(2000) 09 AHC CK 0157

Allahabad High Court

Case No: Criminal Appeal No. 2608 of 1980

Badalua and Aganua (In Jail)		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Sept. 27, 2000

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 304, 323, 34

Citation: (2000) 3 ACR 2628

Hon'ble Judges: S.K. Agrawal, J; J.C. Gupta, J

Bench: Division Bench

Advocate: Sheo Kumar Singh and S.P. Singh, for the Appellant; A.G.A., for the Respondent

Final Decision: Allowed

Judgement

J.C. Gupta, J.

By means of this appeal, order and judgment dated 27.10.1980 passed by the then Session Judge, Banda in Sessions Trial No. 43 of 1980 has been challenged whereby Appellant No. 1 Badalua has been convicted and sentenced to imprisonment for life u/s 302 and to six months R.I. u/s 323, I.P.C. read with Section 34, I.P.C. while Appellant No. 2 Anganua has been convicted u/s 323, I.P.C. read with Section 34, I.P.C. and sentenced to six months R.I.. Chhota accused who was also sentenced to six months R.I. u/s 323, I.P.C. read with Section 34, I.P.C. has not preferred any appeal, while Smt. Sukhdeiya mother of Badalua Appellant has been given benefit of doubt and accordingly acquitted.

2. The prosecution case in brief is that on 6.3.1978 at about 4 p.m. Prem Chandra P.W. 5 son of deceased Jag Mohan, went to see his field wherein gram crop was standing. At about 6 p.m. when he was returning home, he noticed that Badalua Appellant No. 1 was uprooting plants of gram from his field. He protested but Badalua continued his mission and took away a bundle of uprooted crop. Prem Chandra gave information of this incident

to his father Jag Mohan. Thereafter Jag Mohan and Prem Chandra went to the house of Badalua. Chunkai and Jagdeo followed them. Badalua was not found in his house but was found present in a nearby grave-yard. He was having a "barchi" with him. When Jag Mohan asked Badalua why he had uprooted his gram crop, Badalua started assaulting Jag Mohan with "barchi". In the meantime, Chunkai and Jagdeo also arrived there. On a call given by Badalua, the other three accused Anganua, Chhota and Smt. Sukhdeiya also came there. Anganua and Chhota accused were armed with lathi while Smt. Sukhdeiya possessed an axe. These three accused assaulted Chunkai with their respective weapons. Jagdeo was also assaulted by Anganua and Chhota with lathi. Jag Mohan met an instantaneous death, Brij Bhushan and a number of villagers were attracted to the scene of occurrence. Seeing them arriving accused persons ran away. Dead body of Jag Mohan was then removed to his house and since Jagdeo had also become unconscious, he too was brought to the residence. On the next morning, injured Chunkai P.W. 4 wrote down first information report, Ex. Ka-2 and the same was sent to police station Marka through village Chaukidar Imami. Prem Chandra P.W. 5 also accompanied Imami Chaukidar.

3. Injuries of Chunkai P.W. 4 were examined by Dr. A. Nagaich, Medical Officer, Baberu Primary Health Centre on 8.3.1978 at 1.30 a.m. and following injuries were found:

1. Incised wound 4.5 cm. ? 1 cm. ? scalp deep on the right side skull, 6 cm. above the right eye brow and 3 cm. away from the midline.

2. Abrasion 2.5 cm. ? 1 cm. on the left side of skull, 11 cm. from left eye brow and 1 cm. away from the midline.

3. Contusion 18 cm. ? 10 cm. on the posterior part of left shoulder and left upper arm, 15 cm. above left elbow joint.

4. Abrasion 4 cm. ? 1/2 cm. on the back of right hand, 6 cm. below right wrist.

5. Contusion 6 cm. ? 2 cm. on the front of left thigh, 17 cm. above the left knee.

6. Contusion (Traumatic Swelling) over the left foot extending from the ankle joint upto the toes.

7. Contusion 18 cm. ? 5 cm. over the front of right leg, 5 cm. above the right ankle.

8. Contusion 8 cm. ? 2.5 cm. on the back of right side, 10 cm. away from the vertebral column, 2 cm. below the top of the right shoulder.

