. He had reached at Niyamapur at about one hour or forty-five minutes because the Inspector, in the way, stopped in some places and made enquiry from the peoples in respect of this murder. They were reaching at Niyamatpur at about 02:00 p.m.

(23) P.W.2-Hira, who is the resident of the deceased Jai Prakash and informant, deposed before the trial Court that Jai Prakash was his village and he known to him. The murder took place in the grove situated outskirt of the village and near to the house of Jagdish. The murder took place at about 05:00-05:30 a.m. His house is situated about 60 paces in the western direction from the house of Jagdish. Alarm was raised and thereafter, he and other persons reached there by running. He saw that Jai Prakash was lying in the groove in a unconscious and injured state. He did not see anyone to assault Jai Prakash. He was known to accused Sadhu, Taluqdar, Lot and Shital and they were neither present there nor he saw them running.

(24) P.W.2-Hari was declared, at this stage, hostile by the prosecution and the trial

Court permitted the learned D.G.C. (Criminal) to cross-examine him. In his cross-examination, P.W.2-Hari has stated that the Inspector had not made any enquiry in respect of the incident. The trial Court has recorded that on scribing the statement recorded by the Inspector under Section 161 Cr.P.C., P.W.2-Hari stated that he had not given such statement and further he did not tell as to how the Inspector had written this. He further deposed that when Jagdish was brought to Wazirganj, Jai Prakash was alive and he was also along with him and while reaching Varahmatpur, Jai Prakash died. Thereafter, they brought him to Niyamatpur. He also deposed that when he reached at the place of occurrence, the wife of Jagdish, his daughter, mother of Jagdish and Jagdish were present there. He further stated that he did not know as to whether prior to two days ago, Jai Prakash ploughed the land in dispute by tractor or not. He also stated that on account of attack, blood was oozing from the nose and mouth of Jai Prakash and wrist of the hand was broken. After the incident, accused persons had not seen in the village but they were coming in the interregnum period. He further stated that it is wrong to say that on account of fear or pressure of the accused, he has not stated the correct facts against the accused.

(25) P.W.2-Hari, in cross-examination made on behalf of the accused, has further stated that when alarm was raised in the morning and when other persons known, then, he also known the incident. When the alarm was raised, light was not proper but person from 10-15 steps could be recognized. The blood was oozing from the injuries of Jai Prakash and when Jai Prakash was laid on the cot, blood was also oozing from him. He also deposed that they were brought the deadbody of the deceased from Viramatpur.

(26) P.W.4-Kamlesh alias Poonam, who is the daughter of the informant Jagdish and niece of the deceased Jai Prakash, has deposed that in the month of November, 1990, at 05:30 p.m., she was not married and she was residing with her father Jagdish. On the date of the incident, when he was sleeping, and on listening the noise of her uncle Ambika Prasad coming outside her house, she woke up and came outside the house along with her family members and saw that accused persons Sadhu, Lot, Talluq and Shital brought Jai Prakash by holding, pushing and dragging towards West-South direction in the grove and slammed him beneath the mango tree planted in eastern direction of the grove and assaulted him with lathi and knife of lathi. Accused Lot Prasad, while climbing upon the chest of Jai Prakash, pressed his neck and also assaulted him. Apart from her, her other family members, her mother Gangotri Devi, her father Jagdish Prasad, her aunt Sakuntala wife of Jai Prakash and her grand-mother were also coming out from the house on the alarm. All the family members, while raising alarm, ran in order to save Jai Prakash and then, accused Sadhu and others ran towards Southern direction. Thereafter, they reached near to Jai Prakash and saw that Jai Prakash was breathing lightly; slight blood was oozing out from his nose and he was moaning. Thereafter, the death of Jai Prakash was caused after half an hour. She further stated that at the time of the incident, accused persons were carrying lathi and two persons were carrying danda.

