

HIGH COURT OF ALLAHABAD**Bench: Hon'ble Rajiv Gupta, J. and Hon'ble Shiv Shanker Prasad, J.****Date of Decision: 31st May, 2024**

GOVERNMENT APPEAL NO. 137 OF 1983

STATE ... APPELLANT**VERSUS****RAM NARESH GUPTA & OTHERS ... RESPONDENT(S)****Legislation:**

Section 302, 323, 148, 149, 34 of the Indian Penal Code (IPC)

Section 145, 313 of the Code of Criminal Procedure (CrPC)

Subject: Government appeal arising from a case involving the alleged murder of a one-year-old child and injuries inflicted during a land dispute. The primary issue pertains to the acquittal of the accused under Section 302/34 IPC by the trial court and their conviction under Section 323/34 IPC.

Headnotes:

Criminal Law - Acquittal for Murder - Government Appeal against trial court's judgment acquitting accused of murder charges under Section 302/34 IPC - Trial court convicted accused for causing simple injuries under Section 323/34 IPC - Prosecution alleged that accused snatched a one-year-old child from her mother's lap and threw her on the ground, leading to her death - Post-mortem report indicated death due to shock and haemorrhage from a ruptured spleen with no external injuries - Prosecution witnesses' testimonies inconsistent and contradicted by medical evidence - Held, prosecution failed to establish guilt beyond reasonable doubt for murder - Acquittal for murder charges affirmed. [Paras 20-23, 36-39, 46-47]

Injury Causing - Conviction for Simple Injuries - Prosecution established that accused inflicted simple injuries on complainants during altercation - Medical evidence corroborated injuries consistent with blunt force trauma - Trial court's finding of guilt under Section 323/34 IPC supported by consistent testimonies of injured witnesses and medical reports - Conviction for simple injuries upheld. [Paras 33-34, 48]

Procedural Aspects - Charges Framing - Discrepancy in charges framed by trial court noted - Separate charges for individual accused under Section 302 IPC and joint charges under Section 302/34 IPC - Alteration unexplained by prosecution - Emphasized importance of clarity in charges framing. [Para 45]

Decision - Dismissal of Government Appeal - Appeal challenging acquittal under Section 302/34 IPC dismissed - Trial court's judgment affirmed - Conviction and sentence for simple injuries under Section 323/34 IPC sustained - No order as to costs. [Paras 49-51]

Referred Cases:

- Bhajandas v. Emperor Cr.L.J. Reports 1923 Lahore High Court 421

Representing Advocates:

Mr. Purshottam Upadhyay, learned Additional Government Advocate for the State

Mr. Nikhil Kumar, learned Amicus Curiae for the accused-respondents

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. We have heard Mr. Purshottam Upadhyay, learned Additional Government Advocate for the State-appellant and Mr. Nikhil Kumar, learned Amicus Curiae, for the accused-respondents as well as perused the materials available on trial court's record.

2. This Government Appeal is directed against the impugned judgment and order dated 30.09.1982, passed by IVth Additional Sessions Judge, Mirzapur in Sessions Trial No. 7 of 1981 (State Vs. Ram Naresh Gupta and others), whereby accused-appellants Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta have been convicted for the offence under section 323/34 I.P.C. and sentenced to undergo three months rigorous imprisonment alongwith fine of Rs. 150/- each; in default thereof, they have to further undergo 15 days additional imprisonment each. By the impugned judgment, the accused-respondents have been acquitted from the charges under Sections 302, 302/34 I.P.C.

3. During pendency of the instant Government Appeal, accused-respondent nos. 1, 2 and 4, namely, Ram Naresh Gupta, Basdeo Gupta and Madan Gupta have already died, hence the instant Government Appeal at their behest have also been abated by this Court vide order dated 6th May, 2024.

