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**(2009) 10 AHC CK 0235**

**Allahabad High Court**

**Case No:** Criminal A. No. 1297 of 1982

Rais alias Behra and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Oct. 14, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 307, 324, 34

**Citation:** (2010) 1 ACR 909

**Hon'ble Judges:** Vineet Saran, J; B.N. Shukla, J

**Bench:** Division Bench

**Advocate:** Rahul Mishra, Prakash Narain, Pratap Narain, P.N. Mishra, J.P. Mishra, Satyendra Narayan Singh and Yogendra Sahai Saxena, for the Appellant; A.G.A. and R.K. Singh, for the Respondent

**Final Decision:** Partly Allowed

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**Judgement**

Vineet Saran and B. N. Shukla, JJ.

This appeal is directed against the judgment and order dated 5.5.1982, passed by the Session Judge, Saharanpur in S.T. No. 64 of 1981, State v. Jaipal and two Ors. under Sections 302/34 and 307/34, I.P.C. relating to P.S. Manglore, district Saharanpur (now this police station is part of district Haridwar, Uttarakhand) whereby convicting the accused Jaipal, Rais alias Behra and Abdul Rahim u/s 302 r/w Sections 34 and 307 r/w Section 34, I.P.C. and sentenced them to undergo imprisonment for life and R.I. for 7 years on each count respectively.

2. The present appeal has been filed by accused Rais alias Behra and Abdul Rahim. Accused Jaipal has filed Criminal Appeal No. 1381 of 1982 but it is abated due to death of sole Appellant Jaipal.

3. Occurrence is said to have taken place on 5.11.1980 at 11 p.m. and F.I.R. was lodged on 6.11.1980 at 2.20 a.m. Place of occurrence is village Kunwaheri which is 8

km. away from the police station. Kishan is the complainant. In brief, it is prosecution case that prior to the occurrence accused Jaipal had molested wife of Kishan and Hargyan who was father of Kishan had checked Jaipal and rebuked him which infuriated Jaipal. On fateful night Jaipal came alongwith accused Rais alias Behra and Abdul Rahim and there is allegation that accused Jaipal fired shot with country-made pistol which hit Hargyan who died and Rais alias Behra fired at Laxman with his country-made pistol which hit Laxman who is son-in-law of Hargyan and then all three accused flee away with country-made pistols in their hands.

4. After the occurrence Kishan took his brother-in-law (Laxman and father Hargyan to the hospital where Hargyan succumbed to his injuries and Laxman was admitted in hospital. Kishan lodged report at P.S. Manglore. Head Constable Rajendra Kumar (P.W. 6) prepared chik report (Ext. Ka-3) and made entry in the G.D. (Ex. Ka-4).

5. S.O.R.K. Sharma (P.W. 10) took up investigation. He prepared inquest report on dead body of Hargyan with allied papers (Exts. Ka-8 to Ka-11) and after sealing sent it for post-mortem with relevant documents through Constables Rajpal Singh and Om Prakash.

6. Dr. S.S. Gahlot (P.W. 7) examined the injuries of Laxman and prepared injury report (Ext. Ka-7). He found following injuries on body of Laxman:

1. Multiple lacerated wound numbering 8 on the front of the upper part of the left side of chest, below clavicle two in the line of 2nd rib at a distance of 3 cm. each, two below 1st row at a distance of 2 cm. each 3 in third row at a distance of 3 cm. and 2.5 cm. each, oval in shape, with inverted edges, red in colour due to bleeding. No pellet seen externally, no blackening, no burning and no singeing of hairs. Size of wound diameter 0.3 cm. Advised X-ray.

2. Two lacerated wounds on the front of neck left side. One above other with swelling in the size of 7 x 4 cm. of the neck front aspect, no blackening, no burning, no pellet seen externally, bleeding was present. Shape of wound oval and size diameter 0.3 cm. margins were inverted. Advised X-ray.

3. One lacerated wound on the lateral aspect of neck left side diameter of wound 0.3 cm. No blackening, no burning, no pellet seen externally. Edges were inverted and bleeding present. Advised X-ray.

4. Three lacerated wounds placed at a distance of 1.25 cm. in the deltoid region left side, size diameter 0.3 cm. No pellet seen externally. No blackening but an area of 6 x 7 cm. around the wounds was seen burnt and was red due to bleeding. Advised X-ray.

Doctor opined that injuries could be caused by fire arm.

Dr. R.K. Tandon (P.W. 2) has done X-ray of Laxman and found radio opaque shadows. He has proved X-ray report (Ext. Ka-2).

Dr. M.P. Garg (P.W. 1) conducted autopsy on the dead body and prepared post-mortem report (Ext. Ka-1). He opined that death was caused due to shock and haemorrhage due to injuries of spleen, left kidney, intestine and liver.

7. S.I. R.K. Sharma (P.W. 10) visited the spot prepared site plan (Ext. Ka-12), memo (Ext. Ka-13 and Ka-14), fard (Ext. Ka-5) and after investigation submitted charge-sheet (Ext. Ka-16).

8. After committal of case to the Court of Session, the Session Judge charged the accused persons Jaipal, Rais alias Behra and Abdul Rahim u/s 302 r/w Sections 34 and 307 r/w Section 34, I.P.C. Accused pleaded not guilty and claimed to be tried.

