

OM PRAKASH AND OTHERS

v.

STATE OF UTTAR PRADESH

March 11, 1983

[V.D. TOLZAPURKAR AND A. VARADARAJAN, JJ.]

*Code of Criminal Procedure 1973—Section 157—First Information Report—
Time of despatch—Whether should be noted in it.*

Penal Code—Section 396—Murder and dacoity—Evidence—Appreciation of.

The deceased was the Pradhan of his village. There were feuds of various kinds and political rivalries between the party of the deceased on the one hand and the accused on the other and a number of cases were pending before the Courts.

The prosecution case against the accused was that on the night of the occurrence, which was a moonlit night, the deceased was sleeping in the western room of his house while his wife and children were sleeping in the eastern room, between the two of which there was a baroatha. In the room in which the wife was sleeping there was a lighted lantern hanging from a peg on the eastern wall of that room about 6 feet high from the floor. P.W. 8, the brother-in-law of the deceased was sleeping in a tin shed situate to the west of the western room. Sometime late in the night the deceased and his wife woke up on hearing some commotion. They found that a number of armed men entered the eastern room and started breaking open the northern door whereupon the wife of the deceased raised the wick of the lantern to see what was happening. By the time the deceased entered the eastern room the accused who were armed with pistols and other deadly weapons had entered the room after breaking open the northern door. The 9 accused persons severely assaulted the deceased who as a result of the injuries fell down dead. The accused also assaulted the wife of the deceased (P.W. 2) and her brother (P.W. 8) and ran away with ornaments, cash and clothes. In the meantime, some of the prosecution witnesses, who heard the commotion went towards the house of the deceased and saw in the moon light the assailants leaving the scene of occurrence. The first information report was lodged by P.W. 1 in the police station which was six miles away from the village at 6.05 a.m. on that day.

Before the Sessions Judge the accused contended that the dacoity was committed by an armed gang not known to the prosecution witnesses but that they had been falsely implicated on account of enmity between them and the deceased.

The Sessions Judge found that the first information report had been lodged at the police station without any inordinate delay or that there was

nothing on record to show that there was any oblique motive for concocting a false story of the occurrence. He, however, doubted the veracity of the evidence of P.Ws. 1 and 7, that these witnesses could not have had sufficient glimpse of the miscreants to be able to identify them. He also disbelieved the evidence of P.W. 8, the brother-in-law of the deceased. He, however, believed the evidence of the wife of the deceased (P.W. 2) that she saw the accused in light of the lantern hanging on the eastern wall both when they entered her room as well as when they attacked her husband and thereafter carrying away properties from the house. The Sessions Judge also accepted the evidence that P.Ws. 2 and 8 were present in the house at the time of the occurrence and since they had received injuries at the hands of the assailants they could see what had taken place and that the light of the lantern and moon light were sufficient to identify the assailants. He, therefore, acquitted some of the accused and convicted the appellants and sentenced them to undergo imprisonment for life.

On appeal the High Court did not think it safe to rely on any part of the evidence of P.W. 8 but believed the evidence of P.W. 2 on the ground that she had given straight-forward evidence without an attempt at making any improvements to fit it with the testimony of the other prosecution witnesses. The High Court confirmed the conviction and sentences awarded to the appellants.

Dismissing the appeals,

HELD : There is no substance in the contention that the first information report was ante-timed; nor is there any requirement in section 157 of the Code of Criminal Procedure that the first information report should be despatched forthwith or that the time of despatch must be noted thereon. The Sessions Judge found that the first information report had been lodged at the police station without any inordinate delay and that no oblique motive for concocting a false story of the occurrence in the first information report had been established. If the police had intended to obtain a concocted report, it is more likely that they would have obtained it from P.W. 8, who was in the house at the time of occurrence than take it from P.W. 1 who went there on hearing shouts and sounds. [573 B-D ; 575 B]

The evidence on record shows that the formal first information report was recorded in the police station at the earliest on the morning of the occurrence, that is, at 6.05 a.m. This had been corroborated with the evidence of P.W. 11, Sub-Inspector of Police, who reached the village which is about 6 miles away at 8 a.m. and immediately took up the investigation. [575 B-D]

There is no substance in the contention that, having regard to the size of the eastern room in which the dead body was found, it was not probable that the 9 appellants armed with various weapons could have all been present in it at the same time. The room was sufficiently big and the first information report stated that the culprits were moving in and out of the house at the time of the occurrence. It was not likely that all of them were in the room at

A the same time and it was not improbable that they were seen by P.W. 2 at different times during the occurrence which went on for some time. [575 F-H]

B Although the explanation of the prosecution for its failure to examine the doctor who attended the injured persons was not satisfactory the fact that the witnesses had stated that they sustained injuries during the occurrence was not disputed. Therefore, mere non-examination of the doctor for proving the injuries is not fatal to the prosecution case. [576 C-E]

From the mere fact that none of the looted properties had been recovered from any of the appellants it could not be said that they were not the culprits in the case. On the contrary, there is enough incriminating evidence against them. [576 G-H]