4. As per the prosecution case, there was enmity between the accused persons and Mahendra Prasad (complainant/P.W.-1) with regard to some land situated in village Khetkatawa. On 4.7.1979 a first information report (Ex. Ka-17) was lodged by P.W.-1 Mahendra Prasad at Police Station Kon, District Mirzapur against accused persons, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan registered as Case Crime No. 16 of 1979 under Sections 148, 149, 302 and 323 of I.P.C. at Police Station-Kone, District Mirzapur, as per which on 4.7.1979 at about 6:00 a.m. the accused persons went to the village Khetkatawa and asked the complainant (P.W.-1) as to why he had set up hut (Mandai) on the land which the accused persons claimed to be their own. The complainant is alleged to have replied that he erected the hut (Mandai) to look after his land. An altercation ensued, whereafter the accused Basudeo is alleged to have wielded a lathi on the complainant's brother Rajendra and when complainant Mahendra went to rescue Rajendra, accused Madan Gupta attacked him with lathi, wife of Rajendra Smt. Kabootari also rushed to the spot to rescue him but Ram Naresh Gupta beat her with lathi and also snatched the female child Lilawati aged about 9 months from her lap and threw her on the ground. Ramnath stuck a lathi on Halkeri, father of the complaint and he too was injured. In the meantime, other villagers arrived there and on their intervention, the accused ran away from the place of incident. Thereafter, the complainant Mahendra Prasad took all the injured persons along with the female child to the police station Kone, District-Mirzapur. While going to the police station, the female child died on the way.

5. On the basis of the written report, chick first information report Ex. Ka-17 was prepared. Details of the incident were entered in the general diary of 4.7.1979 at Rapat No. 7 at 6:45 a.m. and the crime was registered at No. 16/1979, under Sections 148, 149, 302, 323 I.P.C..

6. After registration of the first information report, Sub-Inspector Dharmdeo Singh prepared the inquest report (Ex. Ka-2) of the dead body of the deceased female child. He also prepared the photo lash (Ex. Ka-11) and sealed the dead body and sent it for post-mortem by Constable Ram Gopal.

7. An autopsy of the dead body of the deceased Lilawati has been conducted by Dr. R.A. Mishra (P.W.-4) on 5th July, 1979 at 02:00 p.m. He did not found any visible injury on the body of the deceased. He opined that the death of the deceased is shock and haemorrhage due to rupture of enlarged spleen.

8. P.W.-4 has also medically examined the injured Halkhori on 5th July, 1979 at 11:00 a.m. and found following injuries on her body:

“1. Lacerated wound 3 ½ cm. x 2 cm. x ½ cm. on middle of head, 11 cm. above root of nose. Pus present.

2. Contusion abrasion 4 cm. x 1 cm. on back of left forehead, 5 cm. above wrist joint.”

9. The injuries of injured/complainant/P.W.-1 Mahendra Prasad has also been examined by Dr. R.A. Mishra, P.W.-4 and he found following injuries on his person:

“1. Contusion with swelling 3 cm. x 1 cm. on back and middle of right palm.

2. Contusion 6 cm. x 1 ½ cm. on back of left chest. 8 cm. below lower part of scapula.

3. Contusion 2 cm. x 1 cm. on left chest on its back 6 cm. below shoulder joint.

4. Contusion 2 cm. x 1 cm. on back of right elbow joint.

5. Contused abrasion 1 cm. x ½ cm. on left side of head, 12 cm. above the left ear.”

10. Following injuries have also been found by the same doctor i.e. P.W.-4 on the person of injured Rajendra Prasad P.W.-2:

“1. Lacerated wound 6 cm. x 1 cm. x bone deep on left side of head. 5 cm. above left eye brow.

2. Lacerated wound 2 cm. x ½ cm. x ½ cm. on right side of head 12 cm. above right ear.

3. Contusion 2 cm. x 1 cm. on back of left forearm 6 cm. above wrist joint.
 4. Contusion 16 cm. x 1/2 cm. on back of chest crossing middle at level of 6 cm.
 5. Contusion 10 cm. x 1½ cm. on back of chest crossing middle transic 8 cm. below injury No. 4.
 6. Contusion 10 cm. x 1 cm. on back of left chest, 4 cm. below injury No. 5.
 7. Contusion 4 cm. x 1 cm. on left thigh, 8 cm. above left knee joint.”
11. P.W.-4 found following injury on the person of injured Smt. Kabutari (P.W.6) :-
- “1. Lacerated wound 5 cm. x 1 cm. x bone deep on right side of head, 7 cm. above right ear.”
12. The injury reports of the injured persons have been exhibited as Ex. Ka-3, Ka-4, Ka-5, Ka-6 and post mortem report of the deceased has been exhibited as Ex. Ka-7.
13. The investigating officer made spot inspection and prepared the site plan (Ex. Ka-13). The injured were also sent for their medical examinations. The statements of the witnesses were recorded by the investigating officer. Thereafter, the investigation of the case was taken over by the Station House Officer, Sri Ram Dular Ram. He recorded the statements of Sarjoo, Ramjeth and Nankakoo.
14. After completion of the statutory investigation under Chapter XII Cr.P.C., Sri Ram Dular Ram, the investigating Officer submitted charge-sheet (Ex. Ka-14) against all the accused persons under Sections 302/323 I.P.C.