9. Contusion 15 cm. ? 7 cm. on the lower part of back right side, 20 cm. below injury No. 8.

Injuries Nos. 1, 6 and 7 were kept under observation and referred to District Banda for X-ray of skull, right and left legs and foot. Injuries Nos. 2, 3, 4, 5, 8 and 9 were simple. Injury No. 1 was caused by sharp edged weapon and all other injuries were of blunt weapon. Duration was within two days. Injury report of Chunkai is Ex. Ka-12.

4. The same doctor also examined injuries of Jagdeo on 8.3.1978 at 2.30 a.m. and found following injuries:

1. Contusion (Traumatic Swelling) 5 cm. ? 2 cm. on the posterior part of the skull in midline 25 cm. away from the bridge of the nose.

2. Abraided contusion 6 cm. ? 4 cm. on the front of right knee cap.

3. Abrasion 3 cm. ? 1 cm. on the front of left knee cap.

4. Contusion with blackening around left eye extending from upper eye lid upto 4 cm. from the lower eye lid.

5. Contusion 4.5 cm. ? 3 cm. on the left side of the chest upper part, 5 cm. from the left shoulder.

6. Contusion 11 cm. ? 3.5 cm. on the left side of the chest extending from the top of the shoulder upto 4 cm. below the left clavicular joint outer side.

7. Contusion 7 cm. ? 3 cm. on the back upper part left side 5 cm. away from the left shoulder.

5. Dr. K. L. Agrawal, P.W. 1 conducted post-mortem examination on the dead body of Jag Mohan on 8.3.1978 at 10.30 a.m. Following ante-mortem injuries were noticed:

1. Incised wound 1-1/2 cm. ? 1 cm. ? whole thickness of right forearm middle medial side, margins were clean cut.

2. Incised wound 1-1/4 cm. ? 1 cm., right forearm middle part outer aspect, margins clean cut, communicating with injury No. 1.

3. Punctured wound 1-1/2 cm. ? 1 cm. ? chest cavity deep just above right axilla, margins clean cut vertical.

4. Incised wound 1 cm. ? 0.5 cm. ? muscle deep right side of lower chest, 9 cm. below the right nipple towards left.

5. Incised wound 1 cm. ? 0.5 cm. ? muscle deep, 1-1/2 cm. left from injury No. 4 towards left, margins were clean cut.

6. Incised wound 1 cm. ? 0.5 cm. ? muscle deep just left from infra sternal notch, margins clean cut.

7. Incised wound 0.5 cm. ? 0.3 cm. ? muscle deep, 6 cm. below to the right nipple towards right from right, margins were clean cut.

In the internal examination clotted blood was found present in right side of chest wall between muscles and ribs. Pleura was perforated at two places on right side. Similarly right lung was perforated at two places. Heart was empty. Chest cavity contained about one litre of free and clotted blood. Stomach contained about 50 gms. of undigested food while small intestines and large intestines contained facecal matter. In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante-mortem injuries. Post-mortem report is Ex. Ka-1, Dr. Agrawal opined that ante-mortem injuries could be caused by "barchi".

6. Mohd. Kamil P.W. 8 was Head Moharrir at police station Marka. On the basis of written report of Chunkai he prepared check F.I.R., Ex. Ka-6 and registered the case in General Diary at serial No. 9, whose copy is Ex. Ka-14. S.I. Ram Magan Singh, P.W. 6, was the Station Officer. He took up investigation immediately after the case was registered. He recorded the statements of Chaukidar Imami and Prem Chandra, the first informant. Thereafter he proceeded to the scene of occurrence. He found the dead body of Jag Mohan lying in the courtyard of the house of Chunkai. He conducted inquest and prepared panchayatnama and other papers and then sent the dead body for post-mortem examination with constable Ramesh Singh P.W. 2. The investigating Officer also prepared site plan Ex. Ka-8 after making inspection of the place of occurrence. He also collected blood stained and plain earth in separate containers and prepared their memo Ex. Ka-9. He then interrogated other witnesses and after completing the investigation on 5.4.1978, submitted charge-sheet against all the accused persons.

