Bhagwan Din and Others Vs State

Court: Allahabad High Court

Date of Decision: Aug. 3, 1966

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 121, 514
Penal Code, 1860 (IPC) â€" Section 149, 307, 324, 34

Citation: AIR 1967 All 580 : (1967) CriLJ 1588

Hon'ble Judges: Yashodanandan, J; S.D. Khare, J

Bench: Division Bench

Advocate: P.C. Chaturvedi, for the Appellant; A.G.A., for the Respondent

Final Decision: Partly Allowed

Judgement

S.D. Khare, J.
This is an appeal by Bhagwan Din and nine others, all of whom have been convicted for the offence of rioting and making

attempts to commit the murders of Murlidhar and Phakkar (P. Ws. 1 and 2) by causing gunshot injuries to them. It first came up for hearing before

a learned single Judge of this Court, who referred it to a larger Bench, Connected with it is Criminal Revision No. 1780 of 1966 filed by four of the

appellants and their sureties.

2. The occurrence is of 26th February, 1963. and it took place in the village of Bisra within police circle Bisra, district Banda. Phakkar (P W 2)

had, at about 6 a.m. gone towards Banha Talab to ease himself and Murlidhar (P. W. 1) had also gone that very side to bring green fodder for his

cattle. After Phakkar had eased himself and had proceeded in the company of Murlidhar towards Sarju Dube''s field the ten appellants, out of

whom Ram Kumar was armed with a pistol, Shivball and Ham Kishun were armed with guns and the remaining seven appellants with lathis, rushed

out from their hiding place. Phakkar tried to run away from there. Bhagwan Din (appellant) exhorted others by saying ""maro"" which could either

mean ""cause injuries"" or ""kill"". The accused persons, who were holding lathis, did not go near Phakkar and Murlidhar who were at a distance of

only about 18 or 19 paces from them. However, all the three accused persons, who had firearms with them, fired their weapons. Shivbali and Bam

Kishun caused injuries to Phakkar, while Ram Kumar, who was armed with a pistol, was responsible for the injuries which Murlidhar suffered.

Both the injured raised an alarm which attracted the attention of other villagers who had gone that side to ease themselves and upon their arrival all

the assailants made good their escape.

3. The first information report of the occurrence was lodged by Murlidhar (injured) on the same day at 7 a.m. at police station Bisra which is at a

distance of four furlongs from the place of occurrence. The motive for the crime, the occurrence as it had taken place and the names of the

witnesses were mentioned in it. Both the injured were sent for their medical examination. They were examined by Dr. M. P. Lal (P. W. 11) on the

same day at 3 p.m. and the doctor found the following injuries on the two injured persons as a result of his examination:

PHAKKAR

1. Several pellet injuries of the size 1/5"" x 1/5"" skin deep on the back side of the left thigh in an area of 8"" x 5"".

2. Several pellet injuries of the size 1/6"" x 1/5"" skin deep on the back of the right thigh in an area of 9"" x 4 1/2

MURLIDHAR

1. Several pellet injuries of the size 1/6"" x 1/6"" skin deep on the back of the right thigh in an area of 12"" x 6"".

2. Several pellet injuries of the size 1/6"" x 1/6"" skin deep on the back of the left thigh in an area of 5"" x 3

4. In the opinion of the doctor all the injuries were simple and appeared to be about nine hours old at the time of the examination. They could have

been caused with a firearm such as a pistol or gun. The doctor was further of the opinion that the firearm must have been fired from a distance of

about 12 feet or more Since there was some difference in the dimensions of the injuries caused to each of the injured persons the doctor was of the

opinion that all the four injuries, two to each of the injured persons, could not be the result of one shot from a firearm. The doctor could not be

definite whether the injuries received by Phakkar on the back of his two thighs were by a shot from one firearm or by two shots from two firearms

The doctor was able to extract two pellets from the back, of the left thigh of Phakkar and also two pellets from the injuries of Murlidhar The

doctor was also of the opinion that both the injuries of Murlidhar could have been caused with one shot from one firearm and similarly both the

injuries of Phakkar could also be caused by one shot from one firearm.

5. The prosecution relied on the testimony of five eye-witnesses of the occurrence. They are Murlidhar injured (P. W. 1), Phakkar injured (P. W.