C There is no substance in the contention that there was no sufficient light in the room to identify the assailants. Though, the prosecution had not got the lantern identified by P.W. 2, P.W.11 testified that the lantern was hanging on a peg on the eastern wall of the room and was in working condition. This fact was mentioned in the first information report. P.W.2 woke up on hearing the noise and raised the wick of the lantern. It was a moon-lit night. All this apart it was not the case of the appellants that there was no lantern in the room at all. Nor was it suggested that the night was cloudy and visibility was poor. [577 H; B-F]

E The submission that P.W.2 had modulated her evidence to fit in with the prosecution case is not well founded. She had denied the suggestion that unknown persons came to commit decoity inside the house and that she had falsely implicated the appellants because she could not recognise the real culprits. She was undoubtedly in the eastern room which was the scene of the occurrence and had sufficient opportunity to recognise the assailants, who were known to her. During the occurrence she herself sustained many injuries. [579 D-E]

F Merely because P.W. 1 had not sustained any injury during the occurrence and had not mentioned the names of any of the accused to the villagers who entered the house soon after the occurrence, it is not possible to reject his evidence altogether. [580 A-B]

G The Sessions Judge erred in rejecting the evidence of P.Ws. 1 and 7 and the High Court erred in rejecting the evidence of P.W. 8. There is no reason whatsoever for rejecting the evidence of these witnesses to the extent that their evidence was corroborated by the evidence of P.W. 2 whose evidence had been believed by both the courts below. The evidence of P.Ws. 1, 7 and 8 in so far as it goes to prove the presence of the appellants at the scene of the occurrence lends assurance to the evidence of P.W. 2 that the appellants entered the house and assaulted her husband fatally and that some of them caused injuries to her and committed decoity. The prosecution had proved the case against the appellants beyond all reasonable doubt. [580 D-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 54 & 55 of 1974. A

Appeals by Special leave from the Judgment and Order dated the 21st September, 1973 of the Allahabad High Court in Criminal Appeal Nos. 1923 & 1918 of 1969 respectively.

Frank Anthony and *K.B. Rohtagi* for the Appellants in Crl. A. 54 of 1974. B

Frank Anthony, S.N. Singh and *T.N. Singh* for the Appellants in Crl. A. No. 55 of 1974

S.M. Jain, H.M. Singh and Dalveer Bhandari for the Respondent in both Appeals. C

Devendra N. Goburdhan and *D. Goburdhan* for the complainant in both the Appeals.

The Judgment of the Court was delivered by D

VARADARAJAN J. These appeals by special leave are directed against the dismissal of Criminal Appeals Nos. 1918 and 1923 of 1963 by a Division Bench of the Allahabad High Court. Those appeals in the High Court were filed against the conviction of nine accused persons, Om Prakash (A-1), Anoop Singh (A-2), Sheo Gopal (A-3), Raj Narain (A-4), Chandra Prakash (A-6), Mool Chand (A-12), Beni Singh (A-16) Ram Pal (A-17) and Lajjar Ram alias Raja Ram (A-18) under s. 396 I.P.C. and the sentence of imprisonment for life awarded to them by the learned Sessions Judge, Kanpur - Etawah at Kanpur in Sessions Trial No. 172 of 1969, in which in all 18 accused persons were tried. The trial Court acquitted the other nine accused, Bhoop Singh (A-5), Virendra (A-7), Ramadhin (A-8), Ranjit (A-9), Chhotay Lal (A-10), Chunni Lal (A-11), Bhanu Prakash (A-13), Dhani Ram (A-14) and Ram Gopal (A-15) in the alleged dacoity with murder at the house of Mauji Lal, Pradhan in Makhauli village, at about 1.A.M. in the night of 16/17.2.1968. In that incident Mauji Lal died and his wife Ram Shree (P.W.2), Parasuram (P.W.7) and P.W.2's brother Ram Shankar (P.W.8) are stated to have sustained injuries. E F G

The case of the prosecution was this : There was enmity between the deceased Pradhan Mauji Lal and his brother Baij Nath (P.W.1) on one hand and the appellants on the other ever since the H

