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## Dayanand and Others Vs State of Rajasthan

### Criminal Appeal No. 4 of 1980

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**Court:** Rajasthan High Court (Jaipur Bench)

**Date of Decision:** Jan. 9, 1985

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) & Section 313#Penal Code, 1860 (IPC) & Section 147, 148, 149, 302, 307

**Citation:** (1985) WLN 81

**Hon'ble Judges:** S.N. Bhargava, J; N.M. Kasliwal, J

**Bench:** Division Bench

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### Judgement

N.M. Kasliwal, J.

This appeal by seven accused persons is directed against the judgment of learned Sessions Judge, Jhunjhunu, dated

November 30, 1979 convicting and sentencing them as under:

(a) All the seven u/s 302/149 IPC, to imprisonment for life and a fine of Rs. 100/- each, and in default of payment of fine to further suffer two

month's rigorous imprisonment;

(b) All the seven u/s 325/149, IPC to two year's rigorous imprisonment and a fine of Rs. 100/- each and in default of payment of fine to two

months' imprisonment

(c) All the accused u/s 324 read with Section 149 IPC to three months imprisonment and a fine of Rs. 50/- each and in default of payment of, fine

to further suffer one month's imprisonment;

(d) all the accused u/s 323/149, IPC to one month's imprisonment and a fine of Rs. 50/- and in default of payment of fine to further suffer one

month's imprisonment;

(e) all the accused u/s 447 IPC to one month's imprisonment (R.I.);

(f) accused Hari Ram, Subhash, Satya Narain and Dayanand u/s 148 IPC to one year's rigorous imprisonment

(g) accused Ram Karan, Mala Ram and Champa Lal u/s 147 IPC to six month's rigorous imprisonment.

2. All the substantive sentences have been ordered to run concurrently.

3. Brief facts of the prosecution case are that Chimna Ram PW 1 resident of Village Mishrapura lodged an FIR Ex.P 2 on August 8, 1979, at

10.45 p.m. at Police Station, Jhunjhunu with the allegations that a dispute was going on between him and the family members of Anada Ram in

respect of some land under a well. Cases were pending in courts between the parties. The members of Anada Ram wanted to grab the land under

the well of Rameshwar deceased and on that account there was enmity between the two families. On August 8, 1979, at about 6 p.m. when the

informant (Chimna Ram) was sorting out grass from his crops then younger brother Rameshwar's son Sampat came to him and informed that his

father Rameshwar was belling insects in his crops in the field, then suddenly accused persons Hari Ram, Satya Narain, Dayanand Subhash and

three unknown persons attacked on him by "Barchhis" and "Lathis". When his (Sampat) mother went for rescuing Rameshwar, she was also

attacked. Thereafter, his mother and himself raised alarm on which Sukhram and Mst. Prabhati came on the spot but the seven accused persons

ran to attack on them also. After hearing the above information, the informant Chimna Ram went in the field and found Sukhram and Prabhati lying

injured in a field having crop of "Bajra". When he went a little further then he found Rameshwar lying dead. Mst. Shanti w/o Rameshwar was

sitting near the dead body of Rameshwar and was seeing and Banwari Lal s/o Deva Ram, Sardar s/o Narain and Rameshwar s/o Gopal were also

standing there, who had seen the occurrence. In the report it was also mentioned that all the 7 accused persons had come with a common object

and inflicted injuries on the brothers of the informant namely Rameshwar and Sukha and his niece Mst. Prabhati. It was also mentioned in the

report that the three unknown persons can be identified by Mst. Shanti, Sampat and Sukha Ram, if those persons are shown to them.