In cross-examination, P.W.4-Kamlesh alias Poonam has stated that they were three sisters and she is elder daughter. Her marriage was solemnized on 24.05.1994 and other two sisters are unmarried and younger to him. She

deposed that Jai Prakash and Ambika used to sleep outside the house and on the said date also, they were sleeping outside the house. Because of winter season, other family members were sleeping inside the house. The door was closed inside the house. Her father Jagdish told him that look whose alarm was coming, then, she listened that the noise was of Ambika and when they came outside the house, there was no daylight but there was moonlight. The moon was in the sky but he could not say as to whether moon was full or half but light was enough. She further stated that when they came outside the house, accused persons brought Jai Prakash about 20 steps far from them. They were not stopping there on account of fear but on raising alarm, they ran towards accused persons. Her father did not carry any lathi or weapon. Her father was not getting time to save Jai Prakash from the accused persons. As soon as they reached near Jai Prakash, accused persons, while assaulting Jai Prakash, ran away 10-5 steps from them. She has stated that at the time of the incident, Lot Prasad, while putting both the knee on the chest of Jai Prakash, pressed him frequently and beaten only on his mouth. She saw from 10-12 steps that Lot Prasad, while climbing on the chest of Jai Prakash, pressed and at that time, she was reaching towards Jai Prakash.

(27) D.W.1-Adalat, in his examination-in-chief, has stated that he had not ploughed the chak with his tractor as alleged by the prosecution. D.W.2-Shri has stated that Jai Prakash was lying unconscious when there was still one hour in the dawn, whereas D.W.3-Gyan Singh to corroborate D.W.2 and D.W.4 Lalit Prasad, a petition clerk of the Collectorate, Gonda to prove special report and D.W.5 Jagannath Prasad to state that at about 6

O'clock in the morning when the witness was going to each himself, the deceased was found lying unconscious in the grove beneath the mango tree and at that time, accused Shital, Shri, Daya Ram and others were present there.

(28) The learned trial Judge, after hearing the learned counsel for the parties and going through the record, convicted and sentenced the appellant Lot Prasad in the manner stated in paragraph-1 and acquitted the other accused persons, namely, Sadhu Prasad, Talluqdar, Shital from the charges levelled against them vide judgment and order dated 20.07.1995 while giving them benefit of doubt.

(29) It is pertinent to mention that the State of U.P. has not challenged the acquittal of accused persons, namely, Sadhu Prasad, Talluqdar and Shital by preferring an appeal under Section 378(1), Cr. P.C.

(30) As mentioned earlier, aggrieved by his conviction and sentence, appellant Lot Prasad preferred the instant criminal appeal before this Court.

(C) APPELLANT'S CASE

(31) On behalf of the convict/appellant, broadly the submissions of Sri I.B. Singh, learned Senior Advocate assisted by Sri Ishan Baghel, learned counsel for the appellant, while challenging the impugned judgment and order dated 20.07.1995, are as under :-

I. There were serious contradiction of the statements of P.W.1 and P.W.4 relating to manner of assault and the initial case as disclosed in the F.I.R. was wholly changed in the statement

recorded under Section 161 Cr.P.C. and subsequently improved by the witnesses. In the F.I.R., it was stated by the informant Jagdish Prasad (P.W.1) that the deceased Jai Prakash was assaulted with Lathi and danda and thereafter he was taken towards the groove, whereas in the statement recorded under Section 161 Cr.P.C., P.W.1-Jagdish Prasad had stated that the deceased Jai Prakash was dragged to the groove, where the appellant Lot Prasad sat on his chest and pressed it and subsequently slapping him on his chin. This statement was subsequently improved by P.W.1-Jagdish Prasad, who, in his statement before the trial Court, has deposed that on hearing the noise, he came out of the house and, thereafter, his wife, wife of the deceased, his brother and his daughter came out of the house. Thus, the prosecution case has not been consistent and there has been material improvement as against the initial case setup in the F.I.R.

II. P.W.4-Kamlesh alias Punam, who is the daughter of the informant P.W.1-Jagdish Prasad, has deposed before the trial Court that the deceased Jai Prakash and Ambika were sleeping outside the house in a thatch and her grand-father Ambika raised the alarm, upon which her father Jagdish Prasad (P.W.1) asked her to see what was going on outside the house and thereafter, she came out of the house along with family members. Thus, there is clear cut contradiction in the statements of P.W.1 and P.W.4 and the prosecution case is not consistent in this regard.