- A** deceased Mauji Lal, fought an election battle in 1955 with Mauji Lal, the father of Om Prakash (A—1) and Bhagwati Prasad, the father of Raj Narain (A—4). There were several cases between the parties. About a month before this occurrence, Mauji Lal had reported by Exh. Ka—7 dated 22.1.1968 that accused persons Om Prakash (A—1) and Sheo Gopal (A—3) had committed theft
- B** of timber belonging to the village school managed by him. A few days later on 26.1.1968 Mauji Lal had complained before the Sub-Divisional Magistrate, Ghatampur that Mool Chand (A—12) forcibly occupied Gaon Sabha land. In 1967 there was rioting in the village, to which the prosecution party and accused belong. In that rioting one Ran Sanahi was murdered on one side and Kanwar Lal was murdered on the other side, and two cases were registered, and
- C** Om Prakash (A—1), Sheo Gopal (A—3), Raj Narain (A—4), Ranjit (A—9), Chhotay Lal (A—11), Mool Chand (A—12), Bhoop Singh (A—5), Rampal (A—17), Lajjar Ram (A—18) and other are accused in one case while in the other case the deceased Mauji Lal and 14
- D** others including Mauji Lal's brother Baij Nath (P.W.1) are accused and those cases were pending even on the date of the occurrence in this case. Om Prakash (A—1), Anoop Singh (A—2), and Sheo Gopal (A—3) are brothers. Raj Narain (A—4), Bhoop Singh (A—5) Virendra (A—7) and Chandra Prakash (A—6) are brothers. Mool Chand (A—12) and Bhanu Prakash (A—13) are brothers, Beni Singh (A—16)
- E** nephew of Dhani Ram (A—14) and Ram Gopal (A—15), Ram Pal (A—17) and Lajjar Ram alias Raja Ram (A—18) are cousins.

- On the moon lit-night of 16/17.2.1968 deceased Mauji Lal who was Pradhan of the village and his wife Ram Shree (P.W.2) and their children were sleeping in their house in Makhauli village, Mauji Lal in the western kotha and PW 2 and her children in the eastern kotha, between which there is a barotha. There was a lighted lantern hanging from a peg at a height of 6 feet from the floor on the eastern wall of the eastern kotha. Ram Shankar
- F** (P.W.8) the brother of Ram Shree (P.W.2) who was assisting his deceased brother-in-law Mauji Lal in the cultivation of his lands was sleeping in a tin shed situate west of the western kotha. The deceased Mauji Lal and his wife Ram Shree (P.W.2) woke up on hearing some commotion when the miscreants who entered the eastern kotha of the house were breaking open the northern door
- G** P.W.2 raised the wick of the lantern, material Exh. III, which had been lowered previously, and there was sufficient light in the kotha for recognising the miscreants. Mauji Lal had come
- H**

into the eastern kotha before its northern door was broken open by the miscreants. Om Prakash (A-1), Sheo Gopal (A-3), Anoop Singh (A-2), Raj Narain (A-4), Chandra Prakash (A-6), Mool Chand (A-12), Beni Singh (A-16), Ram Pal (A-17) and Lajjar Ram alias Raja Ram (A-18) entered the eastern kotha after breaking open the northern door with a kulhari, Om Prakash armed with a pistol and the others armed with Kanta, ballams, kulhari lathi and pistol. A pistol shot was fired through the opening in the door before the miscreants entered the eastern kotha. These nine accused persons; Om Prakash (A-1), Anoop Singh (A-2), Sheo Gopal (A-3), Raj Narain (A-4), Chandra Prakash (A-6), Mool Chand (A-12), Beni Singh (A-16), Ram Pal (A-17) and Lajjar Ram alias Raja Ram (A-18) severely assaulted Mauji Lal who died at the spot as a result of the injuries sustained by him. Sheo Gopal (A-3), Chandra Prakash (A-6), Beni Singh (A-16), Ram Pal (A-17) and Lajjar Ram alias Raja Ram (A-18) assaulted P.W. 2 severely and ransacked the house for about 15 or 20 minutes and took away from that eastern kotha and the adjacent box-room of the house ornaments, cash, clothes etc., valued at Rs. 2,700/-. Ram Shankar (P.W.8) who was sleeping in the tin shed, as stated above, woke up on hearing the shouts and sound of gun-fire and saw accused Virendra (A-7) and Ramadhin (A-8) standing near his cot armed with lathis and they inflicted lathi blows on him. When he got an opportunity, Ram shankar (P.W.8) entered the house and concealed himself by the side wall near the door connecting the eastern kotha and the barotha and witnessed what was happening inside the eastern kotha. P.Ws. 2 and 8 could see the miscreants in the light of the lantern material Exh. III. Baij Nath (P.W.1), Parasuram (P.W.7) and others of the village woke up on hearing sound of gun-shot, and proceeded towards the house of the deceased Mauji Lal and stood under a neem tree in front of one Banwari Lal's house and concealed themselves in the chappra of one Motilal situate east of the deceased Mauji Lal's house. They saw the miscreants when they were departing from the scene, with the moon-light. The miscreants standing on the roof of Sham Lal's house earlier shot at Parasuram (P.W.7) while he was standing in front of that house and he sustained gun shot injuries.

About one and a half hours after the miscreants left the place, P.W. 1 who went inside the house and found Mauji Lal lying dead with injuries and P.Ws. 2 and 8 having injured, got the report, Exh. Ka-1 written by one Shankar Singh. He thereafter proceeded to

A the Police Station at Mooa Nangar situate six miles away from the village, and handed it over to the Head Constable Ram Kishore Panday (P.W.9). On the basis of that report a formal FIR was registered at the Police Station at 6.05 AM on 17.2.1968. Tiwari, the Sub-Inspector of Police (P.W. 11) took up investigation and reached the village at 8 AM on 17.2.1968 when PW 2 handed over to him a list of properties which had been looted from her house. P.W. 11 found the dead body of Mauji Lal in the eastern kotha and the lantern material Exh. III hanging from a peg in the eastern wall of the kotha and boxes broken open and the locks thrown in the verandah.