2), Kuber Singh (P. W. 3), Ram Jal (P. W. 4) and Ram Kishun (P. W. 6). They fully supported the prosecution case. Murlidhar also stated about

the motive for the crime and said that Ram Autar and Chunbad were beaten in 1962 and on that account a criminal case was started against

fourteen persons, including Murlidhar and Phakkar. In that case Narbada Puswa, Ram Kumar. Ram Autar and Chunbad (appellants) were

prosecution witnesses. The case, however, ended in acquittal. He further stated that four days after that occurrence about which a criminal case

had been started the accused Ram Autar and Chunbad and one Dhanpat, the servant of P. W. Sanglu were beaten on 30th May, 1962, and a

criminal case was started against Dhanpat, Ram Kishun (appellant). Ram Kumar (appellant), Narbada (appellant) and others. A case u/s 107/117

Cr. P. C. was also started against both the parties. Murlidhar and Phakkar and four persons of his party were bound down from one side and

Kurwa, Narbada, Ram Kishun, Ram Kumar appellants and 12 other persons of the other party were bound down He further stated that sometime

in the year 1962 eleven persons including Ram Kumar. Bhagwandin, Puswa, Narbada and Prasad were beaten and a criminal case was started

against Murli, Phakkar and 17 others.

6. What was stated by Murlidhar and has been mentioned above will clearly show that there was good amount of ill-feeling between Phakkar and

Murlidhar on the one side and Bhagwandin and members of his party on the other side.

7. All the accused persons pleaded not guilty. Out of the 10 accused persons, six, namely, Bhagwandin, Ram Autar, Ram Kishun, Ram Kumar,

Chunbad and Shivbali belong to one and the same family. Chunbad and Shivbali are the sons of Bhagwandin, while the remaining three accused

persons whose names have been mentioned above are his brothers. Two more accused persons, namely, Puswa and Prasad, are their relations

while the remaining two, namely. Narbada and Bishambhar are alleged to be of their party. Their defence was that they had been falsely implicated

due to enmity. They, however, did not dispute the facts which according to the prosecution case constituted the motive for committing the offence.

Two witnesses were examined in defence. The purpose of the examination of Bhura Singh (D. W. 1) was to prove certain enmities between

Bhagwandin on the one hand and Kuber Singh and Shyam Lal (P. Ws.) on the other. According to Bhura Singh one Ram Gharib, who resided at

the house of Kuber Singh (P. W.), had been convicted for causing injuries to Ram Kumar (appellant). As regards Shyam Lal (P. W 4) the

statement of Bhura Singh (D. W. 1) was that Narbada (appellant) along with one Tatti had abducted his sister-in-law. It was also said that he

belonged to the party of the complainants. One more witness, namely. Dr. S.P. Jain (D. W. 2) was examined to prove that Bhagwandin was

suffering from tuberculosis when he examined him on 23-4-1963. The occurrence is of 26-2-1963,

8. The learned Sessions Judge, after having considered the entire evidence on the record, arrived at the conclusion that the prosecution witnesses

were reliable and Bhagwandin could also be present at the time of the occurrence to exhort other accused persons. He, therefore, convicted the

three accused persons who were armed with firearms under Sections 148 I. P. C. and 307 I. P. C. He sentenced them to two years'' rigorous

imprisonment for the offence of rioting and to five years'' rigorous imprisonment for attempting to commit murder, an offence punishable u/s 307 I.

P. C. The remaining appellants were convicted u/s 147 I. P. C. and each sentenced to one year''s rigorous imprisonment and also u/s 307/ 149 I.

P. C., the sentence awarded to each under that provision of law being three years.'' rigorous imprisonment All the sentences were ordered to run

concurrently.

9. The learned Single Judge before whom this appeal was first listed for disposal noticed that there was some conflict of opinion in two decisions of

this Court given by learned Single Judges on the point of presumption to be drawn from the use of firearms when the injury caused was not

dangerous to life. We would discuss the case-law after having examined the relevant provisions of the Indian Penal Code.

10. Section 307 I. P. C. provides:

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of

murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if

hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore

mentioned.

When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death

Illustrations.

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued. A would be guilty of murder. A is liable to punishment

under this section.