7. On behalf of prosecution, 10 witnesses were examined. They are (1) P.W. 1 Dr. K. L. Agarwal-he proved the post-mortem report of Jag Mohan, (2) P.W. 2 Constable Ramesh Singh-he escorted the dead body of Jag Mohan to mortuary for post-mortem examination, (3) P.W. 3 Constable Uma Nath Tewari stated that on 23.3.1978, he had brought three sealed bundles from police station to Sadar Malkhana and then on 5.4.1978 carried them to the office of C.M.O., put them in a sealed wooden box, and thereafter carried the sealed box to Chemical Examiner, (4) P.W. 4 Chunkai is the injured and first informant. He is uncle of deceased Jag Mohan. He supported the prosecution case and narrated the entire incident, (5) P.W. 5 Prem Chandra is son of the deceased, he is also a witness of fact. He gave out the entire details of the prosecution story and the manner of incident, (6) P.W. 6 is Station Officer Ram Magan Singh who had investigated the case and submitted charge-sheet, (7) P.W. 7 Dr. A. Nagaich is the Medical Officer who had examined the injuries of Chunkai and Jagdeo. He specifically stated that injuries of both the injured could be caused on 6.3.1978, (8) P.W. 8 S.I. Mohd. Kamil was posted at P.S. Marka. He proved the check F.I.R. and the relevant general diary entry. (a) P.W. 9, Satya

Narain was a clerk in the C.M.O. office and (10) P.W. 10 Constable Narbada Prasad Tewari was posted in Sadar Malkhana. The last two witnesses were produced to complete the link evidence regarding the case property.

8. Accused persons in their statements recorded u/s 313, Cr. P.C. denied the prosecution allegations. Their case is of total denial and of false implication on account of enmity. They produced Jag Mohan D.W. 1 in defence who stated that on the night of occurrence at about 10-10.30 p.m., he came out of his house on hearing cries from the side of deceased''s house and proceeded to the graveyard from where cries continued to be coming and on reaching there, he found the deceased lying dead. He stated that Jagdeo and Chunkai were also there and they had injuries on their persons. He further stated that when he inquired from Jagdeo and Chunkai about the assailants, they told him that they were not able to identify them.

9. Placing reliance on the evidence of the two witnesses of the fact namely ; P.W. 4 Chunkai and P.W. 5 Prem Chandra, the learned Sessions Judge found Appellant Badalua guilty u/s 302, I.P.C. and also u/s 323 read with Section 34, I.P.C. and accused Anganua and Chhota u/s 323 read with Section 34, I.P.C. However Smt. Sukhdeiya was extended benefit of doubt on the ground that it was doubtful that Smt. Sukhdeiya participated in the incident. Aggrieved by the said order only Badalua and Aganua have preferred this appeal. No appeal has been filed by Chhota nor State has filed any appeal against the order acquitting Smt. Sukhdeiya.

10. Learned Counsel for the Appellants and the learned A.G.A. for the State were heard at length.

11. Learned Counsel for the Appellants submitted that though presence of injured Chunkai P.W. 4 at the scene of occurrence could not be doubted but his evidence is not truthful inasmuch as he has not given true account of the incident. It was further submitted that time of incident was highly doubtful and in all probability the same occurred in darkness as a result of which assailants could not be identified. It was also submitted that the ocular version of the incident that all the injuries to deceased Jag Mohan were inflicted by Badalua Appellant with ''barchi'' is not supported by medical evidence, which also shows that the weapons which were actually used in the incident could not be noticed by the injured witnesses on account of darkness prevailing at the time of incident. It was also argued that first information report is inordinately delayed. Lastly it was argued that at any rate case would not fall u/s 302, I.P.C. and at best it could fall within the ambit of Section 304, Part II of the Indian Penal Code. On the other hand learned Additional Government Advocate contended that the evidence of the two eye-witnesses namely P.W. 4 Chunkai and P.W. 5 Prem Chandra is wholly reliable and trustworthy and there is no such discrepancy in their evidence as has been pointed out by the learned Counsel for the Appellants.

