

**(1941) 09 AHC CK 0005**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 263 of 1941

Kammoon and others

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** Sept. 24, 1941

**Hon'ble Judges:** Braund, J

**Bench:** Single Bench

**Advocate:** K.D. Malaviyas, for the Appellant; Vishwa Mitra (Assistant Government Advocate) for Crown, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Braund, J.

This is an appeal by five men, Kammoon, Kalka Prasad, Hori Lal, Mathura and Ashiq Ali from their convictions by the learned Additional Sessions Judge of the Etawah district. They have all been convicted of rioting u/s 147 of the Indian Penal Code and in addition, three of them, Kammoon, Mathura and Ashiq Alt have been convicted also u/s 304 read with Section 149 of the Indian Penal Cede and upon such last mentioned conviction sentenced to ten years" rigorous imprisonment each.

2. The story is somewhat involved one but it has been well told in a remarkably clear judgment by the learned Session-Judge. I need not I think, deal in any way with the past history of the matter, that is to say, with what happened prior to 28th of May, 1940, when the incident occurred, because it is to be found well set out in the learned Judge's judgment. It is sufficient to say that it is evident that there were two men who were and had been for some time bitterly opposed to one another. They were Bhagwati Prasad, the patwari, on the one hand and Vishunath on the other hand. And as is so frequently the case, each of these men had attracted to his own cause a band of supporters. This had led to a sequence of charges and cross-charges on trivial trumped up causes brought against each other and in the end there had been created in the locality a bitter enmity between these two factions which eventually ended in the tragedy which is the subject-matter of this

case.

3. In the morning of the 28th of May, at about 8 A.M. it is said by the prosecution that Vishunath accompanied by a man named Ram Sewak and another named Rup Singh were on their way from their village of Bahadurpur to Dibiapur. The distance is only a mile or two and part of the journey was over the metalled road between Phaphund and Dibiapur. After Vishunath and his two companions had joined the metalled road about a mile from Dibiapur, it is alleged that they perceived approaching them from Dibiapur a bullock cart either containing or accompanied by some 10 or 11 persons who became the accused in this case. It was alleged that among them were Bhagwati Prasad, the five Appellants and sundry others. The bullock cart was driven by the Appellant, Ashiq Ali.

4. The prosecution story then goes on to the effect that Bhagwati Prasad, when he saw Vishunath and his two companions welcomed this as a favourable opportunity for giving vent to his grievances. It is alleged that he said, "well met, let u now beat them " or words to that effect. The learned Judge has accepted it. The Bhagwati Prasad did say something of this kind and has drawn from it an inference, in which he was quite justified, that it goes to show that the meeting was fortuitous one and not one which had been planned beforehand. Then battle was joined between them with the results that I shall disclose in a moment.

5. The defence story is, of course, the direct opposite. According to this, the Appellant, Hori Lal accompanied by the Appellant, Mathura and by the driver, Ashiq Ali, had been into Dibiapur very early in the morning for the purpose of doing some business there. Having settled their affairs in Dibiapur, they were on their way back. It is not denied that the meeting with Vishunath did take place at the (sic) which the prosecution places it, but the circumstances according to this story are quite different. In the first place Hori Lal, according to this story, only had with him two companions, namely, the driver, Ashiq Ali and Mathura. On the other hand, it is said that Vishunath accompanied by nine or ten companions, instead of being peaceful wayfarers on the road, as the prosecution says, broke out of the jungle when they saw Hori Lal and his two friends approaching and committed an assault on them with lathis in the course of which and in defence of themselves, Hori Lal, Mathura and Ashiq Ali hit back and so caused the injuries which have given rise to this judgment.

6. The case is, therefore, one of pure fact whether, as the prosecution allege, Vishunath, Ram Sewak and Rup Singh were attacked by Hori Lal, Bhagwati Prasad and their party or whether, as the defence would have it, Hori Lal, Mathura and Ashiq Ali were alone and on their way back from Dibiapur when they were attacked by Vishunath and some nine or ten others.