15. On the basis of material so collected and produced by the prosecution, the trial court on 23rd June, 1981 following charge was framed against the accused-respondent Ram Naresh Gupta:

“I, U.S. Pandey, Vth Addl. Sessions Judge, Mirzapur hereby charge you Ram Naresh Gupta as follows:

That you on 4.7.1979 at about 6.00 A.M. in village Khetkatawa within police circle Kon, District Mirzapur did commit murder by intentionally causing the death of Lilawati, a child aged about one year and thereby committed an offence punishable under section 302 I.P.C. and within my cognizance.

And I hereby direct that you be tried by me on the said charge.”

16. On the same day i.e. 23rd June, 1981 following charges were framed against the accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta jointly:

“I, U.S.Pandey, IVth Addl. Sessions Judge, Mirzapur hereby charge you Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta, and Madan Gupta as follows:

Firstly that you on 4.7.1979 at about 6.00 A.M. in village Khetkatawa within police circle Kon, District Mirzapur in furtherance of your common intention in commit murder by intentionally causing the death of Lilawati, a child aged about one year and thereby committed an offence punishable under section 302/34 I.P.C. and within my cognizance.

Secondly, that you on the same date, time and place and in-furtherance of the same common intention caused simple hurt to Halkhori, Mahendra Prasad, Rajendra Prasad and Smt. Kabutari and thereby committed an offence punishable under section 323/34 I.P.C. and within my cognizance.

And I hereby direct that you be tried by me on the said charges.”

The charges were read over and explained to the accused persons in Hindi, who pleaded not guilty and claimed to be tried.

17. During the course of trial, the prosecution has produced following documentary evidences:-

“1. F.I.R. dated 04.07.1979 is exhibited as Ex. Ka-17.

2. Written Report dated 04.07.1979 is exhibited as Ex. Ka.-16.

3. Written Report dated 04.07.1979 is exhibited as Ex. Ka-15.

4. Written Report dated 04.07.1979 is exhibited as Ex. Ka-1.

5. Injury Report of Halkhori dated 05.07.1979 is exhibited as Ex. Ka-3.

6. Injury Report of Mahendra Prasad dated 05.07.1979 is exhibited as Ex. Ka-4.

7. Injury Report of Rajendra Prasad dated 05.07.1979 is exhibited as Ex. Ka-5.

8. Injury Report dated Smt. Kabootari 05.07.1979 is exhibited as Ex. Ka-6.

8. Post mortem report of deceased child Km. Lilawati dated 05.07.1979 is exhibited as Ex. Ka-7.

9. Charge Sheet mool dated 28.07.1979 is exhibited as Ex. Ka-14.

10. Site Plan with index dated 07.07.1979 is exhibited as Ex. Ka-13.”

18. The prosecution also examined total nine witnesses in the following manner:-

“(1). P.W.-1/Informant, namely, Mahendra Prasad, who is the informant and received injuries in the incident.

(2). P.W.-2, namely, Rajendra Prasad, who is the father of the deceased female child namely Km. Lilawati and also received injuries in the incident;

(3) P.W.-3, namely, Sarju Prasad, who is stated to be the eye-witness of the incident.

(4) P.W.-4, namely, Dr. R. A. Mishra, who has medically examined the injured persons and also conducted the post mortem report of the deceased female child namely, Km. Lilawati on 5h July, 1979 at C.H.C., Robertsganj, Mirzapur.

(5) P.W.-5, namely, Halkhori Saav, who is the father of the informant, grandfather of the the deceased female child namely, Km. Lilawati and also received injuries in the incident.