12. So far as the factum of death of Jag Mohan due to ante-mortem injuries, as noted in the post-mortem report, is concerned, the same has neither been disputed nor challenged before us by the Appellant''s counsel. It also could not be disputed that Chunkai P.W. 4 and Jagdeo P.W. 5 had also received injuries in the same incident in which Jag Mohan was assaulted. Even otherwise also, the medical evidence, brought on record through the statement of Dr. K. L. Agrawal P.W. 1 who conducted post-mortem on the dead body of Jag Mohan and Dr. A. Nagaich who had medically examined the injuries of Chunkai and Jagdeo, fully established that in the evening of 6.3.1978 Jag Mohan, Chunkai and Jagdeo had been assaulted and injuries were caused to them, Jag Mohan succumbed to his injuries immediately.

13. We have now to examine whether incident had occurred during day time at about sun set on 6.3.1978 or occurred much later when darkness had already set and thus rendering the identification of the assailants highly improbable. At the outset, it may be mentioned that Jagdeo who had received injuries on his person during the course of incident died before his statement could be recorded at the trial. Brij Bhushan who was cited as an eye-witness in the first information report was discharged by the prosecution on the ground of his having been won over by the accused persons as was also stated by Chunkai P.W. 4 in his statement given at the trial. We are thus left with the evidence of two eye-witnesses, namely, Chunkai, P.W. 4, and Prem Chandra P.W. 5. Chunkai P.W. 4 is the first informant and uncle of deceased Jag Mohan while Prem Chandra, P.W. 5, is son of the deceased. Learned Counsel appearing for the Appellants strenuously urged before us that the evidence of these witnesses being presumptive in nature is unreliable and, therefore, this Court should come to the conclusion that the prosecution has not been able to establish its case beyond reasonable doubt against Appellants. In his endeavour to prove the unreliability of these witnesses, the learned Counsel took us through their entire evidence and after scrutinizing their evidence with all care and caution, we find that nothing has been brought out in their cross-examination on the basis of which their testimonies could be discarded as unreliable. P.W. 4 Chunkai, though related to the deceased, had himself sustained injuries in the incident. His injuries were examined by Dr. A. Nagaich, P.W. 7, on 8.3.1978 at 1.30 a.m. and altogether nine injuries were found on his person. Chunkai stated that on the day of occurrence, Prem Chandra informed deceased Jag Mohan that Badalua had uprooted and stolen their gram crop. Thereafter Jag Mohan along with Prem Chandra went towards the house of Badalua Appellant. He (Chunkai) and his brother Jagdeo also followed them and when they reached near the courtyard which is to the north-east of the house of Badalua accused, they saw the incident wherein deceased was assaulted by Badalua accused with a ''barchi''. On a call given by Badalua, other three accused also arrived there. This witness further stated that he was assaulted by Smt. Sukhdeiya accused with an axe and by Chhota and Anganua with lathi and Jagdeo was assaulted by Chhota and Anganua accused with lathi. He proved F.I.R., Ex. Ka-2 to be in his own hand writing and stated that the same was sent through Prem Chandra and village Chauikidar Imami on the next morning to police station for being lodged there. Nothing could be brought out in his

statement to show that he was in any way inimical to the accused persons.

14. P.W. 5, Prem Chandra, is son of the deceased. He fully corroborated the prosecution story and narrated the entire details of occurrence. According to him also deceased Jag Mohan was assaulted with "barchi" by Badalua accused while Jagdeo and Chunkai were assaulted by other accused persons. Against him also no animosity with the accused could be brought on record.