B

C Autopsy on the body of Mauji Lal was conducted by Dr. Sharma (P.W. 3), Civil Surgeon, Kanpur at 2 PM on 18.2.1968. He found six incised wounds, two lacerated wounds and three abrasions on the body of the deceased. The left eye was found black. The sculp bones were found cut through and through under three incised wounds. The doctor (P.W.3) was of the opinion that the incised wound might have been caused by some sharp edged weapons like kanta and axe, that the lacerated wounds could have been caused with lathi, that the abrasions might have been caused by coming into contact with some rough object, that the blackening of the eye might be due to clotting of blood due to the head injury and that all the injuries together were sufficient in the ordinary course of nature to cause instantaneous death. Ex. Ka—2 is the post-mortem certificate issued by P.W.3.

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The injured witnesses P.Ws. 2, 7 and 8 were examined between 6 PM and 7.30 PM on 17.2.1968 by Dr. Mukherjee of Chattarpur Dispensary, who could not be examined as a prosecution witness on account of difficulty due to his non-availability. The wound certificates, Exh. Ka 18—20, issued by that Doctor in respect of P.Ws. 2, 7 and 8 have been proved by the Compounder Vishamber Nath (P.W. 13). P.W. 2 had sustained 19 injuries consisting of one lacerated wound on the left side of the head and a number of contusions and abrasions on various parts of her body, all caused by blunt weapons. P.W. 7 had sustained six gun-shot injuries. P.W. 8 had sustained a contusion on the top of his shoulder joint and an abrasion on the lower aspect of the right clavicular region, all caused by blunt weapons such as lathis.

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H That fact the there was enmity between the two parties and that Mauji Lal was murdered and property worth about Rs. 2,700/— from his house was looted in the night of 16.17.2.1968 and that in

that incident Mauji Lal's wife (P.W. 2) and brother-in-law (P.W. 8) were injured and P.W. 7 who came near the scene of occurrence had received six gun-shot injuries, was not doubted or disputed before the learned Sessions Judge by the learned counsel for the defence. But all the accused denied in their statement their presence and participation in the occurrence. The suggestion made on behalf of the accused was that an armed gang of dacoits, not known to the prosecution witnesses, committed the crime and that the accused have been falsely implicated on account of enmity. No defence witnesses were examined.

The prosecution examined. PWs 1, 2, 7 and 8 as eye-witnesses to speak about the participation of the accused in the occurrence. P.W. 1 implicated all the 18 accused persons as having been present at the time of the occurrence. P.W. 2 implicated only the nine appellants, namely A—1 to 4, 6, 12 and 16 to 18 as those who entered the house and attacked her and her husband and committed dacoity. P.W. 7, implicated fourteen accused, namely Anoop Singh (A—2), Raj Narain (A—4), Bhoop Narain (A—5), Chandra Prakash (A—6), Virendra (A—7), Ramadhin (A—8), Ranjeet (A—9), Chhote alias Ram Swarup (A—10), Chunni Lal (A—11), Mool Chand (A—12), Bhanu Prakash (A—13), Dhani Ram (A—14), Ram Gopal (A—15) and Rampal (A—17) as some of the miscreants who were present at the house of P.W. 2. P.W. 8 also implicated these nine appellants besides Virendra (A—7) and Ranjit (A—8).

The learned Sessions Judge found that the FIR (Exh. ka—1) had been lodged at the Police Station without any inordinate delay and that there was nothing on the record to show that there was any oblique motive for concocting a false story of the occurrence. But he was of the opinion that the evidence of P.Ws. 1 and 7 does not inspire confidence, that it could not be believed beyond all reasonable doubt that those two witnesses had seen the occurrence, that P.W. 1 would have been fired at if he had been present at the chappar as claimed by him and that the probability is that as soon as P.W. 7 received the six gun-shot injuries in front of Narbada's house, he would have either fallen down there or returned to his house. He was further of the opinion that in any case P.Ws. 1 and 7 could not have had sufficient "glimpse of the miscreants" so as to be able to identify them. He rejected the evidence of P.W. 8 about the participation of Virendra (A—7) and Ramadhin (A—8) in the occurrence as not inspired sufficient confidence and was of the opinion that the evidence

A of P.Ws. 1, 7 and 8 about the participation of the acquitted accused 5, 7 to 11 and 13 to 15 in the crime was not acceptable. As regards the participation of the appellants in the crime he accepted the evidence of P.Ws. 2 and 8. The evidence of P.W. 2 is that she saw the appellants in the light of the lantern that was hanging in the eastern wall of the eastern kotha as soon as they entered her kotha and also while they were attacking her husband and causing injuries to her and carrying away the properties from the house. The evidence of P.W. 8 is that he saw Om Prakash (A—1) when he was escaping from the tin shed where he was sleeping earlier to the western kotha and that he saw the other appellants from behind the door of the western kotha when they were attacking deceased and P.W. 2 and looting the properties from the house. The learned Sessions Judge accepted the evidence of P.Ws. 2 and 8 about their presence in the house at the time of the occurrence, and also the fact that they received the injuries at the hands of the miscreants and could see what had taken place in the light of the lantern as well as of the moon. Accordingly, he acquitted accused 5, 7 to 11 and 13 to 15 and convicted the appellants and sentenced them as mentioned above.