4. A case was registered u/s 302 and various other offences of the Penal Code and Liladhar PW 13 Station House Officer, Police Station,

Jhunjhunu started investigation. On the same night at about 12.30 Liladhar reached on the spot along with police force and sent Sukha Ram and

Smt. Prabhati in a jeep for immediate treatment in the hospital at Jhunjhunu. Some police personnel were left to take care of the dead body of

Rameshwar. On the next day in the morning the inquest memo of the dead body and other documents were prepared. Dr. Girdhar Bhomia (PW 9)

Medical Jurist went on the spot and examined the dead body of Rameshwar. Thereafter he conducted the autopsy of dead body of Rameshwar at

10.40 a.m. and found 16 injuries on the body of Rameshwar. All these injuries were found to be ante-mortem in nature. Out of the aforesaid 16

injuries Nos. 1,2,6, 7,9 and 11 were caused by a sharp a weapon while the other were caused by a blunt weapon. In the opinion of the doctor the

cause of death was the fracture of the bones and shock and haemorrhage. Dr. Girdhar Bhomia also examined the injuries of Sukhram PW 10 and

found 14 injuries on his body. Injuries Nos. 1, 3 and 12 were of simple in nature and caused by sharp edged weapon and the rest were caused by

blunt weapon. After x-ray examination of injury No. 2 fracture in the bone was found as such the same was described as grievous. Sukhram was

examined at 2.15 a.m. in the night of August 8, 1979. Sukhram was admitted in the hospital and remained there till August 29, 1979. Mst. Prabhati

was also examined and four injuries were found on her body. All the injuries were simple in nature and caused by blunt weapon. Smt. Shanti w/o

deceased Rameshwar was examined on August 11, 1979 at 12.30 in the day and a requisition from the police station Jhunjhunu, and 5 injuries

were found on her body. All these injuries were found to be simple in nature. The accused persons Hari Ram and Subash were arrested on August

10, 1979 and Ram Narayan and Champa Lal were arrested on August 13, 1979. Thereafter, accused Satya Narain and Dayanand were arrested

on August 17, 1979 and accused Mala Ram was arrested on August 18, 1979. The accused persons Ram Karan. Champa Lal and Mala were

got identified by witnesses Sardara Ram PW 5, Banwari Lal PW 2, Sukhram PW 10, Sampat PW 6 and PW 3 Smt. Shanti in the identification

parades held in the presence of Girraj Prasad PW 12 Munsif and Judicial Magistrate, Jhunjhunu. All the aforesaid witnesses correctly identified the

above mentioned accused persons Ram Karan Champa Lal and Mala Ram. Accused Champa Lal made a confessional statement vide Ex. P 37

on August 31, 1979 before the learned Munsif Judicial Magistrate, Jhunjhunu. The learned Munsif and Judicial Magistrate, Jhunjhunu committed the

case for trial to the court of sessions by order dated September 11, 1979. The learned Sessions Judge framed charges u/s 148, 302 read with 149

307 read with 149, 323, 324 read with 149 and 447 IPC against accused persons Hari Ram, Subash, Satya Narain and Dayanand. Charges u/s

147, 302 read with 149, 307 and 149, 323, 324 read with 149 and 447 IPC were framed against accused persons Mala Ram, Ram Karan and

Champa Lal. The accused persons denied the charges and claimed to be tried.

5. The prosecution in support of its case examined 13 witnesses. So far as the accused persons Hari Ram, Subash, Satya Narain and Dayanand

are concerned they stated in their statements u/s 313 Cr. PC that the case has been falsely lodged against them on account of enmity. Accused

persons Mala Ram, Ram Karan and Champa Lal stated that they had been falsely implicated and that they had been shown to the witnesses in the

police station in the court and in jail before holding the identification parade. Accused Champa Lal also stated that his confession was recorded by

giving threats and an incentive that he would be released. The accused persons did not examine any evidence in their defence.

6. Learned Sessions Judge placed reliance on the statement of Dr. Girdhar Bhomia PW 9 for holding that death of Rameshwar was homicidal.

Even the defence counsel did not raise any dispute on the above finding neither before the learned Sessions Judge nor before us.