III. Neither in the statement under Section 161 Cr.P.C. nor in the F.I.R., the fact that the appellant-Lot Prasad assaulted the deceased Jai Prakash while sitting on his chest, by lathi end (hura) on his chest

under the mango tree, was mentioned by the prosecution, however, after the receipt of post-mortem report, wherein the injury was found otherwise then, it has been disclosed in the F.I.R. If the witnesses seen the occurrence, they would have certainly stated from the very beginning that the appellant sat on the chest of the deceased under the mango tree and assaulted him with lathi and its end (hura).

IV. There is doubt in respect of the conduct of P.W.1 and P.W.4 in recognizing the accused persons. P.W.1, in his examination-in-chief, has stated that he was sleeping inside his house on the date of the incident i.e. on 01.11.1990 at 05:30 a.m. and in his cross-examination, he has stated that when he came out of his house after hearing noise/alarm, dawn was not prevailing and it was a moon light night and there was enough light on account of moon light and at that time, he was at a distance of 20-25 paces. P.W.4, in her statement before the trial Court, has reiterated the aforesaid fact and has stated that it was 5:30 a.m. and in the cross-examination, she has admitted the fact that there was moon light and the dawn was not prevailing. According to him, the evidence of P.W.4 shows that she had conveyed the happening to her father and thereafter her father came out from house and saw the incident. Submission is that if the father was in sleepy condition, then, it will take some time to come to normal sense and in the moon light, it was not possible for the witnesses to have recognized the accused persons. Furthermore, both P.W.1 and P.W.4 have stated before the trial court that Ambika, who is alleged to have sleeping along with the deceased, was suffering from night-blindness and, therefore, he could not have recognized the accused persons.

V. The special report was received on 02.11.1990 at 3:00 p.m. in the office of the District Magistrate and no explanation has been given by the prosecution as to why the same was received on 02.11.1990 when the said report was forwarded on 01.11.1990. In order to prove this fact, appellant has drawn our attention to the statement of D.W.4-Lalit Prasad, who was the Complaint Clerk of the Collectorate and has stated that D.W.4 Lalit Prasad, in his examination-in-chief, has deposed before the trial Court that he brought the original special report along with him and he subsequently proved the receiving of the same on 02.11.1990 by Zamdar Singh, who was the Steno to the District Magistrate, but in the cross-examination, nothing was asked from D.W.4 by the prosecution and the only question, which was asked is as to when the said report was received, is not entered in it.

VI. No independent witness is supporting the prosecution case. The prosecution story set out up during the trial, which is contrary to the prosecution story initiated in the F.I.R.. P.W.1-Jagdish Prasad, in his statement before the trial Court, has deposed that he went to lodge the F.I.R. all alone on foot at a distance of 8-9 Kms. to the police station Wazeerganj. He further deposed that though he was having motorcycle in his name, but the said motorcycle was not available at the time of the incident and the same was available at Belsar, where he was working as Gram Panchayat Officer. In his cross-examination, P.W.1 has deposed before the trial Court that he did not think it appropriate to take any person along with him to the police station because people told him that if he wastes time in these things, then, accused persons will indulge

him in the crime. This statement of P.W.1 itself shows that he was apprehensive of the fact that he can be named in the FIR by the accused persons as no one has seen the incident and there was possibility of naming of any person one way or the other. According to him, there was family dispute with regard to a land.

VII. The trial Court committed illegality in convicting the appellant, relying upon the statements of the so-called witnesses, who are highly interested and partisan witnesses, and whose statement have already been disbelieved by the trial Court in respect of the other co-accused persons, who have been given the benefit of doubt. There were serious contradiction of the statements of PW 1-Jagdish Prasad and PW4-Kamlesh alias Punam relating to manner of assault. The Trial Court has erroneously rejected the statements of the defense witnesss. The informant Jagdish Prasad (P.W.1) has a criminal history, which is admitted by him in his statement at para no.37 at page-24 to the effect that prior to 7-8 years from the date of the murder of his brother, a report under Section 436 I.P.C. was lodged against him in respect of the arson of the house of Ram Bihari Kori. The appellant is not a previous convict. According to him, there is clear improvement in the prosecution case solely in order to falsely implicate the appellant.