The learned Judges of the High Court agreed with the trial court in not relying upon the evidence of P.Ws. 1 and 7. They were not prepared to doubt the presence of P.W. 8 in the tin shed of the house of the deceased Mauji Lal and P.W. 2 in view of the fact that he has received injuries at the hands of the miscreants. But they found it difficult to believe that on finding an opportunity to move away from the tin-shed, he would have entered the house and taken shelter there when the miscreants were in the house and beating the deceased and P.W. 2. They were of the opinion that P.W. 8 could have been of more help to his sister P.W. 2 by running to the village abadi for help so that on the arrival of the villagers the offenders may run away and not cause undue havoc in the house. P.W. 2 had not mentioned P.W. 8 as one of the persons who came into the kotha after the miscreants left the place though, he had mentioned the names of many other persons who came into the kotha. According to the learned Judges, P.W. 8 could have seen only some of the offenders but he has intentionally made improvements in his version. For these reasons the learned Judges of the High Court thought it not safe to rely on any part of the evidence of P.W. 8. But they were of the opinion that the incident could have been witnessed only by P.W. 2 and her children and that there is no substance in the criticism that independent witnesses have not been called to depose about the occurrence as eye-witnesses. They were of the opinion that P.W. 2

has given straight-forward evidence without any attempt at making any improvement to fit in with the testimony of the other prosecution witnesses. They accepted the evidence of P.W. 2 as wholly reliable and confirmed the convictions of the appellants and the sentence awarded to them and dismissed the appeals.

The learned counsel for the appellants submitted that the F.I.R. Exh. Ka-1 is ante-timed. He drew our attention to section 157 of the Code of Criminal Procedure and submitted that the time of despatch of Exh. Ka-1 is not entered there on. Section 157 only states that the first information report should be despatched forthwith and does not say that the time of despatch must be noted thereon. The learned Sessions Judge has observed in his judgment that Exh. Ka-1 seems to have been lodged at the Police Station without any inordinate delay and that there is nothing on record to show that there was any oblique motive for concocting a false story of the occurrence itself in that first information report. The learned counsel for the appellants invited our attention to the evidence of Shiv Poojan Tiwari, Sub-Inspector of Moosa Nagar Police Station who had been examined as C.W. 1. The evidence of C.W. 1 is that while he was raiding Numain Purwa village in a murder case of his Police Station at about 2.00 A.M. in the night of 16/17-2-1968 he heard noise coming from the side of Makhauli village situate 3 miles north of Numain Purwa village and went there along with some armed police guard at about 4.00 A.M. and was informed that Mauji Lal had been murdered in his house and property had been looted from his house by decoits and that his brother and certain other persons had gone to the police station for lodging a report. He has also stated that he went to the house of Mauji Lal and found his dead body lying inside the house and that he stayed in the village until the Sub Inspector of the Police Station concerned (P.W. 11) arrived at the spot and started investigation. The learned counsel for the appellants commented on the basis of the evidence of C.W. 1 that he had not noted the names of the assailants in the general diary entry made by him in his police station that the names of the 18 accused including those of the appellants have been mentioned in the first information report Exh. Ka-1 only as an after thought. The relevant portion of Exh. Ka-1 may be extracted in order to appreciate the contention of the learned counsel for the appellants. P.W. 1 the author of exhibit Ka 1 who does not claim to have seen the incident which took place in the eastern kotha of the house of the deceased has stated in that report thus :—

A "Today my brother Mauji Lal was sleeping inside his house in the night as usual. A lantern was burning in the house. Smt. Ram Shree (P.W. 2) was also inside the house. Shri Ram Shankar s/o Manni Lal (P.W.8) was sleeping under the tin-shed. In the night intervening between 16th and 17th of February 1968, at about 1.00
B O' clock, the accused persons, having armed themselves with kantas, ballams, lathis, axes, guns and pistols came and surrounded the house of my brother Mauji Lal. They cut open the door and entered the house. They inflicted injuries upon my brother Mauji Lal and caused his instantaneous death. They also caused injuries to my
C bhabhi. My bhabhi raised alarm. Ram Shankar was also assaulted with lathis. He too, raised alarm. On hearing the shouts and the sounds of guns and pistols I and Prasu Ram s/o Hira Lal (P.W. 7), Ram Adhar, Ram Kumar, Ram Prasad Sachan, Banwari Lal s/o Ram Lal, residents of my village, Beta Lal Sachan of Damodarpur, and several other persons, reached the spot, saw the occurrence, and challanged the accused persons. They recognised them in the light of the moon. My bhabhiji and Ram Shankar have also recongnised the accused persons in the light of the moon and lantern. Parasu Ram has also recei-
D ved injuries from the shots of the gun. There are several injuries on the person of my brother. After committing the assault, the accused persons looted away the articles kept in the boxes in the house, ornaments, clothes and cash etc. The accused persons kept coming and going outside inside and on the roof. Out of the accused persons, Anup Singh
E was armed with an axe, Dr. Om Prakash with a pistol, Raj Narian and Mool Chand with kantas, Ram Gopal and Dhani Ram with guns and Bhoop Narain and Ranjeet with ballams. The remaining persons were armed with
F lathis."

