

(2012) 04 AHC CK 0161

Allahabad High Court

Case No: Criminal Appeal No. 932 of 1981

Kashi Prasad and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision: April 3, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 210, 313
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 307

Citation: (2012) ACR 1786 : (2012) 5 ADJ 173**Hon'ble Judges:** Vinod Prasad, J**Bench:** Single Bench**Advocate:** Sheo Kumar Singh, Y.K. Shukla, P.N. Mishra, Lihazur R. Khan, Dharam Pal Singh, Avinash and Amit Saxena Amicus Curiae, for the Appellant; A.G.A ., for the Respondent

Judgement

Hon'ble Vinod Prasad, J.

This appeal arises out of judgment and order dated 25.4.1981 passed by IVth Additional Session's Judge, Jalaun at Qrai in S.T. No. 116/1978, State v. Kashi Prasad and others, relating to police station Konch district Jalaun, by which decision, appellants were convicted and sentenced for offences under Sections 148, 342, 426, 307 IPC, for causing injuries to injured Panche (later on deceased). Appellants Kashi Prasad and Rajendra Singh were convicted u/s 307 IPC and were implanted sentence of five years" R.I. for that offence. For offences under Sections 148, 342 and 426 IPC, the two appellants Rajendra Singh and Brij Kishore were sentenced to one year, six months and three months R.I. respectively. Learned trial judge has further directed their sentences to run concurrently. Appellants Suraj Singh and Pancham were convicted u/s 307, 147, 342 and 426 IPC for causing injuries to Govind Singh, Phool Singh and Dal Chand and were imposed sentence of four years, six months, three months and six months R.I. respectively for those offences. Appellant Brij Kishore, however, was convicted only under Sections 342, 426 and 147

IPC and was imposed with the same sentence as was awarded to other appellants for those charges. Challenge in this appeal by the appellants is to their aforesaid conviction and sentences. Pendente lite consideration of their appeal in this Court, three of the appellants Kashi Prasad, Suraj Singh and Pancham expired and therefore, vide order dated 6.9.2005, their appeals stand abated. Thus, now appeals of rest of two surviving appellants, Rajendra Singh and Brij Kishore is to be considered.

2. Unfolded background facts, as are decipherable from the written FIR, Exhibit ka-1, and evidence of the informant Virendra Singh, PW-1, were that on 19.6.1976 at 12 noon PW-1 was straightening his southern wall to make it straight with the projection alongwith mason Titoo, cousin brother Phool Singh, Govind Singh resident of village Satoh, Dal Chand Kurmi resident of Birguwan, who was the father-in-law of his sister and his servant Panche Mehtar. Govind Singh had arrived at the incident scene on a tractor of Rajendra Singh r/o village Satoh. At that time appellants Kashi Prasad, armed with a SBBL gun and Rajendra Singh, armed with a country made pistol, arrived at the construction site and forbade erecting of wall, claiming the land belonging to them. This interdicting was followed by a verbal tirade between both the sides. Amongst such vestigial, both Kashi Prasad and Rajendra Singh, resorted to firing causing injuries to Phool Singh, Panche, Dal Chand and Govind Singh. Accused also fired at the rear wheel of the tractor and punctured it. After committing such crime, accused retreated from the spot. Nathu Ram, resident of informant's village, who in relation was his uncle, boarded Govind Singh in the tractor of Dal Chand and took him for his medical treatment. In another tractor of Nathu Ram Kurmi, other injured Phool Singh, Panche and Dal Chand alongwith Nathu Ram, Hari Singh, Babboo Raja and Shyam Sunder also proceeded for the hospital and when their tractor arrived near the grove of Mauji Lal, situated in Panchhipura, they were surrounded by the appellants Kashi Prasad, Rajendra Singh, Pancham, Brij Kishore and Suraj Singh, out of whom Kashi Prasad and Suraj Singh were armed with guns, Rajendra Singh with a country made pistol, Pancham with a spade and Brij Kishore with lathi and they all instigated to eliminate the injured party. Hearing the instigation Babbu Raja, Hari Singh, Shyam Sunder, Nathu Ram, Dal Chand and Phool Singh alacritically alighted from the tractor and sprinted away to save their lives. Panche Mehtar, who had sustained some grievous Injuries, however, could not made his escape good and remained in the tractor. He was forced to alight from it and thereafter tractor was taken towards north to Harsakari pond and there, after damaging it, was pushed in it, Panche Mehtar was kidnapped by Kashi Prasad and Rajendra Singh, who confined him illegally in their house. This incident was witnessed by Nathu Ram, Hari Singh, Shyam Sunder, Babbu Raja, Tulsu and many other co-villagers.