15. We, therefore, find that both the aforesaid witnesses were independent having no grudge or animus against any of the Appellants. Out of them Chunkai P.W. 4 himself received injuries during the course of incident and therefore, his presence at the scene of occurrence cannot be doubted. He has presented a graphic picture of the assault made over him, Jag Mohan and Jagdeo. Merely because he and P.W. 5 Prem Chandra are near relatives of the deceased, their testimony cannot be discarded, especially when it is materially corroborated not only by medical evidence but also by the circumstances appearing in the case. There is absolutely no reason for these witnesses to falsely implicate these accused persons by sparing the real culprits.

16. Badalua Appellant alone is said to have assaulted the deceased with a "barchi". It has come in the cross-examination of P.W. 4 Chunkai that the "barchi" which Appellant Badalua used in the offence had both its edges sharp. Post-mortem report of Jag Mohan shows that in all seven injuries were found on the deceased. Injury No. 3 was a punctured wound while Ors. were incised wounds. Dr. K. L. Agrawal stated that injuries of the deceased could be of a "barchi". He further stated that injuries Nos. 1, 2 and 3 were inflicted in a piercing manner. It is admitted by P.W. 4 Chunkai and P.W. 5 Prem Chandra that Badalua Appellant had given a number of "barchi" blows on Jag Mohan. Since the blade of the "barchi" had sharp edges, it could cause both incised wounds as well as punctured wounds. Incised wound would be caused when "barchi" falls horizontally like a lathi and punctured wound if the same is plied like a spear and pierced into. Chunkai P.W. 4 had blunt weapon injuries except injury No. 1 and Jagdeo also sustained blunt weapon injuries which according to the prosecution case were caused by other Appellants, one of them was armed with an axe and rest with lathi. Although Smt. Sukhdeiya who is said to be armed with an axe has been acquitted by the trial court by giving her benefit of doubt but her acquittal, in our opinion, does not adversely affect the prosecution case as far as the Appellant are concerned. We are further of the view that her acquittal was not justified but as State has not preferred any appeal against her acquittal, we cannot convict her. In any view of the matter, as many as three persons had assaulted Jagdeo and Chunkai and the number of injuries found on the two injured persons do suggest that they were possibly caused by atleast three persons. It was argued by the Appellants" counsel that injury No. 1 of Chunkai, P.W. 4 was an incised injury and if he was assaulted only by those who possessed lathi, this injury remained unexplained. As per the statement of this witness and P.W. 5 Prem Chandra, mother of Badalua had inflicted one blow on his head by kulhari (axe), therefore, it cannot be said that the aforesaid injury has not been explained. In any view of the matter, the said injury

was on head. It could be caused by a lathi also but the doctor examining the injuries might have described this injury as an incised wound instead of lacerated wound. Thus, after examining this question from any point or angle, we do not find any discrepancy between the ocular testimony and the medical evidence.

17. It was next submitted by learned Counsel for the Appellants that though incident is alleged to have occurred at about sun set on 6.3.1978, medical examination of the two injured was made on 8.3.1978 at 1.30 a.m. and 2.30 a.m. and this late medical examination supports the defence suggestion that the incident in all probability had occurred in darkness and not at the time as alleged by the prosecution. The injuries of the two injured were examined at Primary Health Centre, Baberu, district Banda. Nothing has been brought on record as to what was the distance between the village of incident and the dispensary nor the witnesses were cross-examined to explain the reason of their delayed medical examination. It is of common experience that though persons reach hospital in time but due to non-availability of doctor, their medical examination is postponed. Even Dr. A. Nagaich, P.W. 7, was not asked as to whether he remained present in the hospital on 7.3.1978 throughout the day. In the absence of any effective cross-examination on the point, we are unable to accept this submission of the learned Counsel particularly when the witnesses had no axe to grind against any of the Appellants.