G The actual part played by either any of the appellants or any of the acquitted accused has not been mentioned in this report. It must be remembered in this connection that while P.W. 1 has named all the 18 accused mentioned in Exh. Ka-1. P.W. 2 has named only
H the 9 appellants, P.W. 7 has named the 9 appellants as also accused 7 and 8 and P.W. 8 has named 14 accused persons. If Exh. Ka-1 was ante-timed as submitted by the learned counsel for the appellants it is not probable that the police would have obtained that report from

P.W. 1 who was not one of the residents of the house of Mauji Lal where the occurrence had taken place but was admittedly living in his own house situate at some distance from the house of the deceased and was admittedly attracted to the scene of occurrence only by shouts and the sounds of guns and pistols. If the police had intended to obtain a concocted first information report it is not probable that instead of obtaining it from P.W. 8 who was indisputably one of the residents of the house in which the occurrence had taken place they would have obtained it from P.W. 1. The evidence shows that on the basis of this first information report a formal F.I.R. was recorded to the Police Station situate six miles away from the scene of occurrence at 6.05 A.M. on 17.2.1968. The evidence of P.W. 1 is that he left for the police station about 1 or 1½ hours after the culprits left the place and gave the report which he had got written by one Shankar Singh. The Sub-Inspector of Police, P.W. 11 has stated that he thereafter took up investigations of the case and reached the village at 8.00 A.M. and found the dead body of Mauji Lal in the eastern kotha and obtained a list of the looted properties from P.W. 2. In these circumstances we are of the opinion that the submission of the learned counsel for the appellants that the first information report Exh. Ka—1 is ante-timed is not well founded.

The learned counsel for the appellants next submitted that having regard to the size of the eastern kotha of the house of the deceased it is not probable that these 9 appellants with arms such as guns, pistols, axe and lathis could have been in the kotha together at the same time at the time of the occurrence. The evidence of P.W. 2 is that that the kotha is 19 or 20 cubits north-south, 4½ cubits east west and 10' in height. The evidence of P.W. 11 shows that the eastern kotha is 7½ in height. It is stated in the first information report Exh. Ka—1 that the culprits were moving in and out of the house of the deceased at the time of the occurrence. Therefore, it is quite not unlikely that all the 9 appellants were in the eastern kotha of the house at the same time and it is not improbable that these appellants were seen by P.W. 2 at different times during the occurrence which must have gone on for some length of time during which P.W. 2 has received as many as 19 injuries. The deceased and P.W. 8 also received injuries, and P.W. 7 who was near about the house of the deceased at the time of the occurrence has also received as many as 6 gun shot injuries. In these circumstances we are of the opinion that the submission of the learned counsel for the appellants that having regard to the size of the eastern kotha it is not probable that

A the appellants armed with various weapons could not have been present in that kotha is not acceptable.

B The learned counsel for the appellants next submitted that Dr. Mukherjee who was incharge of the Primary Health Centre, Ghatampur on 17-2-1968 and had examined P. Ws. 2, 7 and 8 on that day and issued the wound certificates Exh. Ka—18 to Ka—20, has not been examined and that only the compounder of that Primary Health Centre, P.W. 13 has been called to prove those certificates. The reason given by the prosecution for the non-examination of Dr. Mukherjee is that he was not available and could not be examined without difficulty. The explanation for the non-examination of Dr. Mukherjee is no doubt not quite satisfactory. The learned Public Prosecutor should have taken steps to procure the attendance of Dr. Mukherjee for giving evidence about the injuries noted by him as per Exh. Ka—18 to Ka—20 on the persons of P.Ws. 2, 7 and 8. But the fact that these three witnesses had sustained injuries during the occurrence in this case was not and could not be disputed. Those witnesses have stated in their evidence that they sustained injuries during the occurrence. Therefore, the non-examination of Dr. Mukherjee for proving the injuries noticed by him on the bodies of P.Ws. 2, 7 and 8 as per the wound certificates Exh. Ka—18 to Ka—20 is not fatal to the prosecution.