7. It is very important in this case to look and see what injuries were inflicted because they play a large part in it. Vishunath, according to the prosecution, when

the attack began ran away. He was, therefore, uninjured but of his two companions, Rup Singh and Ram Sewak, both were injured, Rup Singh so severely that he died. In addition to these two, a man called Ganga Ram, who was working in the neighbouring fields and had come to the rescue when the fight took place, had himself been severely injured. In the result, therefore, there were three casualties on Vishunath's side, Ram Sewak, Rup Singh and Ganga Ram. Now the important thing to observe is that all these men suffered very considerable damage. As I have already said, Rup Singh died. He had three heavy blows on the head which had caused four fractures of the skull and he had traces of a severe blow on the chest. Ram Sewak had seven injuries, three of them on the head and the other four on the various other parts of his body. Ganga Ram had six injuries, three of them on the head, All these injuries are eloquent, at any rate, of this that the three men in question, Rup Singh, Ram Sewak and Ganga Ram, were very severely handled.

8. Now, let us see what happened on the other side. There were three casualties, Hori Lal, Ashiq Ali and Mathura. Of these, only Hori Lal had any injuries which could, in any sense, be described as severe. He had one contused wound of not very large proportions on his head and two utterly trifling other injuries, one on his middle finger and the other on his forearm. The injuries sustained by Ashiq Ali and Mathura were altogether trivial--each consisting of one tiny bruise on the shin. Comparing the injuries, therefore, on Hori Lal's side with those on Vishunath's side, the latter were incomparably the greater.

9. To support two directly conflicting versions of the same affair, it is almost inevitable that the witnesses on one side or the other must be perjuring themselves. And for that reason an (sic) of evidence of. Uncontrovertibly fact is worth more than a ton of evidence which has no fact behind it to support it. The learned Judge has attributed great importance to this evidence of the injuries. On either side and I think he was perfectly right to do so. He came to the conclusion that, if not utterly inconsistent with the defence version, it at any rate, very strongly supported the prosecution story. That is true. It has to be remembered what the defence story was. It was, to put it in its simplest terms, that Hori Lal, Ashiq Ali and Mathura (sic) been set on by nine or ten hooligans, dragged from their cart and beaten with lathis. Yet one of them sustained injuries which were by no means severe, while the other two sustained injuries which were utterly insignificant. I agree with the learned Judge in thinking that it is almost impossible to believe the defence version in view of the medical evidence.

10. In addition to this, there is the evidence of the prosecution witnesses--some five in number--as to what actually took place. I have read the evidence carefully and although the usual charges are levelled against the witnesses of being prejudiced and of being in some instances inconsistent, there is nothing in their evidence which makes me think that they have necessarily told a story which is not true. It is fair to say that there are two witnesses for the defence who claim to have been

eye-witnesses of what the Appellants allege occurred. But, in view of the evidence, I have not the slightest difficulty in agreeing with the learned Judge that the three Appellants Hori Lal, Mathura and Ashiq Ali took part in the fight and that their story of self-defence is wholly untrue.

11. As regards the other two Appellants, Kammoon and Kalka Prasad, their case has been throughout that they were not there at all. They were not parties to the defence set up by Hori Lal, Mathura and Ashiq Ali simply because they said that they were not there at all. The learned Judge has found as a fact on the evidence that they were there and I agree with him. They were both named in the first information report and there is evidence that they were there. I need not, I think, say more. I agree with the learned Additional Sessions Judge in the view he took in that respect.

12. As regards the convictions of Kammoon, Kalka Prasad, Hori Lal and Mathura, therefore, I think that this appeal must be dismissed.

13. That, however, does not quite dispose of the matter because a point has occurred to me, though it has not been taken on, behalf of the Appellants, which raised in my mind some considerable doubt in respect of the Appellant, Ashiq Ali.

