

(2013) 04 AHC CK 0270

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 1022 of 2009

Radhey Shyam

APPELLANT

Vs

State

RESPONDENT

Date of Decision: April 3, 2013**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 105
- Penal Code, 1860 (IPC) - Section 103, 302, 304, 325, 34

Citation: (2013) 5 ALJ 324**Hon'ble Judges:** Imtiyaz Murataza, J; Amar Saran, J**Bench:** Division Bench**Final Decision:** Partly Allowed

Judgement

Amar Saran, J.

These two connected criminal appeals which arise out of the judgment of the learned Additional Sessions Judge, Gonda dated 24.2.2009, convicting and sentencing the appellants Jagdish Prasad and Radhey Shyam to imprisonment for life and a fine of Rs. 5000/- each and a default sentence of 5 months imprisonment for non-payment of fine for an offence under sections 302/34 I.P.C. are being heard and disposed of together by means of this common order. We have heard learned counsel for the appellants and the learned AGA.

2. The prosecution case as disclosed in the First Information Report, lodged by PW-1 Ram Kumar, the son of the deceased Bharat Ram was that their house was adjoining the house of their grand uncle Ram Narayan. There was some abadi land between the two houses. Some land which was rightfully the informant's had been left out of their property, when the informant's side were getting their new house constructed as their Southern wall had not been built in a straight line. The accused side wanted to grab the said land and were making an effort to achieve this objective on the date

and time of incident, i.e. on 24.10.1991 at 2.00 p.m. This was objected to by the informant, his father Bharat Ram and his brothers Hausila Prasad and Shiv Kumar. This angered the appellants and Anokhey Lal, and on the exhortation of Anokhey Lal, that one person be murdered so that the informant's side would not claim the said land in future, the appellant Radhey Shyam brought a spear from his house and the appellant Jagdish and Anokhey Lal brought out lathis and gave a chase to the deceased Bharat Ram, who ran along with the informant and others towards the main door of their house in order to escape the assault. At that point the appellant Radhey Shyam struck the spear on the chest of the deceased, whilst the appellant Jagdish Prasad and Anokhey Lal assaulted him with lathis. On their cries, Karkau, Brij Nath and Ram Niwas reached the spot. The appellant Jagdish also assaulted Haushila Prasad PW-2 with a Lathi causing an injury on his right arm.

3. The FIR of this incident was got registered at the police station Colonelganj by PW-1 Ram Kumar on 24.10.1991 at 3.10 p.m. The Investigating Officer PW-6 SI R.S. Shukla conducted the investigation of this case. He inspected the spot, prepared the site plan (Ext. Ka-7) and thereafter he conducted the inquest and wrote a letter to the Chief Medical Officer, Gonda for conducting an autopsy on the corpse of the deceased. After completing the investigation, he submitted a charge-sheet against the appellants (Ext. Ka-13).

4. PW-5 Dr. J.P. Pandey conducted the post-mortem on the body of the deceased Bharat Ram on 25.10.1991 at 3.00 p.m. He found one lacerated wound 3 cm x 1 cm x bone deep on top of the head 12 cm above right ear and one punctured wound 1.5 cm x 0.5 cm cavity deep with a clean cut margin on front of the left side of the chest just below the left nipple. The internal examination showed no apparent damage (NAD) on the scalp, skull and bones, except some cut margins. The membrane of the pericardium was punctured at the anterior part just below injury No. 2. About 3 liters of blood were also found in the heart. The cause of death was haemorrhage and shock due to ante-mortem injuries.

5. The injury report of injured Haushila Prasad (Ext. ka-16) has been proved by PW-7 Sudhir Kumar Mishra, the Pharmacist at C.H.C. Colonelganj, district Gonda as Dr. Ravindra Singh, the Medical Officer, who examined the injuries of Haushila Prasad on 24.10.1991 at 9.15 a.m. had died and this witness was familiar with the doctor's handwriting and signature. The injured Hoshila Prasad had two injuries of which one was a contusion 7.5 cm x 2.0 cm over right side of back, oblique red and the other was a contusion 4 cm x 2 cm over back of right wrist, oblique red. The injuries were simple and were caused due to a blunt object and were less than one day old at the time of medical examination.