(6) P.W.-6, namely, Kabutari, who is the mother of the deceased female child namely, Km. Lilawati and also received injuries in the incident.

(7) P.W.-7, namely, Dharmdev Singh, who was the first investigating officer; has prepared the panchayatnama and recorded the statements of Rajendra Prasad, Halkhori, Kabootari

(8) P.W.-8, namely, Ramdular, who was the investigating officer and submitted the charge-sheet against the accused persons.

(9) P.W.-9, namely Ramvilas Singh, Constable.”

19. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta, while giving their statements in the Court, denied the prosecution evidence and stated that they have been falsely implicated on account of harbouring grudges qua land in question.

20. On the basis of above evidence oral as well as documentary adduced during the course of trial, on the issue whether the female child Kumari Lilawati had been snatched from the lap of P.W.-6 Smt. Kabutari by the accused Ram Naresh and thereafter he had thrown her on the ground due to which the child sustained internal injuries and died on the way of police station, the trial court, relying upon the version as unfolded in the first information report, testimonies of P.W.-1/Informant Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-3 Sarjoo Prasad, P.W.-5 Halkhori and P.W.-6 Smt. Kabutari Mahajan, has opined that the prosecution evidence qua forcibly throwing down of Smt. Kabutari after receiving lathi blow is self contradictory. The trial court further recorded its finding that after receiving lathi blow Smt. Kabutari fell down and as soon as she fell down, the female child had also slipped from her lap on the ground. Automatically, the female child would have fallen down from her lap on the ground.

21. Further while dealing with the testimony of witnesses a question arose as to whether mere falling down from the lap would cause the death of the female child or not, the trial court while relying upon the testimony of P.W.-4 Dr. R.A.

Mishra, recorded its finding that the spleen of the female child would rupture if the female child had fallen down on the ground from the lap of PW.-6 Kabutari, while the latter had fallen down on receiving lathi blows on her head.

22. On the basis of such finding, the trial court has come to the conclusion that the prosecution has failed to prove beyond reasonable doubt that the accused Ram Naresh had snatched the female child from the lap of P.W.-6 Smt. Kabutari and threw her on the ground which caused rupture of her spleen resulting in her death. The trial court also opined that there is no evidence on record that the accused Ram Naresh had any knowledge about the weakness or illness of the deceased female child, as such, even if it is taken to be correct that the accused Ram Naresh had snatched and threw the female child on the ground which resulted in her death would not amount to murder. Relying upon the judgment of the Lahore High Court in the case Bhajandas Vs. Emperor reported in Cr.L.J. Reports 1923 Lahore High Court 421, the trial court also opined that the accused would be guilty only of causing simple injury and from that view also, the charge under Section 302 of I.P.C. hereby fails and further the charge under Section 302 read with Section 34 of I.P.C. also fails.

23. On the basis of such finding, the trial court has held that the accused are found guilty of the charge under Section 323/34 I.P.C. Consequently, the trial court convicted the accused Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 323/34 I.P.C. and sentenced them to undergo three months rigorous imprisonment along with fine of 150/- each and in case default of fine, they have to further undergo 15 days additional rigorous imprisonment.

24. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the State has preferred the present Government Appeal against the impugned judgment of acquittal of accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta by the trial court.

25. Assailing the impugned judgment and order of conviction, the learned A.G.A. for the State in the present government appeal, has advanced following submissions:

(i). The first information report (Exhibit-ka/17) lodged on 4th July, 1979 at 06:00 a.m. in the morning on the basis of written report (Exhibit-ka/1) given

by the first informant/P.W.-1 Ram/Mahendra Prasad on 4th July, 1981 is prompt first information report.

(ii) There is clinching and direct evidence against the accused by way of testimonies of ocular-cum-injured witnesses i.e. P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari, and independent eye witnesses i.e. P.W.3 Sarju Prasad and the same has also been supported by the medical and other material evidence as available on trial court record.

(iii) Since the incident occurred in broad day light i.e. at 06:00 a.m., all the prosecution witnesses have correctly identified the accused persons while commissioning of the alleged offence and also assigned their role in such offence successfully.