(b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this

section though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it, A has not vet committed the offence. A fires the gun at Z. He has committed the offence

defined in this section, and, if by such firing he wounds Z, he is liable to punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A''s keeping. A has not yet committed

the offence in this section. A places the food on Z''s table or delivers it to Z''s servants to place it on Z''s table. A has committed the offence

defined in this section"".

11. It is clear from a perusal of illustration (c) that an offence u/s 307 I. P. C., can be made out only when (1) the accused fires the gun at the

complainant, and (ii) be has done so with the intention of murdering the complainant. It follows that in case any one of these ingredients is lacking

the offence u/s 307 I. P. C. would not be made out.

12. The same inference can be drawn from a perusal of Section 324 I. P. C. which reads as follows:

Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing, or cutting, or

any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any

explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or

by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with

both"".

A person who causes hurt by means of any instrument for shooting can be punished only u/s 324 I. P. C. provided the case is covered by all the

ingredients of that offence as defined in the section and no other major offence is made out from the facts and circumstances of the case.

13. It is, therefore, clear that the mere fact that a gun has beep used by an accused person for causing injuries to the complainant will not

necessarily bring the case u/s 307 of the Indian Penal Code. There can be no presumption that the accused intended to cause the death of the

complainant merely because he used a firearm to cause him hurt.

14. The intention of the accused person has to be established from either the nature of his act actually committed by him or from other surrounding

circumstances. Where injury has actually been caused to the victim the prosecution, while attempting to establish that the real intention of the

accused was to cause an injury of the nature which was sufficient in the ordinary course of nature to cause death or was so imminently dangerous

that it could cause death, had further to establish the intention or knowledge of the accused as contemplated in Section 307 I. P. C. That in effect

was the view taken by one of us in the case of Hakim Singh v. State. 1965 All LJ 282 when it was held that mere use of a country made pistol to

shoot al a non-vital part of the body from a close range will not make out an offence u/s 307 I. P. C. In the ease of Badshah Singh and Others Vs.

The State, a learned single Judge of this Court reiterated the law on the subject as follows:

For liability u/s 307 the prosecution has to prove the following facts; (1) that the accused did an act and (2) that the act was done with such

intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder"".

The learned Judge further observed that

If hurt is caused by such act. the offender becomes liable to transportation for life, otherwise the maximum term of imprisonment prescribed is 10

years It would thus appear that the section itself does not take into consideration the effect of the act of the accused as a measure of sentence to be

imposed upon him

15. We respectfully agree with the observations mentioned above It is well established that if the intention or necessary knowledge to cause death

was there, it is immaterial whether or not any hurt has been caused to the victim, and the accused can be held liable for an offence u/s 307 I. P. C.

even though no hurt was caused.

16. While applying the law to the farts to that case, the learned single Judge observed that inasmuch as the injury had been caused on the buttocks

from a close range but the firing resulted only in superficial injuries due to defective ammunition the burden to prove that the accused persons knew

that the ammunition was defective lay on the accused persons themselves. For that proposition he relied on Section 106 of the Indian Evidence

Act.

17. The case of Badshah Singh and Others Vs. The State, is, therefore, clearly distinguishable from the facts of the present case. The gun had been

fired from a close range causing superficial injuries to the buttocks because the ammunition used proved to be defective. Had the ammunition been

of the normal standard pellets were bound to penetrate further, enter the abdomen and cause serious injuries to peritoneum and intestines. It was,

therefore, possible to draw an inference in that case that the intention of the accused persons unless evidence was given on behalf of the accused

persons to show that that was not the intention was to cause the death of the victim. In Hakim Singh''s case 1965 All LJ 282 the injuries had been

caused from a close range only on non-vital parts of the body and, therefore, no presumption as could be drawn in Badshah Singh and Others Vs.

The State, was possible.

18. We are, therefore, of the opinion that there is no apparent conflict in the two decisions mentioned above. Each case has been decided on its

own facts and circumstances. The facts and circumstances of the two cases mentioned above were different. The same inference could not be

drawn when the only common factor was the use of firearm.

19. The nature of burden of proof that lies on the prosecution was considered in the case of Sarju Prasad Vs. State of Bihar, . It was held by the

Supreme Court that where the accused person caused an injury to the complainant with a knife in a vital region but no vital organ was cut the act of

the accused person would not by itself be sufficient to take his case out of the purview of Section 307 I. P. C. but in order to bring the offence

home to the accused the prosecution must establish that his intention or knowledge was of one of the three kinds as mentioned in Section 300 I. P.