6. In this case, the informant's side and the accused side are related as follows. Anokhey Lal (the co-accused who died during trial and who was the father of appellant Radhey Shyam was the brother of Ram Narain (father of the appellant Jagdish), and Bharat Ram (the deceased of this case who was the father of the

witnesses, PW 1, Ram Kumar, the informant and PW 2, Hausila Prasad, the injured). Anokhey Lal, Ram Narain and Bharat Ram had one more brother Sohan Lal, who does not figure either on the accused side or on the prosecution side in this case.

7. PW-1 Ram Kumar has deposed that the informant side and the accused side were in possession of an old house which collapsed in 1982. Thereafter, all the four brothers of his father built separate houses. The main door of the informant's house was to the north. On the Southern side of his house there was an Abadi land which he had got from his ancestors. This land was in the informant's possession. The house of appellant Jagdish was south of the said disputed land. On the date of incident at about 2 O'clock, the informant, his brothers Hosila Prasad and Shiv Kumar and their father Bharat Ram were getting some construction made to the south of their house on the Abadi land, as the earlier wall of their house was not in a straight line which had resulted in some of their land being left out. The appellants and Anokhey Lal wanted to grab the said land. When the informant and others tried to stop them, the accused resorted to abuses. When the deceased asked them not to abuse, then on the exhortation of Anokhey Lal that let one man be killed so that no body would come near the said land in future, the appellant Radhey Shyam carrying a spear and Jagdish and Anokhey Lal armed with Lathis began to assault the informant's party. The informant and others ran to their house towards the main door. Then the accused persons chased them and appellant Radhey Shyam plunged a spear on the chest of deceased Bharat Ram and the appellant Jagdish and Anokhey Lal assaulted him with Lathis. The informant and others ran to save their father then Hoshila Prasad was beaten by appellant Jagdish with a Lathi. Karkau, Brij Lal, were residents of the village where the incident took place, (i.e. Kasimpur Pure Kattey) and Ram Niwas, the cousin brother of the informant who was staying at their house in those days arrived at the spot. On their reprimand the accused persons ran away from the spot where the deceased was found lying dead. The informant then reiterated his FIR version which he had got scribed by his brother Shiv Kumar. Then he proceeded to the police station Colonelganj and handed over the report to the police and Hosila and Shiv Kumar remained near the corpse of the deceased. The Investigating Officer recorded the informant's statement and then proceeded to the spot for completing the investigation formalities of this case.

8. PW-2 Hoshila Prasad deposed that at about 2 or 2.30 p.m., he was just returning after getting his wheat ground at the flour mill. When he arrived at the place of incident, he found the accused persons Anokhey Lal, Jagdish and Radhey Shyam abusing his father and when his father protested against the abuses, then Anokhey Lal cried out that someone may be murdered so that no one would come near the land in the future and the dispute could come to an end. Then the appellant Radhey Shyam pierced the spear into the chest of the deceased and Jagdish Prasad and Anokhey Lal gave him Lathi blows. When the witnesses arrived raising alarms then the accused persons ran away. The dispute arose over the land situate to the South of his house.

9. The other witnesses in this case are formal in nature.

10. Learned counsel for the appellants submitted that the appellants have a right both of private defence to their body and to their property. The co-accused Anokhey Lal who died during trial has also received some injuries, but the injury report could not be produced by DW-3 Sarveshwari Prasad Srivastava, Pharmacist at District Jail, Gonda because when he appeared in Court on 5.2.2009 in response to summons, he could not produce the injury register of 29/30th October, 1991 as the same had been misplaced. However, learned counsel pointed out that PW-2 Hoshila Prasad has admitted that when he arrived on the spot, he grappled with Jagdish. PW-2 has also admitted that they hurled brick bats on the accused side and the accused may have received some injuries. PW-1 has also stated that on the date in question, the informant and his brothers were trying to make a construction to the south of their house because the boundary wall of their house was not in a straight line and PW-6, the investigating officer SI R.S. Shukla has further admitted in his cross examination that the informant's side had annexed some part of the Abadi land to the South of the said house which they claimed as their own. This construction could have resulted in completely blocking out the Northern exit of the appellant's house, which was situated South of the informant and deceased's house. That disputed land is shown with the letters C D E and F in the site plan. It was further submitted by the appellant's counsel that no independent witness has been produced for supporting the prosecution case and even the three witnesses Karkau, Brij Nam and Ram Narain, whose names were mentioned in the FIR and in the evidence have not been produced for supporting the prosecution case.