(iv) There is strong motive for the accused-respondents to commit the alleged offence including the heinous murder of one year female child, namely, Lilawati, as there was long standing dispute pending before the prescribed authority under Section 145 Cr.P.C. with regard to title and possession over the land over the plot no. 118Ka (the new number of which was 267 Ka, Kha, Ga, Gha.

(iv) Except the minor inconsistencies/contradictions, the testimonies of all the prosecution witnesses including injured and independent eye-witnesses i.e. P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari are throughout consistent either in their-examination--in-chief and also in their cross-examinations, which have also been supported by the other prosecution witnesses like Investigating Officer, who conducted the investigation of the case and the Doctor who conducted the post-mortem examination of the body of both deceased and the Doctor who conducted the medical examinations of the four injured prosecution witnesses.

(v) The site plan also supports the prosecution case.

(vi) The defence has failed to establish its theory of private defence. It is a not case of cross case in which it is alleged by the defence that they have committed the offence in private defence, as no case or complaint has been lodged by the defence side.

vii. On the basis of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye

witnesses, namely, P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari who are consistent throughout in their examination-in-chief and the cross-examinations inspire confidence in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of the deceased Lilawati and the same has also been supported by the medical evidence in all material particulars, therefore, trial court has committed gross error in acquitting the accused-respondents for the offence under Section 302/34 I.P.C. The trial court while ignoring the entire evidence produced by the prosecution, has passed the impugned judgment, which suffers from illegality and perversity. As such the same is liable to be set aside and the accused-respondents are liable to be convicted for the offence punishable under Section 302/34 I.P.C. also. Hence, the instant Government Appeal filed by the State is liable to be allowed.

26. On the other-hand, learned counsel for the accused-respondents have advanced following counter submissions:

(i). The first information report lodged on 8th July, 1981 at 04:50 p.m. on the basis of written report of the first informant/P.W. dated 8th July, 1981 is ante time.

(ii) Non recovery of crime weapon i.e. lathi or any other weapon makes the prosecution case doubtful.

(iii) There are major contradictions in the testimonies of the prosecution witnesses.

(iv) Instead of the defence, the prosecution has motive to falsely implicate the accused in the present case.

(v). The prosecution side is aggressor in commissioning of the alleged fight (maarpeet) in which the injured persons have sustained simple injury, as they have illegally encroached upon the land of the accused by making a hut, of which litigation is pending before the appropriate court of law. Qua the said fight, the accused Ram Naresh Gupta gave a letter to the Superintendent of Police, Mirzapur and Deputy Superintendent of Police, Turi (Renukut), District Mirzapur for lodging of the first information report against the members of prosecution.

(vi). During the alleged fight (maarpeet), the accused have exercised their right of private defence of their property.

(vii). As per the post-mortem report, no visible injury was seen on the body of the deceased Lilawati. The Autopsy Surgeon has opined that the cause of death of the deceased is shock and haemorrhage due to enlarged spleen. Therefore, the prosecution version specially the prosecution eye witnesses that the accused Ram Naresh Gupta had snatched the deceased Lilawati from the lap of her mother i.e. Kabutari (P.W.-6) and threw her on the ground due to which she died on the way to the Police Station, has no legs to stand.

On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that the instant case is based on weak piece of evidence, therefore, the impugned judgment and order of acquittal under Section 302/34 I.P.C. does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present Government Appeal filed by the State is liable to be dismissed.

27. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

28. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of evidence on record beyond reasonable doubt? And secondly, whether impugned judgment of the trial court, which on the basis of evidence oral as well as documentary led during the course of trial has acquitted the accused-respondents under Sections 302/34 I.P.C. is legally sustainable or not?

29. Before entering into the merits of the case set up by the learned counsel for the accused-appellant in criminal appeal, learned counsel for the accused-respondent in government appeal and the learned A.G.A. as also the learned counsel for the first informant in both the appeals qua impugned judgment and order of acquittal passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses as well as the defence witnesses.