VIII. The nature of injuries alleged to have been received by the deceased not support the prosecution case at all. The deceased Jai Prakash has received all injuries on one side of his body and it is highly improbable that four persons assaulted a man with Lathi and Danda could have caused injuries only on one side of the body.

IX. The appellant happens to be the real brother of Sadhu. There was long drawn litigation between the parties and the result of the long drawn litigation would be in the nature of false implication of the appellant as well. According to him, the enmity which is alleged to be continuing between the parties since 1978 could be a strong motive for false implication of the accused including the appellant. The benefit of enmity was given to co-accused Sheetal but the said benefit has not been granted to the appellant by the trial Court.

(D) RESPONDENT/STATE CASE

Sri Arunendra, learned Additional Government Advocate appearing on behalf of the State has supported the impugned judgment and contended that the guilt of appellant is established from the material on record and he has been rightly convicted and sentenced by the impugned order.

(E) None appears on behalf of the complainant to contest this appeal.

(F) ANALYSIS

(32) As per the F.I.R., informant-Jagdish (P.W.1), son of Ram Tej, resident of Niyamatpur, was having enmity with accused Sadhu Prasad Pandey in respect of a land, which was lying barren and the said land was ploughed by a tractor by the brother of the informant-Jagdish (P.W.1), whereupon accused Sadhu Prasad son of Ram Bihari, resident of Niyamatpur stopped him from ploughing the field and after threatening him, went back. In the morning of 01.11.1990, at about 5:30 a.m., accused Sadhu Prasad, Talluqdar, Lot Prasad son of Ram Bihari and Sheetal son

of Bachhu resident of same village, came before the house of the informant Jagdish (P.W.1), armed with lathi, danda and started assaulting his brother Jay Prakash (deceased) and while assaulting him, dragged him to the groove and upon alarm being raised by his brother, he and his brother Ambika and his family members ran to save him, whereupon accused persons ran away. Thereafter, the informant Jagdish (P.W.1) saw his brother Jay Prakash (deceased) lying injured. Subsequently, he took his brother Jay Prakash (deceased) to Wazeerganj Hospital while on the way he died. Informant Jagdish (P.W.1) also stated that apart from him, other persons of the village, namely, Hira son of Aafat, Ram Deen son of Shankar and other persons also saw the accused persons assaulting the deceased Jay Prakash.

(33) On the basis of the aforesaid allegations, F.I.R. was lodged against four accused persons, namely, Sadhu Prasad, Talluqdar, Lot Prasad (appellant herein), Shital on 01.11.1990 at about 12:15 p.m. by the informant Jagdish (P.W.1), on the basis of which, chik F.I.R. was prepared and a case was registered against the aforesaid four accused persons as Case Crime No. 145 of 1990 under Section 302 I.P.C. by P.W.3-Constable Ram Narain. Thereafter, P.W.5-Sub-Inspector Mahendra Nath Sharma took the investigation of the case and proceeded to the spot and conducted the inquest report on 01.11.1990 at about 04:00 p.m. and sent the dead body of the deceased for post-mortem examination, which was conducted at District Hospital, Gonda on 02.11.1990 at about 4:05 p.m. The Investigating Officer, thereafter, prepared photo lash, site plan and took his possession the blood stained and simple earth under memo. After completion of the

investigation, charge-sheet was filed against accused persons under Section 302 I.P.C. on 12.11.1990. and also after completion of the investigation, charge-sheet was filed against the accused persons under Sections 302/34 I.P.C. on 12.11.1990.