9. In order to prove charges the prosecution examined Smt. Munni (P.W. 5) in order to prove motive. Eye-witness Budh Singh (P.W. 3), Laxman injured (P.W. 4), Sompal (P.W. 8) and Smt. Raj Bala (P.W. 9) are witnesses of fact. Rest witnesses are formal in nature.

10. Accused persons in their statements u/s 313, Code of Criminal Procedure have denied their involvement in the occurrence and claimed that they have been falsely implicated in this case. They examined Bhopal Singh Tyagi (D.W. 1) and Jhandoo Singh (D.W. 2) in defence.

11. After considering entire evidence led by the prosecution and defence the trial court recorded finding of conviction and sentenced the accused persons.

12. We have heard Sri. P.N. Mishra, learned senior counsel assisted by Sri Rahul Mishra, learned Counsel for the Appellants, Sri. R.K. Singh, learned A.G.A. for the State and also gone through the entire record.

13. Learned Counsel for the Appellants submitted that main accused Jaipal against whom there was allegation of committing murder has already died and his appeal is abated and the present Appellants had no common intention to cause death of Hargyan deceased and they never inflicted any injuries to him. It is further submitted that accused Appellant Abdul Raheem did not inflict injury to injured Laxman and co-Appellant Rais alias Behra had no intention to cause death of Laxman and even he had no motive and complicity of these two Appellants is not established with accused Jaipal and nature of injuries sustained by Laxman would not travel beyond purview of Section 324, I.P.C.

14. Learned A.G.A. submitted that both the Appellants were present on the spot and fired shots which hit Laxman.

15. In the F.I.R. motive was against Jaipal. He was annoyed with Hargyan and committed his murder by firing shot with his country-made pistol. We find from evidence led by the prosecution that the present Appellants Rais alias Behra and Abdul Raheem had no motive to kill Hargyan and Laxman. Their complicity with Jaipal is also not established. Witness of fact Budh Singh (P.W. 3) has been dubbed

hostile by the prosecution. He did not see the assailants. Laxman (P.W. 4) is an injured witness. He deposed that he received fire arm injury caused by Rais alias Behra. He could not tell whether Abdul Raheem also fired shot or not. However, he deposed about presence of Abdul Raheem alongwith accused Rais. It has not come in evidence that Rais had fired shot at him with intention to cause death. Only one fire was shot by Rais. This witness has stated on oath that he identified the assailants in electric bulb light connection of which was taken from tube well of Jhandoo but Jhandoo who has been examined in defence (D.W. 2) has deposed that he never gave electric connection to Laxman, hence presence of light on the spot is doubtful. Both the accused had no motive to kill Laxman. Even their complicity with Jaipal is not established from statement of Laxman. He never had chance to interact with the accused persons prior to the occurrence.

16. Smt. Munni (P.W. 5) is not witness of fact. Her testimony is against Jaipal.

Sompal (P.W. 8) who is son of the deceased has not supported the prosecution story and declared hostile by the prosecution.

17. Smt. Raj Bala (P.W. 9) is wife of injured Laxman. She has supported her husband Laxman and deposed that Rais alias Behra had fired shot at her husband with his country made pistol. She further deposed that Abdul Raheem was also present but she could not tell whether Abdul Raheem caused injury or not. She did not depose that injury to her husband was caused by Rais alias Behra with intention to kill him. Single fire was shot by him. Even she did not state about motive on part of Rais alias Behra. Fire was shot from other side of rugged curtain and as soon as she tried to identify the assailants they file away.

18. Dr. S.S. Gahlot (P.W. 7) has proved injury of Laxman and has opined that injury could be caused by fire arm but from distance of more than 8 feet. He did not find blackening/charring.

Dr. R.K. Tandon (P.W. 2) has done X-ray and found radio opaque shadows.

19. It is clear from evidence of both the doctors that fire arm injury was caused to Laxman. These injuries were not found dangerous to life and Dr. Gahlot has also not given statement to this effect. We find that medical evidence support oral evidence regarding causing of fire arm injury to Laxman and it was caused by Rais alias Behra in presence of Abdul Raheem but there was no intention or knowledge to cause death. We also notice that these 2 accused persons had no motive to cause death of Hargyan and they had no grudge against him. Specific allegation of causing injury to Hargyan has been attributed to Jaipal.

20. Appeal relates to year 1982. Injuries caused to Laxman would not travel beyond purview of Section 324, I.P.C. Appellants are facing ordeal from the date of conviction. Case against them u/s 302 r/w Section 34, I.P.C. is not proved. They were in jail from about 7 months during pre/post trial period.

21. Considering role of Rais alias Behra he is liable to be convicted and sentenced u/s 324, I.P.C. simplicitor and Abdul Raheem u/s 324 r/w Section 34, I.P.C. It would be in the interest of justice if sentence is reduced to the period already undergone in jail.

22. The appeal is partly allowed. Conviction and sentence recorded against the Appellants u/s 302 r/w Section 34, I.P.C. is set aside and conviction u/s 307 r/w Section 34, I.P.C. is reduced to Section 324, I.P.C. simplicitor against Rais alias Behra and Section 324 r/w Section 34, I.P.C. against Abdul Raheem and sentenced to the period already undergone in jail.

The Appellants are on bail. Their bail bonds cancelled and sureties discharged.

Office is directed to certify the judgment/record to the Court concerned for compliance and necessary action.