30. Firstly, we may refer to the versions as unfolded in the first information report on the basis of written report given by the first informant/P.W.-1 Mahendra Prasad, which read as follows:

“Today i.e. on 4-7-79, at 6:00 o'clock in the morning, everyone was present inside and outside the hut of the farm along with the family. Tehsildar Survey Settlement has registered the case qua the land in dispute between his father

Halkhori Sah and the accused Basdeo. Because of the said case, there was animosity between his family and the accused. Ram Naresh Gupta, Basdeo, Ramnath Gupta and Madan Gupta reached at his hut and asked as to why they have erected the hut on the land in dispute on which the first informant/P.W.-1 and his family members replied that they had set up the said hut for protecting their field. Consequently, altercation started between them. In the meanwhile, the accused started beating his brother Rajendra Prasad (P.W.-2) by lathi due to which he fell down. When the first informant went to rescue him, accused Madan started beating him with a stick. When the wife of Rajendra, namely, Kabutary (P.W.-6), who was having about one year female child in her lap, ran to rescue them, the accused Ram Naresh Gupta hit her by lathi due to which she sustained injuries on her head and also the accused Ram Naresh Gupta snatched the female child of Kabutari from her lap and threw her on the ground. When the first informant and his family members came to the police station, the female died. His father Halkhori Sah was also beaten by Ramnath Gupta with a stick due to which he sustained injuries on his head and neck. Sarju Prasad, Nanhku and Ram ji saw the incident and several other people of the village came to their rescue and the accused persons ran away towards the east.”

31. P.W.-1/first informant Mahendra Prasad stated in his examination-in-chief that it was 06:00 o'clock in the morning, when he was inside his hut and his brother Rajendra, his father Halkhori Saav, wife of Rajendra, namely, Kabutari having his female child aged about one and half years in her lap, were also present there. At the relevant time, all the accused persons, namely, Ram Naresh Gupta, Ram Nath, Basdeo and Madan being armed with lathi in their hands, reached there. All the accused persons abusing the first informant/P.W.1, his brother Rajendra, his father Halkhori Saav, wife of Rajendra, namely, Kabutari asked as to why they have constructed hut on the land in question. The first informant replied that they were present there for taking care of their field. Thereafter, altercation started between them and meanwhile the accused Basdeo abusing his brother Rajendra, started hitting him with lathi. When he ran to rescue him, then the accused Madan hit him with lathi. The accused Ram Naresh gave one blow of lathi to Kabutari and snatched her daughter from her lap and threw her on the ground. The accused Ram Nath hit his father with lathi. Ram Ji, Nanhku, Sarju etc. witnessed the entire incident. The aforesaid witnesses intervened and rescued them. After beating them, all the accused ran away towards east.

The first informant took the daughter of Kabutari. Rajendra and other injured persons to the Police Station, however, on the way she died.

32. In the cross-examination, this witness stated that Rajendra's daughter, i.e. the deceased, who was killed was not sick, but was healthy. This witness further stated that the accused persons did not enter into the hut. There was a fight on the east side of the hut. He could not disclose as to whether there was blood on the ground or not. At the time of the incident, P.W.-6 Kabutari was inside and they were outside. When the fight started, she also came out. When the accused Ram Naresh hit P.W.-6 Kabutari with a stick, she fell down. After hitting P.W.-6 Kabutari, the accused Ram Naresh snatched the female child (deceased) and threw her and then pushed her due to which she fell down. He further stated that the female child was pulled from the side of P.W.-6 Kabutari by the accused Ram Naresh and thrown. The female child was thrown from a height of five palm length. The female child was picked up after being thrown. There was no visible injury on the body of female child. The clothes of the female child and her body were covered with dust. They took the female child to the police station in the same clothes. No blood was coming out from any part of the body of the female child from anywhere.

(Emphasis added)

33. On deeper scrutiny of the above testimony of P.W.-1, it is apparent that there is no inconsistency or contradiction in his testimony that when P.W.-1 and his family members were present in the hut, all the accused persons came and altercation/fight took place for constructing the said hut on the land in dispute and thereafter all the accused had beaten P.W.-1 Mahendra Prasad, P.W.-2 Rajendra Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari by lathi due to which they sustained simple injuries. As per their medical examination reports and testimony of P.W.-4 Dr. R.A. Mishra who medically examined them, all the injuries found on the bodies of the injured were simple in nature and caused by blunt object like lathi. The said testimony of P.W.-1 has been supported by the medical as well as other oral and documentary evidence. However, in the testimony of P.W.-1 to the extent that the accused Ram Naresh first hit P.W.-6 Kabutari by lathi on her head and snatched her female child from her lap and threw her on the ground, there are major contradictions.