(34) The prosecution has produced seven witnesses, out of which, P.W.1-Jagdish Prasad, who is the informant, and P.W.4-Kamlesh alias Poonam, who is the daughter of the informant, were examined as eye-witnesses. Heera, who is the independent witness, was examined as P.W.2 and he turned hostile. Constable Ram Narain, who is the writer of Chik F.I.R. was examined as P.W.3. Mahendra Nath Sharma, who is the Investigating Officer of the case, was examined as P.W.5. Dr. P.K. Srivastava, who has conducted the post-mortem of the corpse of the deceased Jay Prakash, was examined as P.W.6. Constable Ram Khilawan, who took the corpse of the deceased Jay Prakash for post-mortem, was examined as P.W.7.

(35) From the side of defence, five witnesses were produced. Aadalat, who is the owner of the tractor, was examined as D.W.1. Shri, Gayan Singh and Jagnath, who are the villager, were examined as D.W.2, D.W.3 and D.W.5. Sri Lalit Prasad, who is the Petition Clerk, District Magistrate Office, Gonda, was examined as D.W.4.

(36) It transpires from the version of the F.I.R. that the deceased Jay Prakash was assaulted with lathi and danda and thereafter he was taken towards the groove by the accused persons. In the statement recorded under Section 161 Cr.P.C., informant Jagdish (P.W.1) has stated that the deceased Jay Prakash was dragged to

the groove where the appellant Lot Prasad sat on his chest and pressed it (humuk) and started slapping him on his chin. The aforesaid version of the FIR as well as statement recorded under Section 161 Cr.P.C. was further improved by the P.W.1-Jagdish before the trial Court by stating that upon hearing the noise, he came out from his house and thereafter his wife, wife of the deceased, his brother and his daughter came out of the house. P.W.1-Jagdish has categorically stated in his deposition before the trial Court that on hearing the noise, he came out from his house firstly and thereafter other family members came out and saw the incident. P.W.4-Kamlesh alias Poonam, who is the daughter of informant P.W.1-Jagdish, has stated before the trial Court the story of the incident otherwise. In cross-examination, P.W.4-Kamlesh alias Poonam has deposed before the trial Court that Jai Prakash (deceased) and Ambika used to sleep outside the house and on the date of the incident, they were sleeping outside the house. The winter season was started because of which other family members were sleeping inside the house and door was closed inside the house. She has further deposed that her father Jagdish had given a voice to her and said that look daughter, someone's voice is coming outside, then, she listened the voice of Ambika.

(37) At this juncture, it would be relevant to mention that the F.I.R. is not an encyclopedia and every fact is not required to be stated but factum of the incident and the manner of assault are important and that ought to be mentioned in the F.I.R. If one would have seen the occurrence, then certainly from the very inception of the F.I.R., it would have been stated that the

deceased Jay Prakash was dragged to the groove while he was being assaulted with lathi and danda by the accused persons. The ante-mortem injuries sustained by the deceased Jay Prakash shows that injuries of lathi and danda have not been found on the person of the deceased Jay Prakash as alleged by the prosecution in the F.I.R. The factum that the deceased was taken to the groove and thereafter he was given lathi blow on his chest, has neither been mentioned in the F.I.R. nor in the statement recorded under Section 161 Cr.P.C. by the prosecution. But for the first time, the factum that the deceased was dragged to the groove by the accused persons while assaulting him with lathi and danda, has been deposed before the trial Court. Thus, it appears that P.W.1-Jagdish and P.W.4-Kamlesh alias Poonam have made material improvement, while deposing before the trial Court.

(38) P.W.1-Jagdish and P.W.4-Kamlesh alias Poonam, in their statement, have categorically stated that when they came outside the house after hearing the voice/alarm of Ambika, dawn was prevailing and it was a moon light and there was enough light on account of moon light and at that time, they were at a distance of 20-25 paces. As per the prosecution, the incident was happened on 01.11.1990 at 05:30 a.m. The sun rise on 01.11.1990 was at 06:31 a.m., which means that the statement given by the defense witnesses to the effect that there was still one hour for the dawn to commence, appears to be reasonable. As stated hereinabove, P.W.1 has stated that at the time of incident, he was sleeping and when he listened the voice of Ambika, he came outside the house and saw the incident, whereas P.W.4 has stated that at the time of

the incident, she was sleeping and her father Jagdish had given a voice to her and said that look daughter, someone's voice is coming outside, then, she listened the voice of Ambika and thereafter, they came outside the house and saw the incident.

