

**(2007) 05 AHC CK 0357****Allahabad High Court****Case No:** None

Manssur and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision:** May 21, 2007**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 357
- Penal Code, 1860 (IPC) - Section 147, 149, 302, 304, 323

**Hon'ble Judges:** Vinod Prasad, J; K.S. Rakhra, J**Bench:** Division Bench**Final Decision:** Allowed**Judgement**

K.S. Rakhra, J.

Five appellants-1. Massur 2. Shiv Kuti 3. Nanku 4. Chhangu Lal and 5. Ganga have challenged the judgment and order dated 29.4.1982 passed by III Additional Sessions Judge, Allahabad, in Sessions Trial No. 264 of 1979 by which they have been convicted u/s 302/149, 323/149 and 147 IPC and sentenced to life imprisonment on the first count, six months rigorous imprisonment on the second count and one year's rigorous imprisonment on the third count.

2. The appellants and the first informant Mazharul Haq are residents of village Beli P.S. Cantt district Allahabad. Informant owned agricultural fields in his village. It is alleged that on 17.3.1978 cattle of Bachai Yadav grazed pea crop of the informant. The first informant lodged those catties in the cattle pound which annoyed persons of village Yadav community. On 18.3.1978 at 1 p.m. first informant Mazharul Haq and his brother Izharul haq were harvesting their pea crop when the catties of appellants again started denuding the crop but they were driven out by the informant and his brother who also warned appellant Massur yadav and others to take to keep a check on their catties so that they did not trespass into their fields in future. Warning was taken to be a temerity and the appellants started hurling

abuses and chased the informant and his brother to assault them. Both the victims took to their heels to save their lives. When the informant and his brother reached in the field of village Newada, Izharul Haq brother of informant was assaulted by the appellants with lathis and he fell down their sustaining lathi injuries. When the first informant and other persons from the adjoining fields tried to intervene the appellants also assaulted informant and Saddan, P.W. 5 and then left the place of incident. Informant and the witnesses found Izharul Haq dead Mazharul Haq P.W. 1 scribed the FIR and lodged it at police station Cantt, Allahabad the same day at about 14.15 hours covering a distance of 4 furlong naming all the appellants as the malefactors which FIR was registered as crime No. 39 of 1978.

3. Head Moharrir Uady singh prepared the chik FIR (Ext. Ka 5) and the GD entry (Ext. Ka 6) and Gur Dayal, Station Officer Ps Cantt district Allahabad P.W. 6 started the investigation. He recorded the statement of the informant and Saddan, P.W. 5 at the police station itself and then proceeded to the place of occurrence where he conducted inquest on the dead body of Izharul Haq and after due formalities sent it for autopsy. He also conducted spot inspection and prepared the site plan. He also collected plain and blood stained earth from the place of the incident.

4. The post mortem examination of the body of the deceased was conducted on 19.3.1978 at 2. 15 p.m. by Dr. S.N. Srivastava, P.W. 3. Who found following ante mortem injuries on the body:

1. Lacerated wound 1" x 1/4 x bone deep on the right temporal region of head 3" above the right ear.
2. Lacerated wound 1/3" x 1/4" x bone deep on the right side back of the head, 4" behind the right ear.
3. Lacerated wound 1 1/2" x 1/4 A on the top of head 6" above the right ear. It is also bone deep.
4. Lacerated wound 1- 1/3" x 1/4 x bone deep on the left side head, 3" above the left ear.
5. Lacerated wound 3/4 x 1/4 x bone deep, 1" above the injury No. 4
6. Abrasion 1/2 x 1/2 on the middle part of right collar bone,
7. Abrasion 3/4 x 1/4 on the inner part of left collar bone.
8. Contusion 2" x 1" on the top of right shoulder joint.
9. Abrasion 3/4 x 1/2" on the side of right elbow joint.
10. Abrasion 1/2" x 1/4" on the dorsum of right wrist joint.
11. Contusion 3" x 1" on the dorsum of middle of right hand.

12. Contusion 1/4" x 1/4" on the middle of right thumb 2 1/2x 1/2 on the middle right index finger.
13. Contusion 2" x 1" on the right upper arm inner side, 3" behind the right shoulder joint.
14. Multiple contusion of various sizes varying from 2" x 1/2 to 6" x 1/2 involving whole of the back.
15. Abrasion 2" x 1/2 on the top of right iliac crest bone of hip.
16. Multiple contusion 3" x 1/2" to 5" x 1/2 on the back of right thigh.
17. Multiple contusion 3" x 1/2 around the right knee joint.
18. Contusion 4" x 1/2" on the calf of the right leg middle part
19. Multiple contusion 1" x 1/2" to 2" x 1/2" on the upper part of left upper arm extending from the right shoulder joint.
20. Contusion 1" x 1/2" on the back of the left elbow joint.
21. Three contusion 3" x 1/2" on the front of the left thigh connecting each other.
22. Abrasion 1/2" x 1/2" on the top of left knee joint.
23. Contusion 2" x 1/2" on the middle part of back of right leg.