11. In his additional statement u/s 313 Cr.P.C. appellant Radhey Shyam averred that, the deceased Bharat Ram was the brother of his father Anokhey Lal and that Jagdish Prasad was the son of their brother Raj Narain. On the date of incident, Haushila Prasad, his father, Bharat Ram and Jagdish Prasad were trying to make a construction in front of the house of the accused by raising a wall of 4-5 arms height and were trying to block the exit of their house. When the appellant Radhey Shyam and Anokhey Lal and his son Jagdish Prasad protested, a dispute arose whereupon Haushila Prasad tried to plunge a spear on Radhey Shyam who moved aside and instead the spear struck his father, the deceased Bharat Ram causing his death. Haushila Prasad and others then placed his father Bharat Ram's corpse on their front door. It was also argued that there was only a blunt object injury on the deceased Bharat Ram and it was not clear whether the said blow was given by the appellant Jagdish or by Anokhey Lal. On these contentions, learned counsel for the appellants has prayed for acquittal of the appellants.

12. We are of the view that the defence version that the deceased Bharat Ram had received the spear injury accidentally when his son PW 2 Haushila Prasad had tried to attack the appellant Radhey Shyam with the same, but the latter had moved out of the way, is too far fetched and unbelievable to be swallowed. No spear can be so

long as to cause a chest cavity deep injury on the deceased, particularly when it was being aimed by someone from the side of deceased himself at the side of the accused. We, therefore think that no good ground is made out for reaching to a conclusion that the appellants have made out a case for complete acquittal.

13. However we find that PW-1 Ram Kumar in his examination-in-chief has mentioned that on the date in question, Ram Kumar, his father the deceased Bharat Ram and his brothers Haushila Prasad and Shiv Kumar were trying to raise a construction to the south of their house as the Southern wall of their building was not in a straight line. Significantly this fact was conspicuous by its absence in the FIR. Moreover, if the Southern wall of the house of the informant was not in a straight line, as is the prosecution case itself, then the informant and the deceased side would have greater motive to annex the land towards the South of their house, and to the North of the house of the appellants, and the appellants would have no motive to raise a construction on that part of the land as it would have blocked the entrance and exit of their house which fell on the Northern side of their house. We find that conveniently in his evidence PW 2 Haushila has stated that he arrived when the fight had already broken out, when he was returning after getting his wheat ground at the flour mill. He seems to have taken this position because it appears that he was trying to conceal the genesis of the quarrel. Furthermore the IO PW-6 SI RS Shukla has stated that if the construction had been made on the disputed point (i.e. CDEF on the site plan), it would have completely blocked the exit from the house of the accused. PW-2 Haushila Prasad has also admitted that a scuffle had taken place between the parties and brick batting was resorted to even by the prosecution side, which may have struck the side of the accused. One witness DW-3 was sought to be examined to show that the accused Anokhey was medically examined in Jail but unfortunately the said register for that date (29/30.10.91) was misplaced by the time of this examination almost two decades later. In the said background it cannot be ruled out that some simple injuries may have been received by Anokhey Lal or another member on the accused's side in the course of the quarrel. On an analysis of the totality of the evidence it appears that the incident has taken place after a sudden quarrel between the parties, over the dispute on the land which intervened between the subsequently constructed houses of the parties. It appears that earlier the disputed land was either part of the common ancestral property or abadi land which was shared by all the four brothers including the deceased Bharat Ram and which devolved upon the deceased and his living brothers and their heirs.