(39) From the aforesaid, it transpires that both the witnesses i.e. P.W.1 and P.W.4, at the time of the incident, were sleeping inside the house and the door was closed from inside the house and after listening the voice of Ambika, they came outside the house and saw that the accused persons were dragging the deceased Jai Prakash to groove by assaulting with lathi and danda. They stated before the trial Court that at the time when they came outside the house, the accused persons were at a distance of 20-25 paces. Considering the aforesaid, it is quite improbable that P.W.1 and P.W.4, in a sleeping condition, came outside the house and recognized the accused persons from a distance of 20-25 paces particularly when there was only moonlight and the month of winter season was ensuing. Moreso, P.W.1 and P.W.4 have stated before the trial Court that Ambika, who was sleeping in a thatch along with deceased Jay Prakash, was suffering from night blindness. In such circumstances, it is quite impossible for Ambika to recognize the accused persons. It is not the case of the prosecution that Ambika told the name of the accused persons.

(40) The recognition in the moon light has been stated by MODI in his 24th Edition at page-277, which is reproduced as under :-

"(ii) Moonlight- According to Tidy, the best known person cannot be recognized in the clearest moonlight

beyond a distance of 151/2 m (17 yards). Colonel Bary, IMS, is of the opinion that at distances greater than 10.9 m (12 yards), the statute or outline of the figure alone is available as a means of identification. To define the features at even shorter distance is practically impossible by moonlight."

(41) The 12 yards parameters as indicated hereinabove itself is indicative of the fact that in the moon light, the broad features of the accused persons could have been identified. Apart from it, the accused persons could not have been identified as PW-1 has stated that he was at a distance of 20-25 paces, when the deceased Jai Prakash was being taken by the accused persons forcibly towards groove. The distance of 20-25 paces would come to about 50-62 feet. The identification of the accused from such a long distance even in the moonlight would not have been possible.

(42) There is another aspect of the matter. The accused persons were not armed with any deadly weapons as P.W.1 and P.W.4 have stated from the beginning that the accused persons were armed with lathi and danda and they were dragging the deceased Jay Prakash by assaulting him with lathi and danda. If the accused persons were not armed with any deadly weapons, then, the informant Jagdish (P.W.1), P.W.4-Kamlesh alias Poonam, his brother Ambika and other family members and other witnesses ought to have tried to save the deceased from the clutches of the accused persons but no attempt was made by the informant and other family members to take any lathi or danda or any other weapon to save the deceased. This conduct of the informant P.W.1-Jagdish itself creates doubt upon the prosecution case. Moreso, if the informant Jagdish, his family members and other persons were present at

the time when the accused persons alleged to have dragged the deceased Jay Prakash to groove by assaulting him with lathi and danda, then they could have very easily overpowered the accused and they could have saved the deceased from being killed by the accused/appellant.

(43) The theory of enmity between the informant and accused party is admitted. The main enmity was existing with the informant Jagdish (P.W.1) and a litigation had ensued at this instance between the parties since 1978. A criminal case has also been instituted against accused Sadhu by the informant Jagdish P.W.1 and, therefore, looking to the enmity on record, the possibility of false implication cannot be ruled out. The informant Jagdish (P.W.1) has admitted in his cross-examination that though the litigation was going on in respect of the said land from 1978 to 1990 but there has been no report and neither any dispute has taken place between them. Even he has not made any report in respect of the incident, which has taken place two days prior to the incident in regard to ploughing the disputed land by Jay Prakash (deceased) through the Tractor of Adalat. It transpires from the record that Adalat was examined as D.W.1, who, in his statement, has stated before the trial Court that he never went for ploughing on the disputed field, therefore, part of the case as set up by the prosecution stands falsified in view of the statement of D.W.1-Adalat. Thus, apparent motive setup by the prosecution in respect of ploughing of the disputed land by the deceased Jay Prakash is also not proved.

(44) Considering the aforesaid, I am of the opinion that the false implication of the accused persons including the appellant

cannot be ruled out on account of long standing enmity between the parties.