5. On the internal examination doctor found fissured fracture of the left temporal and parietal bones and depressed fracture of right temporal and parietal bones and Brain was lacerated on the right side. In the opinion of the doctor death had occurred about one day ago because of shock and haemorrhage due to head injury.
6. The two injured persons Mazraul Haq P.W. 1 and Saddan P.W. 5 were medically examined on 18.3.1978 by Dr. J.K. Satsangi PW 4 who found following injuries on the person of Mazraul Haq:
  1. Braided contusion 3" x 1" on the outer aspect of left elbow joint.
  2. Contusion 4" x 1/2" x 1" on the lower 1/3rd portion of back of right arm just above the right elbow joint.
  3. Abrasion 1" x 1/2" on the left and sup. Iliac spine.
  4. Abrasion 1" x 1/2" on the left loin region 1" above the injury No. 3.
  5. Multiple abrasion 1 1/2" x 1" on the outer aspect of left knee joint.
  6. Traumatic swelling 1/2" x 1/2" on the middle joint of right middle finger.
7. Saddan PW 5, another injured, had following injuries on his person:
  1. Sbrasion 3/4" 1/2" on end of right index finger

2. Sbrasion 3/4" x 1/2" on the outer aspect of lower 1/3rd of right leg.

8. In the opinion of the doctor injuries of both these persons were fresh and injury Nos. 1 to 6 of Mazahrul Haq were caused by blunt object and remaining injuries of both the injured were caused by friction and the injuries of Saddan were simple in nature and caused by friction.

9. On the basisi of above material the Investigating Officer after completing the investigation submitted charge sheet against all the five appellants.

10. In the trial seven witnesses were examined by the prosecution to prove the charge against the appellants but no defence evidence was adduced by the appellants.

11. Saghir Ahmad PW 7 was the cattle pound incharge at Beli Road, Allahabad at the relevant time. He has deposed in the trial court that on 17.3.1978 one cow was lodged in the cattle pound at the instance of Mazharul Haq of village Beli which lateron was released in favour of Bachai of village Beli, He further stated that he knew Mazharul Haq and Bachai from before as Bachai's catties were frequently lodged at cattle pound and quite often he used to come to cattle pound for getting them released. Similarly, he knew Mazharul Haq because quite often he used to come to cattle pound for lodging stray cattle caught by him. Rest of the witnesses examined in the trial by the prosecution relate to the incident dated 18.3.1978

12. P.W. 1 Mazharul Haq, P.W. 2 Nasim Ahmad and P.W. 5 Saddan are the witnesses of fact who have fully supported the prosecution story. Mazharul Haq and Saddan have further deposed that they had received injuries in this incident. From the testimony of all these witnesses, date, time, place of occurrence, its origin and the manner of assault as claimed by the prosecution as been fully established. There are no material contradiction and inconsistencies so as to make their deposition doubtful. Mazharul Haq P.W. and Saddan P.W. 5 are injured witnesses whose presence at the spot cannot be doubted. The testimony of these witnesses has been fully supported by the doctor and the investigating Officer who had found bloodstained earth at the place of occurrence and had also found standing crop, trampled and crushed. Nature and number of injuries on the person of Mazharul Haq and Saddan also lends credence to the prosecution version. The nature and number of injuries suffered by the deceased also show that he was badly beaten by the appellants and he died on account of sustained injuries. All the witnesses of fact have been cross examined at length in the trial but nothing material could be culled out by the defence to render their testimony unreliable.

13. Sri P.N. Mishra, learned Counsel for the appellants although argued that the appellants are innocent but his main emphasis was on the fact that on the circumstances mentioned above the offence of the appellants will not fall u/s 302 IPC, In this connection he placed reliance on the case of Nadodli Jayaraman and Ors. v. State of Tamil Nadu 1992 All C R 479, Bhima alias Bhimrao Sida Kamble and Ors. v.

State of Maharashtra 202 (3) All C.R. 2735 and Chander Pal v. State of Haryana 2004 C.L.J. 285. The argument of Sri Misra is that the incident took place at the spur of moment when cattle of the accused party trespassed into the field of the complainant. There was no prior preparation or meditation by the accused persons for making any assault on any one. They were only carrying lathis in their hands and carrying of lathis by the villagers to their fields or for controlling their cattle is a common practice. He pointed out that the appellants Shivkuti and Massur (father and son) Nanku and Chhangu (real brothers) and appellant Ganga do not belong to one family. There was therefore no reason for them to form an unlawful assembly with the common object to cause death of Izharul Haq. He further argued that some of the injuries caused to the deceased were on the vital part of the body i.e. on the head and those injuries could be responsible for causing the death or were sufficient in ordinary course of nature to cause death but there is nothing in the evidence on record to show as to which injury was caused by which of the appellant. Out of 23 injuries suffered by the deceased most of the injuries were on non vital part of the body. Thus from the evidence and the medical report only the offence punishable u/s 325 IPC or Section 304 Part II IPC is made out and no offence u/s 302 IPC is proved and therefore the conviction of the appellants for offence u/s 302 IPC is bad in law.