14. Keeping in mind the principal that even though u/s 105 of the Evidence Act a burden is cast on the accused to show that his case falls under one of the exceptions, the onus on the prosecution to establish its case to the hilt never shifts and an onus is cast on the accused only to establish his case on the basis of a mere preponderance of probabilities. Even when the accused adopts a plea of denial he can, in the alternative, raise a plea of private defence on the basis of material on record. (See [Munshi Ram and Others Vs. Delhi Administration](#), and [Kashi Ram and](#)

[Others Vs. State of M.P.,](#)). In the above background where a quarrel appears to have suddenly broken out, and we find that only a solitary spear blow and a relatively minor solitary lathi blow were given by the appellants Radhey Shyam and Jagdish to the deceased, it could not be held that the appellants shared any common intention to commit the murder of the deceased. If the side of the deceased were trying to take possession of the common land towards the South of their house, which would have blocked the Northern exit from the appellant's house on the day in question, then it would reasonably be inferred that the appellants at least enjoyed a limited right of private defence of property, though it would probably not extend to causing the death of the deceased as the case did not fall in any of the four categories mentioned in section 103 I.P.C., where the right of private defence of property extends to the extent of causing death. When a right of private defence is claimed, and even where the said right has been exceeded, then in view of the law laid down in [Subramani and Others Vs. State of Tamil Nadu,](#) and in [State of Bihar Vs. Nathu Pandey and Others,](#) , it must be held that if the accused are entitled to protect their property, then the said action does not amount to an offence in view of section 96 I.P.C.. There can thus be no common intention to commit the crime, and the accused cannot be convicted u/s 302 with the aid of section 34 I.P.C. However if any of the accused engages in an action in excess of the right permissible in law, then the said accused can be held liable for his individual role. In this view of the matter, we are of the view that in the background of the apparently sudden quarrel between the parties, especially when the accused persons were under the impression that with the construction of the wall their Northern exit would be blocked, and where a scuffle appears to have taken place between the parties, so far as appellant Radhey Shyam who caused the admitted solitary spear blow to the deceased is concerned he could be imputed with at least the knowledge that the blow was likely to cause death, though he may not have had any intention to cause death or to cause such bodily injury as was likely to cause death, hence his conviction u/s 302/34 I.P.C. could not be sustained and it needs to be substituted with a conviction u/s 304, part II simpliciter. So far as the appellant Jagdish is concerned who might have given the other solitary lathi blow in the course of the quarrel on the head of Bharat Ram, which revealed no apparent inner damage, we are of the view that his conviction u/s 302/34 I.P.C. deserves to be altered to one u/s 325 I.P.C. simpliciter as he could at least be said to have intended to cause a grievous injury by giving the lathi blow to the deceased. We further think that the appropriate punishment for the appellant Radhey Shyam who appears to have given the fatal blow to the deceased Bharat Ram and who is presently 65 years in age would be a sentence of five years RI u/s 304 part II, I.P.C. together with the fine as already awarded by the trial Judge, subject to the default sentence. So far as the appellant Jagdish Prasad, who may have given the single lathi blow which was not as serious as the blow given by appellant Radhey Shyam is concerned, we think that a sentence of three years RI would be proper u/s 325 I.P.C. together with the fine as already awarded by the trial Judge, subject to the default sentence, and he is awarded the same.

15. As a result the sentence of imprisonment for life u/s 302 read with section 34 I.P.C. to both the appellants is set aside and in its place the appellants Radhey Shyam and Jagdish are convicted u/s 304, part II and u/s 325 I.P.C. respectively and sentenced as above.

16. The appellant Radhey Shyam is already in Jail. He may serve out the balance part of the sentence, in case he has not already undergone the substituted sentence, as reduced by the admissible remissions, subject to his depositing the fine awarded. The appellant Jagdish Prasad, who is on bail may be taken in custody, in case he has not already undergone the altered period of imprisonment along with the admissible remissions, for serving out the remaining sentence and he shall deposit the fine awarded. The appeals are partly allowed to the aforesaid extent.