Informant Virendra Singh scribed the FIR, Exhibit ka-1, about the incident, covered the distance of six miles to police station Konch and lodged his FIR the same day at 3.45 PM as crime No. 110/1976 for offences under Sections 147, 148, 307 and 427

IPC against named accused.

3. Head constable Har Govind, PW-8, registered the FIR by preparing chick FIR, Exhibit ka-2 and relevant G.D. Entry, Exhibit ka-11. Investigation into the crime was commenced by S.I. Surendra Singh in whose presence, the crime was registered at the police station. He proceeded for the spot and found injured Panchu in the house of Shiv Charan in a precarious state and, therefore, dispatched him to Konch Hospital through a constable. PW-5, the first investigating officer, thereafter recorded interrogatory statements of Virendra Singh, Babbu Raja, Hari Singh and others and thereafter conducted spot inspection and prepared site plan map, Exhibit Ka-3. Thereafter I.O. recovered the tractor and sketched site plan map of the place of its recovery as Exhibit Ka-4. The I.O. had noted that the front portion and light of the tractor were damaged. Tractor was given in the custody of Nathu Ram and a seizure memo in that respect, Exhibit Ka-5, was prepared. Subsequently, I.O. interrogated and recorded the statements of Govind Singh, Phool Singh, Dal Chand and Pancham. Later on Pancham died and hence his interrogatory statement, u/s 161 Criminal Procedure Code, being in the nature of his dying declaration, was proved by the investigating officer as Exhibit Ka-6. The investigating officer had also sketched site plan map regarding second round of shooting as Exhibit Ka-7. Completing investigation he had charged the accused.

4. Pancham, who had sustained injuries during the incident, was shifted to Kanpur for better management of his injuries but unfortunately he lost the battle of his life in the morning of 26.7.1976 at 10.30 a.m. Autopsy on his body was performed by Dr. R.K. Gupta, PW-7, on 27.7.1976 vide Exhibit ka-10. The doctor had noted that the deceased had a poor built. Rigor mortis was present in both the limbs. Greenish discoloration over the right iliac fossae and whole abdomen was present. Following ante mortem injuries were noted by the doctor in the autopsy report:

(1) Multiple healed scars superficial varying in size from 1/4 cm to 1/2 cm in an area extending from 12 cm x 8 cm on right arm and forearm back on elbow joint;

(2) A bed sore 6 cm x 5 cm on the mid line lower part (lumbo sacral region, covered with gangrenous slough);

(3) A bed sore 8 cm x 10 cm on the right side chest, middle region in posterior axillary line - gangrenous slough;

(4) 3 healed superficial scars each 1/4 to 1/2 cm on the back of head;

(5) A bed sore 2 cm x 3 cm on right side head on back and sole region covered with gangrenous slough;

Six lid shots found under above mentioned injuries.

According to the doctor death was caused due to syncope due to surgical exhaustion, - and - congestion of lungs.

Injuries of the injured Govind Singh, Phool Singh, Dal Chandra and Pancham were examined on 19.6.1976 at 2.15 PM, 3.40 p.m., 4 p.m. and 8.45 p.m. vide exhibits Ka-13, Ka-14, Ka-15 and Ka-16. A note was also sent by the doctor to the S.O. Which has been proved as Exhibit Ka-17. X-ray report; of Pancham, Dal Chand and Phool Singh have been proved as Exhibit Ka-8, Ka-9 and Ka-10, a perusal of which indicated that radio opaque shadows were found in the x-ray plates. Injury reports, Exhibit Ka-13 to Ka-16 are reproduced below:

Injury report of Govind Singh:

- (1) Gun-short wound circular area 3 cm diameter and enduration 1 mm around depth not measurable left upper chest -1 cm below left mid clavicle with pain left side chest axillary region and surgical emphysema. Whole about 3" strip in between the anterior, posterior axillary folds.
- (2) Gun-shot wound of the same dimension as No. (1) outer aspect top of left shoulder 3 1/2 cm below and in front of left achromatic muller joint. Depth cannot be ascertained.
- (3) Gun-shot wound of dimensions as above depth could not be ascertain with enduration 1 1/2 cm around front of left arm lower part 2 cm above elbow joint.