34. Similarly, there is no inconsistency or contradiction in the testimonies of the other prosecution eye witnesses i.e. P.W.-2 Rajendra Prasad, P.W.3 Sarju Prasad, P.W.-5 Halkhori Saav and P.W.-6 Kabutari who are consistent

throughout in their examination-in-chief and the cross-examinations that all the accused persons had beaten them with their lathis as a result of which they sustained simple injuries as per their medical examination reports. However, in their testimonies to the extent that the accused Ram Naresh snatched the female child from the lap of P.W.-6 Kabutari and thereafter threw her on the ground due to which she died later on the way of police station, there are major contradictions, which has also not been supported by the medical evidence.

35. For examining the said prosecution version that the accused Ram Naresh Gupta after snatching the female child of P.W.-6 Kabutari from her lap, threw her on the ground due to which she died on way to the Police Station, on the litmus test, we are required to refer relevant statements of the prosecution eye witnesses:

"The testimony of P.W.-1 Mahendra Prasad (cross-examination):

"रामनरेश ने कबूतरी को लाठी मारा तो वह गिर गई। कबूतरी को मारने के बाद रामनरेश ने लड़की को छीन कर पटक दिया फिर धक्का दे दिया जिससे वह गिर गई। उस लड़की को रामनरेश ने बगल से खींचकर पटक दिया था। पाँच बीता की ऊँचाई से लड़की को पटका था। पटकने के बाद लड़की उठाया था। लड़की के शरीर पर कोई जाहिरा चोट नहीं थी। लड़की कपड़ा व बदन में धूल लग गई थी। थाने हम लोग लड़की के उसी कपड़े में लेकर गए थे। लड़की को कहीं से खून नहीं निकल रहा था।"

The testimony of P.W.-2 Rajendra Prasad (cross-examination):

"चोट खाकर मैं जमीन पर गिर गया था। मेरी औरत लाठी खाकर नहीं गिरी थी। जब रामनरेश ने मेरी लड़की को पटक दिया और मेरी औरत को ढकेल दिया तब वह गिर गई थी। ऐसी बात नहीं है कि रामनरेश मेरी लड़की को छीन रहे थे और मेरी औरत छीनने नहीं दे रही थी। लड़की को रामनरेश ने जोर से पटका था यह धीरे से यह मैं नहीं बता सकता। लड़की रामनरेश से 2-4 हाथ पर गिरी थी। मुझे याद नहीं है कि लड़की मुंह के बल गिरी थी या पीठ के बल जमीन वहां ककरीली पथरीली नहीं थी। यह कहना गलत है कि मैं झूठ बयान दे रहा हूँ।"

The testimony of P.W.-3 Sarju Prasad (cross-examination):

"रामनरेश ने कबूतरी को एक लाठी सर पर मारा था। लाठी की चोट से राजेन्द्र व हलखोरी गिर पड़े थे और कोई नहीं गिरा था। इस मारपीट में कबूतरी नहीं गिरी थी, ढकेलने के बाद गिरी थी। रामनरेश ने जब लीलावती को फेंका तो 2-1 कदम पर वह गिरी। यह कहना गलत है कि रामनरेश आदि से रंजिश के कारण मैं मुल्जिमान के विरुद्ध गवाही दे रहा हूँ।"

The testimony of P.W.-5 Halkhori (cross-examination):

रामनरेश के लाठी लगने पर कबूतरी चोट खाकर गिरी नहीं। दरोगा जी के बयान में यह बयान कि "वह चोट खाकर गिर गई कि - - - मैंने नहीं" दिया था, अगर लिखा है तो कोई वजह नहीं बता सकता।

.....