C. It was further held that the state of mind of the accused had to be inferred from the surrounding circumstances, including motive which would be

a relevant circumstance.

20. From what has been stated above it is abundantly clear that the mere circumstance that a knife had been used as a weapon of attack on vital

part of the body (as in Sarju Prasad Vs. State of Bihar,) or a firearm was used to cause injuries to the victim (vide Section 324 I. P. C.) would not

be sufficient to establish that the accused had committed an offence punishable u/s 307 I. P. C. Further evidence has to be led by the prosecution

to establish the intention of the accused to cause death or his knowledge as envisaged u/s 300 I. P. C. The burden of proof is on the prosecution

and not on the accused.

21. In all criminal trials, for all offences punishable under the Indian Penal Code the burden of proof always lies on the prosecution to bring home

the charge to the accused person. It may be that certain circumstances brought out by the defence may make the prosecution case doubtful. Even

then that will be a case where the evidence read as a whole will reveal that the prosecution had failed to prove its case against the accused person

beyond reasonable doubt.

22. Now we proceed to discuss the evidence led in the case against the present appellants. As mentioned already, the prosecution examined five

eye-witnesses of the occurrence. Two of them, namely. Murlidhar and Phakkar (P. Ws. 1 and 2) had themselves received injuries, and their

presence at the time of the occurrence could not be doubted. It is true that they were on inimical terms with Bhagwan Din and other appellants.

However, that circumstance alone will not be sufficient to discredit their testimony. The occurrence had taken place when there was sufficient light.

The two persons, who had been injured, must have seen their assailants. They were not likely to faslely implicate others and conceal the real

offenders. The medical evidence supports their testimony inasmuch as (i) the injuries caused to them could have been caused with two or three

shots fired from a firearm from a distance of about 18 paces; and (ii) the occurrence could have taken place at the time alleged by the prosecution.

23. When the relations between the two parties are strained it does sometimes happen that the members of the complainant''s party include

amongst the list of accused persons certain persons who may not have actually taken part in the assault or that they may exaggerate the event. The

testimony of all the prosecution witnesses has to be carefully scrutinized to make sure whether it can be safely accepted in respect of all the events

or against all the accused persons.

24. Kuber Singh (P. W. 3), Shyam Lal (P. W. 4) and Ram Kishun (P. W. 5) are all residents of village Bisanda and had gone to ease themselves

when they witnessed the occurrence. Kuber Singh (P. W. 3) was returning to his house after having eased himself and was at a distance of 50 to

60 paces from the place of occurrence when the shots were fired. All that could be suggested to him during the course of the cross-examination

was that as he was a resident of Lachhmi Thok, as admitted by him, it was not necessary for him to go towards the side of Banha Talab where the

occurrence took place for the purpose of answering the call of nature. That could be no reason for discarding his testimony. Shyam Lal (P. W. 4)

had also gone to ease himself towards Banha Talab and was at a distance of 80-85 paces when he witnessed the occurrence. All that could be

suggested to him during the course of the cross examination was that he was on inimical terms with Narbada (appellant) and it was for that reason

that he was deposing against the appellants. The witness during the course of his cross examination admitted that his sister-in-law had been

abducted by one Tutti. He, however, stated that Narbada had nothing to do with that abduction and he was not on inimical terms with Narbada

(appellant). This witness too is reliable.

25. Ram Kishun (P. W. 5) was also returning from the side of Banha Talab when he saw the occurrence from a distance of 80 paces. He was

cross examined at length but nothing could be brought out to show that he is not a reliable witness.

26. It has been contended by the learned counsel for the appellants that inasmuch as there were two parties in the village--one that of the

complainant and the other of the accused persons--the probability that the witnesses were the sympathises of the complainant could not be ruled

out and, therefore, their testimony should not be believed. We see no force in this argument. However, as there was party feeling in the village, the

testimony of the prosecution witnesses will have to be received with certain amount of caution.