(45) So far as injuries sustained by the deceased Jay Prakash is concerned, the post-mortem report shows that there is one contused swelling on the right side forehead, extending upto right temporal region in an area of 11 c.m. x 8 c.m. with few abrasions just above the right ear. Another injury has been found in the form of contusion on the left upper lid in an area of 4 1/2 c.m. x 2 1/2 cm. The third injury is in the form of swelling with deformity on the left forearm just above the left wrist. Radius and ulna fractured on the left side, and the fourth injury was found as deep contusion present on the left side chest, lower part in an area of 5 c.m. x 4 c.m. The injury no.1 is on the forehead and injury no.2 is on the upper left lid, meaning thereby in the head region and chest, injury can be attributed to the appellant but the prosecution has failed to explain as to where are those injuries, which were caused on the deceased Jay Prakash by the accused persons, when the deceased was being taken forcibly and when he was being assaulted with fists and danda as stated by the P.W.1. P.W.4 has stated before the trial Court that accused persons dragged the deceased to the mango tree in the groove, where he was thrown to the ground and he was attacked with lathi and lathi's end (hura). Such assault in the nature of 'hura' can be referred as kicking with a lathi in a piercing manner. Now, if lathi is used as like spear and assault is given in a piercing manner, then, the corresponding injury ought to have been received of a different nature rather than received by the deceased and certainly injury would be in a circular form. Moreso, even if it is assumed that the appellant sat on the chest of the deceased by putting his knees on his chest and thereafter, pressed his knees again and again (humuk),

then also the injury will be of different dimensions rather than the injury sustained by the deceased Jay Prakash in the form of deep contusion on the left side chest, lower part in an area of 5 c.m. x 4 c.m. whereas ribs 4,5, 6 and 7 were found to be broken. The injury from lathi and lathi's end (hura) i.e. assault in a piercing manner with lathi is not apparent from the post-mortem report. Thus, the manner of assault becomes doubtful as stated by P.W.1 and P.W.4.

(46) P.W.6-Dr. P.K. Srivastava, who has conducted the post-mortem of the deadbody of the deceased Jay Prakash, has stated before the trial Court in the cross-examination at page-11 that deceased Jay Prakash was not feeling well and took light food on the night of the incident. P.W.1-Jagdish has not stated before the trial Court which food was taken by the deceased at the time of sleeping and at what time, he took food. Normally, in village, people took food at around 08:00 p.m. If it is presumed that the deceased took food at 08:00 p.m. or for the sake of argument, it may be presumed that it may be taken at 09:00 p.m., then also, semi digested food would be present in the stomach within 2-3 hours. P.W.6-Dr. P.K. Srivastava has stated that the death has occurred within six hours of taking food, meaning thereby if the food was taken at 09:00 p.m., then, also the death had occurred prior to 03:00 a.m. Thus, it appears that incident took place in the dark hours and noobody has seen the occurrence and the evidence has been collected just to prove the case as setup by the prosecution.

(47) In view of the facts that the prosecution has not been able to fix the identity of the appellant by credible evidence as the assailant of the deceased, entering into the further details of the case will be futile. Moreover, the three accused persons, namely, Sadhu Prasad, Talluqdar and Shital, have

already been acquitted by the trial Court by giving benefit of doubt vide impugned judgment and order dated 20.07.1995 passed by the trial Court, hence the appellant-Lot Prasad is also entitled for the benefit of doubt. Since, the identity of the miscreants was not established beyond all reasonable doubt, this is a case where appellant is entitled to acquittal on the ground of benefit of doubt.

(48) In the result, the appeal succeeds and is hereby **allowed**. The judgment and order dated 20.07.1995 passed in Sessions Trial No. 73 of 1992 so far as it relates to the appellant stands set aside. The appellant is acquitted from the charges levelled against him. The appellant is on bail. His bail bonds are hereby cancelled and sureties are discharged from their liabilities.

(49) Appellant is directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973.

(50) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022)01ILR A466
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 446 of 2015

Bala Prasad Kurmi **...Appellant**
Versus
State Of U.P. **...Opposite Party**