7. Learned Sessions Judge placed strong reliance on the statements of Banwari PW 2 and Sardara PW 5 as independent witnesses of the

occurrence. Learned Sessions Judge also observed that even if the statement of Rameshwar PW 11 as an eyewitness of the occurrence maybe

considered doubtful still the evidence of Banwari and Sardara was unimpeachable and proved the prosecution case in toto. Learned Sessions

Judge also placed reliance on the identification parade held before Girraj Prasad PW 12 and thus convicted and sentenced all the accused

persons, in the manner indicated above.

8. Mr. Biri Singh, learned counsel for the accused-appellants, submitted that the names of accused-appellants Mala Ram, Champa Lal and Ram

Karan did not find mention in the FIR Ex. P 2. No identification marks like complexion, height, clothes, physical structure etc, were mentioned in

the FIR. The aforesaid accused persons have been falsely implicated and their conviction cannot be maintained merely on the basis of identification

parade. It was submitted that according to the prosecution case Vidhyadhar PW 8 was taken to a long distance of 40 Kms. alongwith the above

mentioned accused-appellants without any rhyme or reason. Vidhyadhar is a highly interested witness and he had accompanied the accused-

appellants in the same jeep from the place of arrest to the police station. In these circumstances, there was every possibility that Vidhyadhar would

have told and explained the general features and marks of the above mentioned accused persons to the witnesses before the identification parade.

It was further submitted that no specific part is assigned to anyone of the above mentioned accused persons in the alleged crime and the

prosecution has failed to prove any motive or ill-will on the part of these accused persons against the deceased or his family members. It was also

submitted that these accused persons had taken a specific objection in identification memo Exs. P 4 and P 5 that they were shown to the witnesses

before their identification. The prosecution has failed to produce such witnesses, who could have proved that these accused persons were kept as

"Bapardha" during their custody.

9. It was also submitted by the learned counsel for defence that enmity between the parties is an admitted fact even by the prosecution and this

being a double edged sword the prosecution witnesses have implicated the whole family of Anada Ram. Hari Ram accused is the only son of

Anada Ram and Daya Nand, Satya Narain and Subash are sons of Hari Ram. Daya Nand was a boy of 13 years of age only at the time of

incident and it was highly impossible for such a child to have taken any part in the crime. No specific allegation has been alleged against accused

Daya Nand and Satya Narain. Satya Narain was also a boy of 19 years of age at the time of the incident and both Dayanand and Satya Narain

have been falsely implicated for ulterior motives. So far as Daya Nand is concerned he could have been only tried under the Children Act and his

conviction by the Sessions Court is patently illegal and perverse.

10. It was further argued by Mr. Biri Singh that though prosecution witnesses have assigned specific part in the crime to accused persons Hari

Ram and Subash but no part has been assigned specifically to Dayanand and Satya Narain. It was also submitted that though these accused

persons were alleged to have been armed with "Barchhis" but no injuries by a sharp edged weapon have been found in the injury reports of Mst.

Shanti, Mst. Prabhati, and Sukhram. It was also submitted the though Mst. Shanti PW 2 came out with a specific case that she fell down on her

husband but the said version is falsified from the fact that neither any blood stained clothes have been seized from her body nor she was got

medically examined on 8th or 9th August, 1979 as was done in the case of other injured prosecution witnesses. Mst. Shanti was clinically

examined on August 11, 1979 and there is no reasonable explanation for such delay.

11. As regards formation of unlawful assembly it was submitted by the learned counsel for accused-appellants that accused Champa Lal and Ram

Karan belonged to village Sultanpur which is 20 Kms. away from the place of incident and accused Mala Ram belonged to village Jiksaua which is

40 Kms. away from the place of incident which took place in village Mishrapura. There is no evidence from the side of the prosecution that these

three accused persons entered into any conspiracy prior to the incident or had any prior meeting of mind in order to become members of an

unlawful assembly. Certain discrepancies were also pointed out in the statements of the eye witnesses of the prosecution to show that their

presence on the incident was highly doubtful.