Injury report of Phool Singh:

- (1) Gun-shot wound 2 mm x 2 mm x depth not measurable right side chest along the posterior axillary fold 13 1/2 cm below the axial.
- (2) Gun-shot wound 2 mm x 2 mm right lower chest just above cathedral margin in line with anterior axillary fold 15 cm below No. 1

Injury report of Dal Chand:

- (1) Gun-shot wound 3 mm x 3 mm x depth not measurable back of right arm upper part 15 1/2 cm below and behind right achromatic clavicular joint.

Injury report of Pancham:

- (1) Gun-shot wounds 2 mm x 3 mm each depth variable and could not be ascertained, each. Twelve in number left side head neck and face in an area of 21 cm x 20 cm with swelling of the whole left face.
- (2) Gun-shot wounds three, two of above size and one left side chin in the form of lacerated wound 2 cm x 1/2 cm from above down ward and to right all in an area of 11 cm x 5 cm left side chin and sub mandibular region.
- (3) Abrasions five of variable size from 1 cm x 1 mm to 3 mm x 3 cm scattered over left side back and right in terscapular region.
- (4) One gun-shot wound 3 mm x 2 mm x depth not ascertained outer aspect left shoulder joint.

(5) Two gun-shot wound left forearm middle post aspect size and details as above.

(6) One gun-shot wound 3 mm x 2 mm x depth uncertain outer aspect left thigh. 12 cm below greater trochetium.

Charge-sheeting of the accused resulted in their summoning by the Magistrate, who found disclosed offences triable by Session's Court, and therefore, committed the case to the Session's Court for trial, where it was registered as S.T. No. 116 of 1978, State v. Kashi Prasad and others.

5. Accused persons were charged for offences under Sections 147, 148, 307, 302 and 426 IPC but they abjured it and claimed to be tried by pleading not guilty and hence their trial commenced.

6. To establish it's case prosecution, during the course of the trial, examined in all, eight witnesses out of whom informant Virendra Singh (P.W.1), Vir Bahadur (P.W.2), Phool Singh (P.W.3) and Badri Prasad (P.W.4) were fact witnesses. Formal witnesses included investigating officer S.I. Surendra Singh (P.W.5), Dr. S.N. Purwar (P.W.6), Dr. R.K. Gupta (P.W.7) and Head Constable Har Govind (P.W.8).

7. In accused statements u/s 313 Cr.P.C., accused Kashi Prasad, while taking general defence of false implication, pleaded that his father Virendra had lodged a cross version at the police station the same day. Prosecution side wanted to grab illegally the immovable property belonging to them over which they and their family members had peaceful possession since many generations. Their, house was raided and therefore, Virendra Singh had fired the gun in self defence. Besides aforesaid accused rest of the accused persons pleaded general defence of their false implication. To establish their version, on preponderance of probability, accused examined Jaswant Singh as D.W.1.

8. It is noted here that learned trial judge had also conducted a spot inspection u/s 210 Cr.P.C. and the note by him exist on the record.

After critically examining the facts and circumstances of the case and looking into various evidences as posted, learned Additional Sessions Judge, vide impugned judgment, held that prosecution had established it's case beyond all reasonable doubt and therefore convicted and sentenced the appellants, as has already been mentioned in the opening paragraph of this judgment and consequently, appellants have challenged their aforesaid conviction and sentence in the instant appeal.

When appeal was called out for hearing, nobody appeared to argue it and consequently Amit Saxena was appointed as amicus curiae to argue the appeal which was pending in this Court for more than three decades.

9. Learned amicus curiae submitted that prosecution story is absolutely false and the defence claimed by the appellant Kashi Prasad is the correct narration of the incident. It was the prosecution side who wanted to trespass and grab the landed

property belonging to the appellant-accused and therefore, father of Kashi Prasad had opened fire in exercise of right of private defence, both of person and property. It was, therefore, submitted that conviction of the appellants is indefensible and appeal be allowed and the appellants be acquitted. It is further contended that for the charge u/s 302 IPC, no evidence was found and therefore, conviction of the appellants is not sustainable. Shri Saxena further submitted that the prosecution story that Panche was forcefully taken down from the tractor and was abducted by two appellants, Kashi Prasad and Rajendra Singh does not inspire any confidence as their conduct is most unnatural and wholly weird. Primarily on the aforesaid contentions, it is argued that appeal be allowed, conviction of the appellants be set aside and they be set at liberty.

