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**(1998) 03 AHC CK 0148**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 448 of 1980

Ramharakh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** March 4, 1998

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 300, 302

**Citation:** (1999) CriLJ 3001

**Hon'ble Judges:** K.D. Shahi, J; G. Malaviya, J

**Bench:** Division Bench

**Advocate:** J.S. Sanger, I.N. Mulla and Deepak Singh, for the Appellant; A.G.A., for the Respondent

**Final Decision:** Dismissed

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**Judgement**

K.D. Shahi, J.

This appeal has been filed against the judgment and order dated 7-3-1980 passed by Shri G.D. Dubey, the then I Additional District and Sessions Judge, Azamgarh in Sessions Trial No. 359 of 1977 whereby appellants Ram Harakh, Maniram and Ram Dwar have been convicted u/s 148, I.P.C. and sentenced to two years" R.I. and appellants Musafir, Shobhnath, Ram Karau, Shriram, Sui ajbali and Raja have been convicted u/s 147, I.P.C. and sentenced to one year"s R.I. They have also been convicted u/s 302 read with Section 149, I.P.C. and sentenced to imprisonment for life. They have further been convicted under Sections 326, 324 and 323 read with Section 149, I.P.C. and sentenced to five years" R.I., one year"s R.I. and six months" R.I. respectively. All the sentences were directed to run concurrently.

2. In brief, the case of the prosecution is that on 1-5-1976 at 3.00 p.m. Malak (since deceased) and the father of the informant Banwari were sitting in the Usari and were talking. In the meantime, accused Ram Harakh armed with Adhdha. Ram

Dawar armed with gun, Mani Ram armed with Gandasa. Musafir. Shobh Nath, Ram Karan, Raja, Shriram and Suryabali armed with lathis came and exhorted that Malak should be killed Dawar fired by his gun which hit Banwari and Malak. Lal Chand son of Malak and his wife came to save Malak and they were also assaulted. Banwari was hospitalised and Malak died. It is alleged that Darbari, Pawaru, Shyamdhari, Ramker etc. had seen the occurrence. The notice of the occurrence is said to be old enmity between accused Ram Harakh and deceased Malaki

3. It is alleged in the F.I.R. that the informant went to Police Station, Gambhirpur, but no report was lodged. He took the victims to the Sadar Hospital and on 2-5-1976 at 8.30 p.m. the F.I.R. was lodged at police station Kotwali. The case was transferred to Police Station, Gambhirpur and on 3-5-1976 at 20.35 p.m. (sic) the case was registered.

4. The Investigating Officer investigated the case, prepared the inquest report and other police papers and after investigation was complete, he submitted the charge-sheet against all the accused persons.

5. Lal Chand was medically examined by Dr. P. Sarangi on 1-5-1976 at 11.15 p.m. He had got one lacerated wound at the left palm.

6. Banwari was also medically examined by Dr. P. Sarangi on 1-5-1976 at 10.25 p.m. The doctor had found the following injuries on the person of Banwari:--

1. Multiple fire-arm wound 1/10" x 1/10" skin deep scattered within a radius of 5" at the middle of the head and face (left side).

2. Abrasion horizontally placed 1" x 1/10" on the left cheek 1/2" below the lower eye-lid, left side.

3. Multiple fire-arm wound 1/10" x 1/10" x skin deep at the front and middle of left ear.

On X-ray the injury of Banwari in his left eye caused by gunshot was found to be grievous.

7. Smt. Dhanraji was medically examined by Dr. C.K. Gupta on 2-5-1976 at 3.00 p.m. She had got the following injuries :--

1. Contusion 8" x 1" x oblique on the left side of chest statutory from left shoulder joint to Rt. side of chest up to level of Rt. breast reddish.