12. Learned Public Prosecutor, on the other hand, has supported the judgment of the learned Sessions Judge that all the arguments now raised

before this Hon"ble Court by the defence counsel have been dealt with in detail by the learned Sessions Judge and the prosecution has proved its

case by unimpeachable evidence.

13. We have given our thoughtful consideration to the arguments advanced by learned counsel for both the parties and have thoroughly perused

the record. It is proved beyond any manner of doubt by the evidence of Dr. Girdhar Bhomia PW 9 that there were 16 injuries on the body of

deceased Rameshwar. Injuries Nos. 1, 2, 6, 7, 9 and 11 could be caused by a weapon like "Barchhi". After looking to "Barchhi" article 1, 2 and

3 Dr. Girdhar Bhomia clearly stated that the injuries afore-mentioned could be caused by such weapons. There was fracture of parietal and

temporal bones of the skull. There was also fracture of 5th, 6th, 7th and 8th ribs of the chest. There was also fracture of bones of hand and legs.

There can also be no manner of doubt that the death of Rameshwar was on account of the above mentioned injuries, which were inflicted in a

brutal and merciless manner. The incident had taken place at about 6 p.m. on August 8, 1989 and a report of the incident was lodged at about

10.45 p.m. on August 8, 1979, at Police Station. Jhunjhunu and the place of incident in village Mishrapura was at a distance of 10 miles from the

Police Station. Thus, the report of the incident was lodged without any loss of time. The report was lodged by Chimna Ram PW 2, who was the

brother of the deceased and he was informed about the incident by Sampat s/o Rameshwar deceased and thereafter Chimna Ram had gone on the

spot and had found Sukhram and Mst. Prabhati in injured condition and Rameshwar lying dead. So far as the accused persons Hari Ram,

Subhash, Satya Narain and Daya Nand are concerned, their names had been clearly mentioned in the FIR and presence of three other persons

who were not known was also mentioned. Even if the injuries of Mst. Shanti maybe ignored because she was examined on August 11, 1979, the

injuries an Sukhram, Mst. Prabhati at the time of occurrence is fully proved from the evidence of Dr. Girdhar Bhomia, who had examined their

injuries in the night of August 8, 1979, itself. These two injured persons were immediately sent from the spot in a jeep by the Station House Officer

Liladhar PW 13, as such the presence of Sukhram and Mst. Prabhati on the spot goes proved, In the clinical examination of injuries of Sukhram,

14 injuries were found on his body out of which injury No. 2 was found to be of grievous nature and others were of simple nature. Injuries Nos. 1,

3 and 12 were found to be caused by sharp edged weapon while others by blunt weapon, 4 injuries were found on the body of Mst. Prabhati and

this clearly goes to prove that such injuries were received by these persons at the time of the occurrence. Sukhram has appeared as PW 10 and

Mst. Prabhati as PW 4. Sukhram has deposed that litigations were going on between his family and that of Anada Ram for some land under a well.

On the day of Raksha-Bandhan at about 5.30 p.m. they were inside their field. He alongwith his daughter Mst. Prabhati were inside their field and

were killing insects in their crops (KATRA MAR RAHE THE). They heard a cry from the field of Rameshwar. He alongwith his daughter Prabhati

ran towards the field of Rameshwar, and they found 7 persons infront of them. Hari Ram, Subhash, Satya Narain and Daya Nand and three others

i.e. all the 7 accused persons present in the court met them. Hari Ram, Subhash, Satya Narain and Daya Nand had "Barchhis" in their hands while

the other three were armed with "Lathis". Hari Ram inflicted a blow by a "Barchhi" on his right leg and the others inflicted injuries on his head.