10. Learned AGA contrarily submitted that prosecution by tendering cogent, confidence inspiring evidence had established guilt beyond all reasonable doubts and therefore, this Court should not interfere with the impugned judgment of conviction and sentence as it does not suffer from any error of law. It was submitted that injured witnesses had corroborated prosecution version in its entirety without any inconsistency in their statements and therefore, their depositions cannot be discarded and conversely defence story cannot be accepted. Learned AGA further submitted that in a cross version it is to be judged as to which side is giving correct narration about the incident and whose version is more credible and when the facts of the present appeal are summated from above angle, it becomes evident that prosecution story is more credible and confidence inspiring than the defence version, which seems to be fabricated; It was, therefore, submitted by learned AGA that appeal be dismissed and conviction and sentence of two surviving appellants be affirmed.

11. I have considered the arguments raised by both the sides and have vetted the documents and oral testimonies of witnesses. Perusal of record indicates that some of the facts are not in dispute which will be pointed out herein below. According to the prosecution case the incident had occurred on 19.6.1976 at 12 noon. FIR about the said incident was lodged at 3.45 p.m. at a distance of six miles. In such a view, first of all what can be safely concluded is that there is absolutely no delay in lodging of the FIR. There was no chance for the prosecution to cook up and fabricate a story against the accused. Perusal of the written FIR Exhibit Ka-1 further makes it clear that it seems to be a correct narration of the facts. Version of the informant is well supported by medical evidence of various injured persons and depositions of the doctors. All the injured persons had sustained injury during the incident by fire-arm and therefore, prosecution charge, of resorting to firing by two appellants during the incident is an established fact. Defence has also not disputed sustaining of injuries by gun-shots as, according to the statement of the appellant Kashi Prasad, u/s 313 Cr.P.C., he admitted that his father had resorted to firing in self defence. The question now remains to be decided is as to which of the two rival versions inspire confidence. Nobody from the accused side had sustained any injury.

No doctor was examined nor any such claim was raised by the accused during trial nor any medical examination report on their behalf was filed alongwith defence papers which has been exhibited as Kha-1 to Kha-11. Against an unarmed person, there cannot be any right of private defence of persons.

12. Turning towards right of private defence of property, the same is also not culled out from the facts and circumstances of the case. Perusal of the defence exhibit kha-6, which is an FIR lodged by Shiv Charan against the accused Virendra, Nathu, Deen Dayal, Kalian, Phool Singh and Govind Singh, Dal Chand, Mohar Singh and Motilal and was registered as a cross version of the instant incident, as crime No. 110 A under Sections 147, 148, 149, 452, 506, 427 IPC, indicates that said cross version was registered at the same police station at 5.20 P.M. The date of the incident is the same as that of the prosecution. Place of the incident is also the same. There is no dispute that date and time as alleged by the prosecution is not true nor it is disputed that firearm was not used during the incident. It is also admitted that informant Virendra Singh (PW-1) and Phool Singh (PW-3) were present during happening of the incident as defence admits their presence. In such a contingency, it is difficult to conclude that a party, who was unarmed had gone to the spot with an idea to make forceful possession of a property. It is only the prosecution side who had sustained injuries and not the appellants. The defence of the accused vis-a-vis prosecution allegations clearly establishes that it was appellant accused who were the aggressors and therefore, they cannot claim right of private defence. At this juncture it is recollected that right of private defence is not a right of retaliation and manning assault on the other side. This Right is given to an individual for preservation of his person and property against an attack on it. Some of the Apex Court's decisions on this aspect are referred to herein below :

13. In *Narinder Kumar v. State of J& K*, AIR 2010 SC 3015, it has been held by the Apex Court as under :

It is, therefore, difficult to appreciate how such an act could be described as one in self-defence. The trial Court as also the High Court have come to the conclusion that the deceased was not armed nor was any attempt made by him on the life of the appellant. The plea of the private defence, therefore, fails and is hereby rejected.

14. In *Sikandar Singh v. State of Bihar*, AIR 2010 SC, it has been held by the Apex Court as under :

23. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent.

24. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid

from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

15. In *Bhamvar Singh and others v. State of M.P.*, AIR 2009 SC 768, it has been observed by the Apex Court as under :

52. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence."

16. In *Katta Surendra v. State of U.P.*, AIR 2009 SC (Suppl) 459, it has been held by the Apex Court as under :

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper

setting."

From the above, it is proved that appellants had no right of private defence as they were the aggressors, and it were they who had caused injuries to the prosecution side and therefore, conviction of the appellants is well merited and does not call for any interference by this Court.