2. Traumatic swelling 2.5" x 1" on the back of Rt. fore-arm 2-1/2" above Rt. wrist joint.

3. Contusion 1.5" x 1/2" oblique on the Rt. back near the lower end of scapula.

8. The post-mortem examination on the body of deceased Malak was done on 2-5-1976 by Dr. S.N. Rai. The doctor had found the following ante mortem injuries on

the person of Malak :--

1. Incised wound 1/2" x 1/10" x skin deep upper 1/3rd of left fore-arm, 3" below Lt. elbow it ant. aspect margin clear.
2. Abrasion 7/10" x 3/10" on left fore-arm 4- 1/2" below the Lt. elbow jt.
3. Abrasion 4/10" x 2/10" on Rt. cheek 1- 1/2" below Rt. lower eye lid.
4. Abrasion 1/10" x 1/10" x 1-1/2" medial (inner) to right lobule of ear.
5. Abrasion 2/10" x 4/10" on right face 1 -1/2" medial (inner) to right lobule of ear.
6. Lacerated wound 1/2" x 2/10" on root of right ear (antero aspect).
7. Abrasion on back of neck (1/2" x 2/10") 1" behind lobule of right ear.
8. Abrasion 3/10" on right shoulder joint.
9. Lacerated wound 1" x 4/10" x muscle deep on anterior aspect of abdomen (left side) 3-1/2" lateral to umbilicus, margins irregular.

On internal examination, the doctor found the spleen ruptured.

9. The injuries of Malak indicate that injury No. 1 was incised wound. Injury No. 2 was abrasion on the left fore-arm. Injury No. 3 was abrasion on right cheek. Injury No. 4 was also abrasion on lobule of ear. Injury No. 5 was also abrasion on lobule of ear. Injury No. 6 was lacerated wound on the root of right ear. Injury No. 7 was also abrasion on back of neck 1" behind lobule of right ear. Injury No. 8 was abrasion on right shoulder joint. Injury No. 9 was lacerated wound muscle deep only on the anterior aspect of the abdomen. Nothing abnormal was detected on internal examination. The doctor found only the spleen ruptured which was enlarged.

10. The above discussion of the nature and extent of sheet of injury will show that out of nine injuries six were only abrasions. Two injuries were lacerated wounds and one was incised wound only skin deep. The injuries were either at the hand or at the ear. There was only one lacerated wound at the abdomen but it was only muscle deep. No internal damage appears to have been caused by any of the injuries. The spleen of the victim was ruptured because it was enlarged and the rupture of the spleen may be due to variety of reasons. At least no injury corresponds to the rupture of the spleen. An enlarged spleen is like a ripe papaya and it may be ruptured even by slightest impact.

11. The charges were framed under different heads against all the accused persons by the learned Sessions Judge on 13-1-1978. The charges were read over and explained to the accused persons. They pleaded not guilty and claimed to be tried.

12. In the F.I.R. it is only alleged that Ram Harakh and Ram Dwar fired with their guns which specifically hit Malak. We have seen the injuries of Malak. No injury at all has been caused by fire-arm.

13. However, to prove the charges the prosecution examined P.W. 1 Shiv Adhar. He is said to be an eye-witness and in para 3 of his statement he stated that Malak was fired at by Ram Harakh and Ram Dawar with their guns. He was assaulted by Mani Ram with his Gandasa and by Shobh Nath with his lathi. He further stated that his father Banwari was also fired at by Ram Harakh and Ram Dawar by their guns. He also stated that Lal Chand and Smt. Dhanraji were beaten by lathis. According to his witness, two fires had been made but fire-arm injury was caused to Banwari only.

14. The prosecution examined Lal Chand (RW. 2) an injured and eye-witness. He has also made the statement similar to the statement of Shiv Adhar (P.W. 1).