Then he fell down and the accused persons went on beating him even after he had fallen down. Then he and Prabhati raised an alarm. Prabhati was

also injured by the accused persons. Subhash had inflicted a blow on her head by a "Barchhi" and the others also gave beating to her. Thereafter,

both Sukhram and Mst. Prabhati remained lying in the crop of "Bajra" in injured condition and all the 7 accused persons ran away. Sukhram

further stated that he was told by the Sub-Inspector that he had to identify the accused persons, then he stated that he had identified the accused

persons in the hospital then said that he had done so in the jail. He further stated that he had identified before the Superintendent of Police and he

did not know any Magistrate. The Court had put a note that the witness was an innocent villager and uneducated, Sukhram further stated that 12-

13 persons were mixed with the accused persons for identification and he had put his thumb impression on the writing made at that time. The

identification proceedings were Ex.P 36. In cross-examination he stated that after the injuries were inflicted, he and Mst. Prabhati were brought to

the hospital and at that time Sardara and others had not accompanied them. They were got admitted in the hospital at Jhunjhunu in the mid-night.

As soon as they were brought to the hospital the doctor had examined their injuries. The Sub-Inspector had recorded his statement on the spot. In

the statement Ex. 5 recorded by the Sub-Inspector he has not stated that Hari Ram had inflicted a blow by a "Barchhi" on his leg but he had made

such statement to the Sub-Inspector but he did not know as to why the same was not recorded. In Ex.P 5 he had also not stated that Subhash had

inflicted a blow by "Barchhi" on the head of Mst. Prabhati. It was denied that he along with Rameshwar were in the village when this incident had

taken place. The suggestion was also denied that all the 7 accused persons were not present on the spot. Similar kind of statement has been given

by Mst. Prabhati PW 4.

14. The most important evidence in the present case is the evidence of PW 2 Banwari and PW 5 Sardara. Both these witnesses are independent

witnesses and in spite of lengthy cross-examination defence has failed to point out any infirmity in their statement. Banwari PW 2 is a resident of

Mishrapura and was digging grass in the field of Sukhram. He stated that about 3 months ago at 6 p.m. when he was digging grass in the field of

Sukhram then he suddenly heard a loud voice from the neighbouring field of Rameshwar. When he stood up then he saw that Subhash, Hari Ram,

Dayanand and Satya Narain and three other persons who were present in the court were inflicting blows on Rameshwar by "Barchhi" and

"Lathis". The witness identified these three accused persons by putting hand on them. Hari Ram, Subhash, Satya Narain, and Dayanand had

"Barchhis" with them and the others had "lathis" with them. When these persons were attacking on Rameshwar his wife Mst. Shanti came to his

rescue, then the accused persons also beat her. At that time Sardara was also coming towards the spot from southern side. Sampat s/o

Rameshwar was also present on the spot. The witness Banwari then stated that he asked the accused persons as to why they were beating them,

all these persons went towards the field where Bajra was standing. Banwari further stated that when he along with Sadara wanted to give some

water to Rameshwar then they found that he had already died. After 5 minutes thereafter another Rameshwar had come on the spot. Banwari

further stated that thereafter he heard cries from the field of Bajra. He went towards that side and found Sukha and Mst. Prabhati in injured

condition. At the time Sardara and another Rameshwar were also with him. Mst. Prabhati was lying unconscious but Sukh was speaking.

Thereafter, they returned back where dead body of Rameshwar was lying. After sometime Chimna Ram also came on the spot and asked as to

who had killed Rameshwar. Then the entire story was narrated to Chimna Ram. Sampat had called Chimna Ram on the spot. He had written

report Ex. P 1 on the spot and is scribed by him. Banwari thereafter stated that three unknown persons, whom he had seen at the spot, were not

known to him but he had identified them in the identification parade. He proved his signatures at A to B in identification memos Exs. P 4 and P 5.

The same story is told by PW 5 Sardara Ram. Learned Sessions Judge has also placed reliance on the statements of these two independent

witnesses. We see no reason to take a different view.