14. It has to be remembered that Ashiq Ali was the driver of the bullock cart in which the Appellants had gone in the early morning to Dibiapur and returned later on. It was while they were returning that they fell in with Vishunath and his two companions and the affair took place. Now, the question was never directly raised as to the capacity in which Ashiq Ali was there. But it has been accepted on all hands, not only that Ashiq Ali was in fact driving the cart at the material time, but that he was the regular cart driver of Hori Lal. The learned Judge himself has accepted that and refers to Ashiq-Ali as Hori Lal's driver. That also appears in the first information report lodged by Hori Lal himself who describes Ashiq Air as "my cart driver." As I say, no direct evidence has been adduced as to the capacity of Ashiq Ali but I cannot do otherwise than accept it as a matter of fact that he was the driver of Hori Lal and in that capacity his servant.

15. Now the conviction in this case, so far as it relates to Section 304 must depend upon one of two alternatives--either that the person convicted has been proved individually to have committed the offence or that the person convicted has been proved to have been a member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object. Hence the conviction of Ashiq Ali must rest either upon his having been proved to have committed culpable homicide himself or upon his presence among the party being attributable to the common object to which he must be proved to be privy of something doing unlawful. Of the first alternative, there is no evidence whatever and the prosecution itself concedes that. None of the witnesses in this case have gone further than to say that they saw Ashiq Ali among the assailants. Of course he was among the assailants. He was driving them. None of the witnesses has said that they saw him

committing an actual assault. That is a very different thing. Now we come to the second alternative and I am faced with this difficulty. Ex-hypothesi, Ashiq Ali was the paid servant of Hori Lal and was driving his cart--the service he was engaged to do. Am I, therefore, to attribute his presence to an intention to share in a common unlawful object rather than to the perfectly lawful intention of doing that which he was engaged to do, namely, to drive the cart. If there are two explanations of the presence of a particular person on a particular occasion one of which is lawful and the other of which is unlawful, I cannot, as against an accused person, assume the unlawful intention, (sic) is presence is perfectly well explained by his intention to perform his duty. I agree that if there were any other evidence that he went beyond the purposes of his duty and took an actual part in some illegal activity with those whom he was driving, that would be an entirely different thing. But, as I have said, there is no such evidence in this case. I will take an illustration. Supposing a man engages a motor bus to drive a party to a particular place. On the way the party of passengers decide to engage in some such unlawful activity as would constitute them as an unlawful assembly. Is there any reason why the paid driver of the motor bus should be presumed to be a member of that unlawful assembly? His presence there is perfectly well explained by his capacity as the driver. If the prosecution desire to go further and to clothe him with some further responsibility, then it seems to me that the prosecution must prove, not merely that he was present there, but that he was present there with a positive intention and object which went beyond his intention to perform his duty in driving the motor bus.

16. Now that, in my view, applies exactly to Ashiq Ali's case. He was present. There is a perfectly innocent capacity in which his presence can be explained and the prosecution has not shown that he exceeded that capacity. It appears to me, therefore, that he cannot be taken to have been a member of this unlawful assembly and that in the result he is guilty on neither charge and must be acquitted.

17. As regards the sentences on the four men whose appeals have been dismissed, I do not think that I can interfere with the sentences u/s 147 of the Indian Penal Code. As regards the sentences on Kammoon and Mathura u/s 304 read with Section 149 of the Indian Penal Code, I think they are a little severe, having regard to their ages and I propose to reduce them to sentences of five years" rigorous imprisonment each. I do not believe in the imposition of small fines at the end of substantial terms of imprisonment and I propose at the same time to set aside the fines of Rs. 50 which have been attached to those two sentences.

18. I regret in some respects to have taken a different view from that taken by the learned Judge as, if I may say so, his judgment was a well-balanced and good one.

19. Kalka Prasad and Hori Lal must surrender to their bail.