15. Banwari (P.W. 3) was also an injured witness and he also stated that Ram Harakh and Ram Dawar fired at Malak with their guns. This theory that Ram Harakh and Ram Dawar fired at Malak with their guns is totally incorrect. He further stated that he was fired at by Ram Harakh and Ram Dawar. According to him, there were two fires at him, but his statement shows that he had got only one fire-arm injury. In his statement in para 16 Banwari specifically stated that Ram Harakh and Ram Dawar both fired at him which hit him. Again he stated that only one firm hit him. He further stated that there were three or four fires. We did not know how may fires hit Malak. He, however, stated that one fire hit in the abdomen of Malak. He again stated that Malak had got fire-arm injury. This statement is totally false. His statement shows that only one fire hit him. The theory of three or four fires is totally incorrect. There was only one fire either by Ram Harakh or by Ram Dawar. In case it is not proved who fired at Banwari and whose fire hit him, every body shall be guilty of individual act and, therefore, both the accused persons could not be convicted for firing at Banwari. He, however, further stated that the persons holding lathi and Gandasa did not assault him.

16. The doctors proved the injury reports and the post-mortem report of the victims. The Investigating Officer proved the investigation and after the close of the evidence of the prosecution, the learned Sessions Judge recorded the statements of the accused persons u/s 313, Cr. P.C. They denied the entire prosecution story and claimed false implication.

17. The learned Sessions Judge found that the accused persons were guilty of the offence punishable under Sections 302/149, IPC, 148, 147, 326, 324 and 323 read with Section 149, IPC and accordingly convicted all of them. Being aggrieved by the judgment and order, convictions and sentences, the appellants have preferred this appeal.

18. We have heard Shri J.S. Sengar, learned Counsel for the appellants and the learned A.G.A. and gone through the record. We have already discussed the broad aspect of the case.

19. learned Counsel for the appellants argued that taking the worst case, that the prosecution had been able to prove its case, there was absolutely no intention to

commit any murder. The injuries of deceased Malak were purely simple as shown in the injury report Ext. Ka-2. The doctor reported that all injuries were simple except injury No. 1 which was at the abdomen. It was advised X-ray. The rest of the injuries were simple and were caused only due to friction. The post-mortem report also shows the same injuries. Dr. S.N. Rai, who had examined Malak, stated in para 5 of his statement that the spleen was ruptured. It was enlarged from before. He also stated that injury No. 9, which was at the abdomen, may have been caused by fire-arm, but he did not find any pellet etc. He further admitted that he did not report that any of the injuries of Malak had been caused by fire-arm. He stated that it might be possible by fall on the ground and it might rupture the spleen. At any rate, the injury report of Malak, his post-mortem report and the statements of the two doctors do not show that spleen had been ruptured by any of the injuries. Malak had enlarged spleen from before and enlarged spleen can be ruptured at any time even by slightest friction and fall on the ground. The victim Malak died not because of the injuries but due to rupture of his spleen, which was enlarged from before.

20. Modi in his Medical Jurisprudence under the heading of "Spleen" has given specific opinion that an enlarged spleen becomes softened and brittle. Hence it is liable to rupture from a fall or from violence of a very slight degree. Rupture of an enlarged spleen from very slight violence is a common occurrence in districts where malaria and kalazar are prevailing, and enlarged spleen may sometimes rupture spontaneously from the contraction of the abdominal muscles during the act of sneezing, coughing, vomiting or straining. Rare cases have also been reported in which it is claimed that perfectly healthy normal spleen has ruptured spontaneously.

21. In this case, it has been observed above that there is nothing on the record to indicate that any injury had ruptured the spleen and if the victim died without any assault by the accused side, they cannot be held guilty of the victim's death.

22. The injuries of Lal Chand and Smt. Dhanraji were simple injuries. It was argued that these injuries may be self-inflicted or even manufactured. It was argued that taking the case of the prosecution as correct, the only offence made out was u/s 323, IPC only.