15. From the evidence mentioned above, the presence of the accused persons at the time of occurrence is held proved beyond any manner of

doubt. Rameshwar has been killed mercilessly and Sukhram and Mst. Prabhati also received injuries in the incident. The question, however,

remains as to what offence has been committed by the accused persons and under what offence they can be convicted. So far as accused persons

Mala Ram Champa Lal and Ram Karan are concerned they were not resident of village Mishrapura and had no direct or indirect motive for

committing the murder of Rameshwar. According to the prosecution case the enmity was between the family members of Anada Ram and the

complainant party including the deceased. The above mentioned three accused persons were armed with Lathis only as stated by all the

prosecution witnesses. The object of unlawful assembly in these circumstances cannot be considered for committing the murder of Rameshwar and

at the most the object could be for causing grievous hurt to Rameshwar and two other members of his family. For Hari Ram, Subash and Satya

Narain the prosecution witnesses have stated that Han Ram was the son of Anada Ram and the other two were sons of Hari Ram and as such

these persons must have formed a common intention to kill Rameshwar, but so as accused persons Mala Ram, Champa Lal and Ram Karan it

cannot be said that they had formed only common intention along with the other accused persons to kill Rameshwar. In these circumstances, the

conviction of Mala Ram, Champa Lal and Ram Karan cannot be maintained for Section 302 read with Section 149 or 34 IPC. However, in the

facts and circumstances of the case they can be convicted for offences under Sections 325, 324 and 323 read with Section 149 IPC and also for

Sections 147 and 447 IPC. Now so far as accused Dayanand is concerned, he was said to be a child of 13 years at the time of the incident and

the learned Public Prosecutor has not disputed his age. In our view, even if the presence of Dayanand is admitted as is stated by the prosecution

witnesses at the time of the incident, no direct and positive act has been assigned to him and we are not prepared to believe that a child of 13 years

of age could have formed any common intention or become a member of unlawful assembly alongwith other accused persons. It might be possible

that he would have gone on the spot along with other members of his family but it is not possible to hold him guilty for any crime as a member of

unlawful assembly or for having formed a common intention to commit murder of Rameshwar or to cause other injuries to the members of the

complainant party. There is no direct evidence to hold as to which injury was inflicted by him and on which of the injured persons, as such

Dayanand is entitled to the benefit of doubt. So far as the accused appellants Hari Ram, Subash and Satya Narain are concerned they were adult

members and had a clear motive and intention to kill Rameshwar and gave merciless beating to Rameshwar which resulted into his death. They

also inflicted injuries on Sukhram and Mst. Prabhati. So far as Hari Ram accused is concerned there is also evidence from the prosecution side that

he had exhorted other accused persons for killing Rameshwar. Thus, taking in view the entire facts and circumstances of the case and the manner

in which the crime has been committed and number of injuries found on the body of Rameshwar, which resulted in the fracture of his parietal and

temporal bones and also on hand and legs, we are clearly of the view that these three accused persons, namely, Hari Ram, Satya Narain, and

Subash though can not be convicted with the aid of Section 149 IPC but we hold them guilty u/s 302 read with Section 34 IPC.

16. In the result this appeal is allowed in part. Accused-appellant Dayanand is acquitted of all the charges and as he is already on bail he need not

surrender to the bail bonds. The convictions and sentences of accused Mala Ram, Champa Lal and Ram Karan u/s 302 read with 149 IPC are set

aside. Their convictions and sentences under Sections 325, 324 and 323 read with Section 149 and also u/s 147 and 447 IPC as given by the trial

court are maintained. All the substantive sentences shall run concurrently. As the accused-appellants Mala Ram, Champa Lal and Ram Karan has

already served out the sentences awarded to them as such they shall be released forthwith if not required in any other case. The accused-appellants

Hari Ram, Subash and Satya Narain are acquitted of their convictions and sentences u/s 302 read with Section 149 IPC and they are convicted

u/s 302 read with Section 34 IPC and each one of them is sentenced to imprisonment for life. Their convictions and sentences under other

Sections as given by the learned Sessions Judge are maintained Satya Narain accused-appellant is on bail he would now surrender to serve out the

sentence awarded to him. The Sessions Judge, Jhunjhunu is directed to take suitable steps in this regard.