17. Turning to the crime committed by the accused appellants, it is categorical case of the prosecution, during trial, that injuries to injured Panche was caused by Kashi Prasad. In his examination in chief itself, PW-1 has testified "Kashi Prasad and Rajendra Singh started threatening me with life. On this Kashi Prasad from his licensee gun had fired on me. I budged slightly and therefore was not hurt Second fire was made by Rajendra Singh by a country made pistol. From it Dal Chandra and Govind sustained injuries. From the fire made by Kashi Prasad Panche and Phool Chand had sustained injuries"

18. Above deposition with agglomerated facts makes it apparently clear that so far as appellant Rajendra Singh is concerned he had caused injuries only to Dal Chandra and Govind. Perusal of their injury reports indicates that none of those two had sustained any grievous injury. Prosecution had not brought on record any oral or written evidence by which their injuries were shown to be dangerous to life and grievous in nature. In such a view, if a single shot was fired by Rajendra Singh, his intention to kill cannot be conclusively and convincingly accepted to sustain his conviction for an attempt to murder charge u/s 307 IPC. What can be safely held without any ambiguity is that said appellant had caused simple hurt to two persons and therefore, his crime will fall within the ambit of Section 324 and not under 307 IPC. In my humble opinion conviction of these two appellants u/s 307 IPC, who had no intention to commit murder, is unsustainable as commission of that offence is not borne out from the facts and circumstances of the appeal.

19. Turning towards the role of Brij Kishore, who was alleged to have been armed with a blunt object, had not caused any injury to any of the persons. Although he was a member of an unlawful assembly but at the spur of the moment he had not participated in the assault incident in that capacity and hence he can be made liable only for offences under Sections 342, 426 and 147 IPC which conviction of his does not require any interference.

The above discussion leads me to conclude that so far as appellant Rajendra Singh is concerned, his conviction is to be altered and diluted to one u/s 324 IPC from 307 IPC. His other re-corded convictions under Sections 148, 342, 426 IPC is to be affirmed. Conviction of appellant Brij Kishore for offences under Sections 147, 342 and 426 IPC does not call for any interference and has to be concurred.

20. Turning towards the sentence of these two appellants for the aforesaid offences, I am of the opinion that the incident had occurred in the year 1976. Thirty five years had lapsed during intervening period. Appellant Rajendra Singh was a youth at that

time being 28 years of age. As of now he must be in the age of 60 and above. To send him to jail to serve his entire period of jail term at this stage period will not be in the interest of justice. His single shot, at the spur of the moment, during verbal duel, do not warrant inflicting of such a serious punishment. Since he had caused injuries to the two persons therefore sentence of one year R.I. with a fine of Rs. 20,000/- u/s 324 IPC, while upholding his conviction and sentences for other offences, under Sections 148, 342, 426 IPC will meet the ends of justice. So far as appellant Brij Kishore is concerned, his conviction under Sections 147, 342 and 426 IPC is to be affirmed but sentences on that charges deserves to be altered to the period of imprisonment already undergone by him with accumulative fine of Rs. 20,000/- imposed upon him, will met the ends of justice as he had not caused any injury to any of the persons.

Concluding the discussion, the appeal succeeds in part. Conviction of appellant Rajendra Singh is altered from u/s 307 IPC to Section 324 IPC but his conviction and sentences under Sections 148, 342, and 426 IPC-are maintained. For the offence u/s 324 IPC he is sentenced to one year R.I. with fine of Rs. 20,000/-.

Appeal of appellant Brij Kishore is partly allowed. While his conviction under Sections 147, 342 and 426 IPC is hereby maintained but on all the aforesaid counts his conviction of imprisonment is reduced to the period already undergone by him with fine of Rs. 20,000/-.

Appellants may deposit fine within one month from the date of notice received by them from the trial Court for the said purpose. Failing to deposit imposed fine, they shall serve six months" R.I. If the fine is deposited by the appellants, a compensation in equal denominations are directed to be paid, out of it, to the injured or then heirs.

Appellant Rajendra Singh is on bail. He is directed to surrender to serve out remaining part of his sentence. His persona and surety bonds are cancelled. Appellant Brij Kishore is on bail. He need not to surrender. His personal and sureties bonds shall be discharged only on his depositing the fine or after he is arrested to serve out the default sentence. All the sentences of both the appellants shall run concurrently.

Let a copy of the judgment be transmitted to the trial Judge for it's intimation.