23. We have examined the record and discussed the entire evidence in this light as well. We find that Banwari had got pellet injury, but it is not clear who had fired at him. The offence made out, therefore, shall be only u/s 324, IPC. All the injuries of Malak deceased were also simple. He was never intended to have been killed. At least he had got no gun-shot or Gandasa injury. Gandasa is a heavy cutting weapon and the incised injury to Lal Chand does not show that Gandasa was used with an intention to kill him. Therefore, the accused persons are only liable to be convicted u/s 324, IPC because the injuries were simple. None out of nine accused persons is said to have injured Banwari. It is only said that Ram Harakh and Ram Dawar had fired at Banwari. It is not clear whose fire hit him. It is, therefore, apparent that only

simple injuries were intended to be caused to the victims otherwise all other persons would have also assaulted all the victims by their respective weapons. The fact that this was only a simple marpeet is also fortified from the fact that the occurrence took place on 1 -6-1976 and the F.I.R. was lodged on 2-5-1976 at 8.30 p.m. in Police Station Kotwali. The informant came to Azamgarh through the concerned Police Station but he did not lodge any F.I.R. there as is apparent from the statement of the Investigating Officer. He had only taken a false case that he tried to lodge the report at the concerned Police Station, but his report was not lodged. On the strength of these facts learned Counsel for the appellants rightly argued that due to rupture of the spleen, Malak died and had he not died, even the F.I.R. would not have been lodged because according to the own understanding of the prosecution it was only a simple sin cognizable offence u/s 323, IPC. In the ordinary course, had it been a murder the informant would have lodged the F.I.R. at the concerned Police Station and would not have delayed the matter. It was rightly argued that the injuries of Malak were not consistent with the allegations in the F.I.R. and it is also correct that Malak was not assaulted by Gandasa with full force. It was argued that even if it is presumed that Ram Harakh, Ram Dawar and Mani Ram used deadly weapons, then also the offence made out shall be u/s 324, IPC. In the F.I.R. it is specifically written that there was also Bhala with the assailants, but in the statements of the witnesses no Bhala has been shown with any of the assailants nor any Bhala is said to have been used.

24. We agree with the contention of the learned Counsel for the appellants that if the accused persons are going to be punished for the offence u/s 324, IPC read with Section 149, IPC, separate conviction and sentence u/s 323, IPC is not necessary.

25. In Illustration (b) of Clause (iv) of Section 300, IPC, it has been provided that if the offender knowing that the victim is labouring under such disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury and the victim dies in consequence of the blow, the offender is guilty of murder although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if the offender not knowing that the victim is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health and the victim dies, the offender is not guilty of murder.

26. In this particular case as well, no injury corresponds to the rupture of the spleen and there is nothing on the record to indicate that the accused persons were knowing that the victim had got enlarged spleen which might rupture any time. In view of this provision also, the accused persons were guilty of causing only bodily injuries to the victim.

27. From the above discussions, it is clear that the accused persons are guilty of the offence u/s 324 read with Section 149, IPC only.

28. The trial is of 1976. Twenty-two years have passed. The accused persons have been in custody for quite long time during the trial. They were convicted and sentenced by the learned Sessions Judge and again they remained in custody for few days. They were released on bail by this Court. No fruitful purpose shall be served by sending the accused persons to jail after 22 years only u/s 324, IPC. The period already undergone shall be sufficient punishment for them. Banwari has lost his one eye. It appears just and proper that he should be suitably compensated.

29. In these circumstances, the appeal is to be partly allowed and partly dismissed. The accused persons are acquitted of the charges under Sections 302 read with Sections 149, IPC, 147, 148, 326, IPC. We have already said above that separate sentence u/s 323, IPC is not necessary when the accused persons are going to be sentenced u/s 324, IPC. The judgment and order of conviction and sentence under Sections. 302, 149, 147, 148 and 326, IPC are hereby set aside. The accused persons are found guilty only u/s 324 read with Section 149, IPC and accordingly they are sentenced for the period already undergone. They are also sentenced to pay a fine of Rs. 3,000/- each. In default of payment of fine, they shall undergo simple imprisonment for three months each. If the fine is realised, a sum of Rs. 20,000/- shall be paid to Banwari, the father of the informant. The appellants are on bail. They need not surrender. Their bail bonds are cancelled and the sureties are discharged.