E The learned counsel for the appellants next submitted that no property out of the properties looted from the house of the deceased and P.W. 2 has been recovered from any of the appellants and that it is, therefore, not probable that any of these appellants was responsible for the occurrence in this case. But, as stated earlier, the fact that Mauji Lal was murdered and property from his house was looted on the night of 16/17-2-1968 and in that occurrence Mauji Lal's wife P.W. 2 and his brother-in-law P.W. 8 were injured in the house and P.W. 7 sustained 6 gun shot injuries when he was standing near the scene of occurrence had not been disputed before the learned Sessions Judge by the learned counsel for the defendants. The suggestion made on behalf of the accused was that an unknown armed gang of dacoits committed the crime and that the accused have been falsely implicated in this case on account of enmity. Having regard to the availability of other incriminating evidence against the appellants, it is not possible to agree with the learned counsel for the appellants that from the mere fact that none of the looted properties has been recovered from any of the appellants it could be held that the appellants are not the culprits in this case.

The learned counsel for the appellants next submitted that the lantern material Exh. III has not been put to or identified by P.W. 2 as the one which was burning in the eastern kotha at the time of the occurrence. Here again it is unfortunate that the learned Public Prosecutor has not got the lantern identified by P.W. 2. But Sub-Inspector of Police P.W. 11 who had seized that lantern has stated in his evidence that it was found hanging on a peg on the eastern wall of the eastern kotha of the house of the deceased and P.W. 2 and that it was in working condition. The presence of the lantern in the eastern kotha at the time of the occurrence as well as of moon light at the time of the occurrence has been mentioned in the first information report Exh. Ka—1 by P.W. 1 who is a brother of the deceased Mauji Lal and a resident of the same village and could be naturally expected to have gone into the house of the deceased soon after the culprits left the place. P.W. 2 has stated in her evidence that it was moon-lit night and the lantern was burning in the eastern kotha where it had been hung on a peg fixed at a height of 6' from the ground on the eastern wall and that when she heard the sound of some persons in the court-yard she got up immediately and raised the wick of the lantern which was until then giving dim light. She has stated in her cross-examination that the lantern used to be hung daily on the same peg, that there was no blackness on the wall near the peg and that she had scratched it off about 8 days prior to the date of her examination in the Court. It is significant to note that it has not been suggested to P.W. 2 that there was no lantern at all in the room in which she was sleeping with her children and that her husband Mauji Lal whose dead body was found by the Sub-Inspector P.W. 11 in that kotha had not come to that kotha at all. It is seen from the almanac that the night of 16/17.2.1968 was the third night after the full moon and that the moon arose at Delhi at 8.43 P.M. on that day. It has not been suggested to P.M. 2 or P.W. 7 or any other witness examined by the prosecution that the night was cloudy and visibility was poor for that or any other reason. It is not improbable that the lantern was burning in the eastern kotha where P.W. 2 and her children were sleeping during the night and that P.W. 2 had raised the wick of the lantern when she heard some commotion in the court-yard of her house before the culprits broke open the eastern door of her kotha and entered the same. Therefore, there must have been sufficient light in the eastern kotha for P.W. 2 to note the presence of the appellants who belong to the same village and were not strangers and for P.W. 8 also to note the presence of the culprits.

A There was sufficient moon light for P.W. 1 and P.W. 7 to see the culprits who are stated to have been moving in and out of the deceased and P.W. 2 during the occurrence. Therefore, it could not be stated that P.Ws 1, 2, 7 and 8 could not have been in a position to identify any of the culprits.

B The learned counsel for the appellants invited our attention to the fact that the learned Sessions Judge has disbelieved the evidence of P. Ws 1 and 7 and the learned Judges of the High Court have not relied on the evidence of P.W. 8 and submitted that P.W. 2 has modulated her evidence to fit in with the case of prosecution and that the evidence of P.W. 2 should not, therefore, be relied upon for basing the conviction of the appellants in this case. We were taken through the evidence of P.W. 2 by the learned counsel for the appellants, and we are of the opinion that the submission that P.W. 2 has modulated her evidence to fit in with the case of the prosecution is not well founded. P.W. 2 has stated thus in her evidence :—

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E “Raj Narain (A—4), Om Parkash (A—1), Mool Chand (A—6), Anup Singh (A—3), Ram Pal (A—7), Beni Singh (A—9), Raja Ram (A—8), Shiv Gopal (A—2) and Chandra Prakash (A—5) cut the northern door of my Kotha with small hatchets and immediately came in my kotha. I saw and indentified them in the light of lantern. I know them from before. All of them were armed with kanta and spears etc. Out of them Rampal (A—7), Beni Singh (A—9), Lajjar Ram (A—8), Shiv Gopal (A—2) and Chandra Prakash (A—5) assaulted me with lathis as a result of which I received several injuries. My husband Mauji Lal had come in my kotha before the entry of the accused persons. The aforesaid accused persons carried out brutal assault on Mauji Lal with lathis, small hatchets and kanta so much so that he expired. My brother Ram Shankar (P.W. 8) was sleeping in a verandah having the tin-shed. Some persons had reached there as well. They were assaulting him. His voice was audible at my kotha. The nine accused persons who entered my kotha had started looting my articles and they looted several ornaments and clothes belonging to me. After having stayed for about 15—20 minutes inside the house all the accused persons went away outside through the northern door of my kotha. During the mur-

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der and loot I did not hear any alarm from the maidan outside from the atari on the upper storey. Some accused person fired a gunshot also inside my kotha from a hole of the door before cutting the same. The pellet of that shot hit the wall but it did not hit me or my husband. Om Prakash (A—1) had a pistol in his hand.