18. Lastly it was submitted by the learned Counsel for the Appellants that the first information report was lodged with an inordinate delay and that also supports the defence argument that the incident had occurred late in the night in darkness. The distance of police station from the scene of occurrence was seven miles. The first information report was lodged in the morning at 9.10 a.m. It is the case of prosecution that in the incident Jag Mohan died on the spot while Jagdeo was seriously injured. Chunkai himself suffered a number of injuries and they remained at their house for whole of the night. In the F.I.R., it was specifically mentioned by Chunkai that on account of the injuries and due to fear of the accused persons, report could not be lodged in the night and the same was scribed by him on next morning. Since the police station was removed by seven miles and journey was to be covered on foot as stated by Prem Chandra, there was nothing unnatural if the F.I.R. was lodged on the next morning. As already pointed out above there was no previous enmity of the first informant with the Appellants. Thus, there could be no plausible reason for the first informant in introducing the names of the Appellants sparing the real assailants. Further the prosecution was going to gain nothing in preponing the time of incident because as per the prosecution evidence, the incident occurred in village abadi near the house of Appellant Badalua and looking to the nature and seat of injuries sustained by the deceased and the two injured witnesses, it is apparent that the assailants must have come in close contact of the deceased and injured witness. Since a number of injuries on three persons were inflicted, the assault must have taken sometime and, therefore, there could not have been any difficulty for the witnesses especially the injured ones to identify the assailants who belonged to their own village

and were well known to them.

19. On a careful analysis of the evidence on record, we uphold the finding of learned Sessions Judge that the prosecution case against the Appellants has been proved beyond any shadow of doubt.

20. Now the question arises for what offence or offences the Appellants could be convicted.

21. As far as Appellant Badalua is concerned, he alone is said to have assaulted the deceased with a "barchi". He inflicted as many as seven injuries out of which only injury No. 3 was chest cavity deep and the first two injuries which according to the doctor were caused in a piercing manner were on right forearm. All other injuries were muscle deep. No opinion was sought from Dr. K. L. Agrawal that injuries found on the deceased cumulatively were sufficient to cause death in ordinary course. It is further the case of prosecution that the deceased and Prem Chandra P.W. 5 had gone to Badalua"s house to accost him as he had stolen gram crops from his field but he was not found there. They did not come back home but went out to search Badalua who met them near the graveyard. In this background, the possibility of some hot words having been exchanged between the deceased and the Appellant Badalua is not ruled out and there seems to be force in the submission of the learned Counsel for the Appellants that something must have been uttered by the deceased which infuriated Appellant Badalua to take law into his own hands. There was no prior animosity and incident occurred at a spur of moment without any premeditation. Only one injury was chest cavity deep and Ors. were either simple or were on non-vital parts of the body.

22. In these circumstances, it would not be safe to hold Appellant Badalua guilty u/s 302, I.P.C simpliciter. He is, therefore, found guilty and convicted u/s 304, Part I, I.P.C. Considering the facts and circumstances and having regard to the fact that the incident had occurred about 22 years ago, we feel that a sentence of 7 years rigorous imprisonment and a fine of rupees 5,000 shall meet the ends of justice. In default of payment of fine, Appellant Badalua shall undergo further R.I. for one year. His conviction and sentence of six months R.I. u/s 323 read with Section 34, I.P.C. are, however, maintained. Both the sentences shall run concurrently. He is on bail. He shall be taken into custody forthwith to serve out the sentences as modified by this Court.

23. So far as Appellant Anganua is concerned, he has been convicted and sentenced to six months R.I. only u/s 323 read with Section 34, I.P.C. It may not be out of place to mention here that no charge u/s 302/34, I.P.C. was framed against this Appellant nor he was tried for the said offence. We uphold his conviction u/s 323 read with Section 34, I.P.C. This Appellant was aged about 34 years when his statement in the trial court was recorded. With the passage of time he must be of about 54-55 years of age now. It would be thus not proper to send him to jail again after a long lapse of about 22 years for his having caused simple injuries to two injured persons. Having regard to the facts and

circumstances, we feel that a sentence of fine of Rs. 2,500 will be a just and proper sentence and we impose that sentence upon him. He is allowed three months time to deposit fine in the trial court, failing which he shall be taken into custody to serve out the sentence as has been awarded by the learned Sessions Judge.

Appeals of both the Appellants are accordingly decided.

Let a copy of this judgment be sent to C.J.M., concerned for compliance.