"लीलावती पहले से बीमार नहीं थी। 4-5 फीट ऊपर से रामनरेश ने लीलावती को गोदी से खीचकर पटका था। यह कहना गलत है कि मैं लीलावती को रामनरेश द्वारा गोद से खीचकर पटकने वाली बात में गलत कह रहा हूँ। यह भी कहना गलत है कि मैं खेत लेने के लिए कत्ल का झूठा मुकदमा चलाया और झूठा बयान दिया।"

The testimony of P.W.-6 Kabutari (examination-in-chief):

रामनरेश ने हमको मारा था। मेरे माथा पर चोट लगी थी। जब मुझे मारा तो उस समय मेरे गोद में मेरी लड़की लीलावती थी। वह 2-2/2 वर्ष की थी। रामनरेश ने लड़की को मेरे गोद से छीनकर पटक दिया।

(Cross-examination)

"मुल्जिमान जब आए तब उस समय मैं मड़ई में थी। जब मैं बाहर निकली तो मारपीट हो रही थी। बाहर निकलते ही रामनरेश की लाठी मेरे सर पर लग गई। मारपीट के पहले मेरे ससुर, मैसुर? व मेरे पति से मुल्जिमान में क्या बातें हुई थी मुझे नहीं मालूम। लाठी लगने पर मैं गिर पड़ी थी। उसके बाद उठ गई थी। रामनरेश ने जब लाठी मारा था उस समय लड़की मेरी गोद में ही थी। किस किस मुल्जिम ने कितनी कितनी लाठी चलाई थी मैं नहीं बता सकती। किसकी लाठी कहा कहा लगी मैं यह भी नहीं बता सकती।"

36. Apart from the above contradictions in the testimonies of prosecution eye witnesses, the said prosecution version has not been supported by the post-mortem examination report of the deceased and also by the testimony of P.W.-4 Dr. R.A. Mishra, who conducted the post-mortem examination of the body of the deceased.

37. P.W.-4, while conducting the post-mortem examination of the body of the deceased Lilawati, found that there was no external injury on the body of the deceased. On internal examination, this witness found that the spleen was torn at a distance of 2 cm x 1/2 cm. In his opinion the cause of death was shock and haemorrhage caused by rupture of an enlarged spleen. Further in his opinion the above ruptured spleen could have resulted in death.

38. In the cross examination, this witness has opined that the deceased girl was lean and thin and pale. Considering the principles mentioned in the Modi Legal Jurisprudence/Laws, he further opined that a lot of force was required for a normal spleen to rupture. He again opined that the enlarged spleen

sometimes bursts due to contraction of the stomach or by coughing or sneezing.

39. The above testimony of P.W.-4 read with the post-mortem examination report completely discards the prosecution version that the accused Ram Naresh Gupta has committed the murder of deceased Lilawati by snatching her from the lap of her mother Kabutari (P.W.-6) and thereafter throwing her on the ground due to which she died after short interval enroute to the Police Station.

40. It is also impossible to believe that if a man snatches a one-year-old girl from her lap and throws her on the ground from about five palm length, she will definitely sustain any mark of injury. Absence of any injury having been found on the body of the deceased Lilawati makes the prosecution version fabricated and doubtful.

45. Apart from the above, we may also record that initially charge against the accused Ram Naresh Gupta has been framed by the trial court on 23.6.1981 simply under Section 302 I.P.C. not under Section 302 read with Section 34 I.P.C., whereas on the same day on 23.6.1981 another charge has been framed by the trial court against the accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan under Section 302 I.P.C. read with Section 34 I.P.C. and Section 323 read with Section 34 I.P.C. Such alteration in the charge framed against the accused-respondents on the same day has not been explained by the prosecution, which also makes the prosecution case doubtful.

46. However, after considering the facts and circumstances of the case and examining the findings recorded by the trial court in acquittal of accused-respondents Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 302/34 I.P.C., we are of the view that the trial court has examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents can be legally sustained. The prosecution has not fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The acquittal of the accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 302/34 I.P.C. is consequently, affirmed.

47. We are also in full agreement with the finding returned by the trial court that the prosecution has fully established its case beyond the reasonable doubt against the accused-respondents under Section 323/34 of I.P.C.

48. In view of the aforesaid facts and the findings recorded by us herein above, we are of the firm opinion that the finding of the Court below with regard to accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta is correct and the guilt of the accused-respondents, namely, Ram Naresh Gupta, Basdeo Gupta, Ram Nath Gupta and Madan Gupta under Section 323/34 I.P.C. has been proved beyond reasonable doubt by the prosecution, which is sustainable.

49. Consequently, in view of the deliberations held above the Government Appeal filed on behalf of the State stands dismissed.

50. There shall be no order as to costs.

51. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Mirzapur, henceforth, for necessary compliance.

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