27. The testimony of the prosecution witnesses as against the appellants who are said to have been wielding firearms is sufficiently corroborated by

the medical evidence and other circumstances of the case, including the motive for the crime. However, their testimony on the point that

Bhagwandin appellant had instigated other appellants to kill or Injure Phakkar and Murlidhar and about the presence of the accused persons who

are alleged to be wielding lathis is not corroborated by other independent evidence. It is difficult to understand what was the occasion for such

exhortation by Bhagwandin. The accused persons, who are said to be armed with firearms, were at first concealing their presence. They must have

been there to use their firearms against Phakkar and Murlidhar. Further exhortation was, therefore, hardly necessary. It is significant to note that

not a single lathi Injury was caused to any of the injured persons, although according to the prosecution ease itself the assailants were at a distance

of only about 18 paces only from their victims.

28. In the circumstances the prosecution case that seven of the accused persons, namely, Bhagwandin, Ram Autar, Narbada, Bishambhar, Puswa,

Prasad and Chunbad, who are alleged to be armed with lathis, had taken any part in the assault on Phakkar and Murlidhar is not established

beyond reasonable doubt. All the seven appellants named above are, therefore, entitled to benefit of doubt and acquittal.

29. The testimony of the prosecution witnesses against Shiva Bali. Ram Kumar and Ram Kishan does not suffer from any infirmity and is accepted.

30. The next point that remains for consideration is what offence, if any, was committed by the three appellants, namely. Shivball. Ram Kumar and

Ram Kishan, who were armed with firearms and had fired their guns or pistol at the time of the assault. All that could be established by the

prosecution was that all the three appellants named above fired their guns or pistol in the direction of Phakkar and Murlidhar from a close range of

about 18 paces at a time when their victims were trying to run away. The injuries caused are on the back part of both the thighs of both the victims,

namely. Murlidhar and Phakkar. In other words, all the four injuries were caused on non-vital parts of the bodies of the victims. In the

circumstances the probability that all the three appellants, namely, Shivball. Ram Kumar and Ram Kishun, who were armed with firearms, did not

intend to cause any injury on any vital part of the bodies of their victims cannot be ruled out. They could, therefore, in the circumstances of the case

be convicted only u/s 324/34 I. P. C It is true that the three appellants, namely. Shivabali. Ram Kumar and Ram Kishun were charged only u/s

307 read with Section 149 I. P. C. However, the facts alleged in the charge are such that they could have been charged alternatively for the

offence punishable u/s 324 read with Section 34 I. P C. All the three appellants can. therefore, be convicted and sentenced u/s 324 read with

Section 34 I. P. C.

31. The appeal of Bhagwandin. Ram Autar, Narbada, Bishambar, Puswa, Prasad and Chunbad is allowed and their conviction and sentence

under Sections 147 and 307/149 I. P C. are set aside. They are on bail. They need not surrender. Their bail bonds are discharged. The appeal so

far as it relates to Shivball, Ram Kumar and Ram Kishun is partly allowed. Their conviction and sentences under Sections 148. 307 and 307/149

I. P. C. are set aside and, instead, they are convicted u/s 324/34 I. P. C. and each sentenced to two years" rigorous imprisonment. They are on

bail. They must surrender to their bail forthwith and serve out the sentence as now imposed on them.

32. We now proceed to dispose of the connected revision This offence was committed by Ram Kumar and Ram Kishun during the period for

which they had been bound down to keep the peace. In default the two appellants named above and their sureties, namely, Jhamman and Raghubir

Singh (the two sureties of Ram Kumar) and Laxmi and Bhauwa (the two sureties of Ram Kishun) had bound them selves to forfeit a sum of Rs.

500 each to Government. Inasmuch as Ram Kumar and Ram Kishan are proved to have committed an of fence u/s 324 read with Section 34 I. P.

C. within the period of one year for which they and their sureties had bound themselves, there is no force in the revision application so far as Ram

Kumar, Ram Kishun, Jhamman, Raghubir Singh, Laxmi and Bhauwa are concerned and it is dismissed. Narbada and Puswa have been acquitted,

and, therefore, they and their sureties, namely, Kalua and Shiv Kumar (the sureties of Puswa) and Prahlad and Tej Bahadur Singh (the sureties of

Narbada) could not be held liable for any such default and their bonds could not be forfeited The revision application so far as it relates to

Narbada, Puswa, and their sureties. Kalua, Shiv Kumar, Prahlad and Tej Bahadur Singh is allowed and the order forfeiting their bonds is set aside.

In case any sum has already been recovered from them it shall be refunded Appeal and Revision are partly allowed.