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A sufficiently loud noise came out as a result of firing shots with a gun and a pistol
2 or 3 minutes after the accused persons went away, My Dewar (husband's brother) Baijnath (P.W.1) came in my kotha first of all and along with him Ramadhar, Ram-Kumar, Banwari and Parasuram (P.W. 7) also came".

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P.W.2 has denied the suggestion that unknown persons came to commit dacoity inside the house and that she has falsely implicated the appellants because she could not recognise the real culprits. We do not see any reason whatsoever for not accepting the evidence of P.W. 2 who undoubtedly was in the eastern kotha where the main part of the occurrence has taken place and must have had sufficient opportunity to identify, with the help of the lantern which was burning, the appellants who were previously known to her and not strangers and she has received as many as 19 injuries during the course of the occurrence which had gone on for about 15—20 minutes.

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The noise created during the occurrence had attracted the attention of the Sub-Inspector of police C.W.1 who belonged to some other police station and was in another village situate a couple of miles away from the one in which the scene of occurrence is situate. It is, therefore, not improbable that P.Ws. 1,7 and others had got up on hearing the noise and that P.W.1 had moved near-about the house of his brother Mauji Lal where the occurrence was taking place. P.W. 1 has named all the 18 accused in his evidence as well as in the first information report Exh. Ka—1 given by him at the police station at about 6.05 A.M on 17.2.1968. The suggestion made to P.W.1 in cross examination is that as soon as Parsuram (P.W.7) received injuries they became afraid and did not advance ahead and that he did not reach the spot and did not see the occurrence with his own eye. He had emphatically denied that suggestion. The learned Sessions Judge has rejected the evidence of P.W.1 mainly because he had not mentioned the name of

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A any of the accused to any of the villagers who entered the house of the deceased soon after the miscreants left the place and also because he has not sustained any injury and he would not have been left unharmed by the accused if he was anywhere near the scene of occurrence. Merely because P.W.1 had not sustained any injury during the occurrence and had not mentioned the name of any of the accused to other villagers who entered the house of the deceased soon after the culprits left the place it is not possible to reject the evidence of P.W.1 altogether.

C The learned Sessions Judge disbelieved the evidence of P.W.7 having regard to the fact that it is admitted by P.W.1 that P.W.7 belonged to the party of the deceased and that it was "doubtful" whether P.W.7 could have had a sufficient "glimpse" of the miscreants so as to be in a position to identify them. The learned Sessions Judge has further observed that as soon as P.W.7 received the six gun shot injuries in front of Narbada's house he would have either fallen down there or returned to his house. There was sufficient moon light at the time of the occurrence and it is not improbable that P.W.7 who had undoubtedly come near the scene of occurrence would have seen any of the culprits and could not identify them. Therefore, it is not possible to agree with the learned Sessions Judge that no reliance could be placed on the evidence of P.Ws. 1 and 7. The learned judges of the High Court have observed in their judgement that P.W. 8 who was undoubtedly present in the house in the tin-shed at the time of the occurrence could have seen some of the offenders and that his evidence could not be relied upon because he has intentionally made improvements in his version about the occurrence. They have also observed that P.W.8 would have helped his sister P.W.2 better if he had run into the abadi and informed other villagers. We are of the opinion that the reasons given by the learned Judges of the High Court for rejecting the evidence of P.W.8 altogether are not convincing. We are further of the opinion that there is no reason whatsoever for rejecting the evidence of P.W.s. 1, 7 and 8 of whom P.Ws.7 and 8 are injured witnesses to the extent that their evidence is corroborated by the evidence of P.W. 2 who has been believed by not only the learned Sessions Judge but also by the learned Judges of the High Court. The evidence of P.Ws. 1, 7 and 8 in so far as it goes to prove the presence of the appellants lends assurance to the evidence of P.W. 2 that the appellants entered the house and assaulted her husband, fatally and that some of them caused injuries to her and committed dacoity by looting properties worth about Rs 2,700/- from her house.

Thus on consideration of the evidence of P.W.2 and of P.Ws.1, 7 and 8 to the extent that it is corroborated by evidence of P.W.2 and the other circumstances of the case, namely that the door of the eastern kotha of the house of the deceased was found broken open, that the dead body of Mauji Lal was found lying in the eastern kotha of the house and that the boxes had been found broken open and the locks were found lying nearby in the verandah of the house, we are of the opinion that prosecution has proved the case against the appellants satisfactorily and beyond all reasonable doubt and that the conviction of the appellants for the offence under section 396 I.P.C. and the sentence awarded to them by the learned Sessions Judge and confirmed by the learned Judges of the High Court are correct. We accordingly confirm the conviction and sentence and dismiss the appeals.

P.B.R.

Appeals dismissed.