14. Replying the argument, learned A.G.A. has argued that victim has been given as many as 23 lathi injuries. Force of lathi blow was so much that they had caused fissured fracture of the left temporal and parietal bone and depressed fracture of the right temporal and parietal bone. The brain was also lacerated. According to him the intention to cause of death can be inferred from these circumstances and injuries.

15. We have given our thoughtful consideration to the argument raised by the two sides. A perusal of the evidence in the trial shows that eye witnesses have not attributed any particular injury on the deceased to any of the appellants. The injuries suffered by the deceased on his head resulting into fissured fracture of the left temporal and parietal bone and depressed fracture of the right temporal and parietal bone are such on the basis of which it can be inferred that the author of these injuries had the intention to cause death or at least he intended to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. It could also be inferred that persons causing such injuries knew that they were so imminently dangerous that in all probabilities they would cause death or such bodily injury as is likely to cause death. The author of these injuries could therefore be held guilty of committing murder but as stated earlier the evidence adduced in this case does not establish as to who has caused the aforesaid injuries to the deceased.

16. The circumstances relating to the case clearly indicates that there was no motive to commit the murder. The incident occurred when some altercation commenced and abuses were exchanged at the spur of moment and under the heat of passion

the appellants chased the complainant and his brother and assaulted them. There was no prior preparation and no cutting weapon or fire arm were used.

17. From such facts we are of the opinion that the appellants cannot be held liable vicariously for the offence of murder in this case. There was no common intention or common object to cause death of any one. It appears that since the complainant's side had lodged cattle of the accused persons in cattle pound the appellants were annoyed and therefore, they wanted to chastise the informant and his brother so that they may not repeat their action in future. In Nanodi case (supra) the Apex court has observed that where a large number of persons are involved and injuries are caused to the prosecution witnesses and others, common intention could be determined from the nature of injuries, commission of incident and nature of weapon used to cause injuries, besides other factors relating to the case.

18. In the present case out of 23 injuries caused to Izharul Haq by lathi only five injuries were on the head and all remaining injuries were simple in nature and on non-vital part of the body. The five injuries on the head of the deceased can not be attributed to each of the appellant and there is no evidence to it. Thus we have not found any evidence as to who amongst five accused were the author of those injuries and therefore find ourselves in disagreement with the trial court that the offence of murder is proved against the appellants. However, since all the appellants attacked the deceased and the injured with lathi we are of the view that the appellants could be held guilty of culpable homicide not amounting to murder for causing such bodily injury as were likely to cause death. The case, in our opinion, would therefore fall u/s 304 part I, IPC and not under 302 IPC and we hold all the appellants guilty of the said offence with the aid of Section 149 IPC for causing unintentional death of Izaharul Haq. The appellants have been rightly held guilty and convicted u/s 323/149 IPC for causing injuries to Saddan and complainant Mazharul Haq. Their conviction u/s 147 IPC also appears to be justified.

19. Before parting with the appeal we think it proper that the family members or the dependent of Izharul Haq be paid adequate compensation by the accused persons, in accordance with the provisions of Section 357 Cr.P.C.

20. Now coming to the sentence to be awarded to the appellants. From the perusal of statement u/s 313 Cr.P.C. we find that at the time of the occurrence Appellant Massure was 45 years Changu Lal was 60 years, Sikoti was aged about 20 years, Nankoo was aged about 47 years and ganga was aged about 40 years. The incident occurred in the year 1981. Adding 26 years to it the appellants Massur will be now 72 years, Shiv Kuti will be 46 years, Nankoo 73, Changu 86 years and ganga will be 66 years. This was their first offence and they had not criminal history. In such a view and keeping the circumstances of the case we are of the opinion that a sentence of seven years R1 with fine of Rs. 25000/- to each of the appellants u/s 304 part I, IPC will be a proper sentence .

21. Resultantly this appeal is partly allowed. While convictions and sentences of the appellants, u/s 323/149 and 147 IPC recorded by the trial court through the impugned judgment is hereby confirmed but their conviction u/s 302/149 IPC and sentence of life imprisonment are set aside. Instead they are held to be guilty u/s 304 part I read with Section 149 IPC and each of them is sentenced to seven years rigorous imprisonment with fine of Rs. 25000/- In default of payment of fine, each of them shall further undergo rigorous imprisonment for one year. The entire amount of fine shall be paid to the wife and children of the deceased, if any In their absence, it shall be paid to the legally entitled person of his family. Appellants are on bail. They shall immediately surrender. The trial court shall take immediate steps for their arrest to send them to jail to serve out sentence awarded by this judgment. All the sentences awarded shall run concurrently.

22. A certified copy of this judgment be sent to the trial court which shall ensure execution of sentence and the orders passed in this appeal against the appellants. The trial court shall also send a copy of this judgment to the complainant for his intimation.

23. Appellants are allowed two months time to deposit the fine awarded by this judgment.