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**(1999) 12 AHC CK 0138**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 2102 of 1980

Om Prakash and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Dec. 7, 1999

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 304, 308, 323, 34

**Citation:** (2000) 1 ACR 365

**Hon'ble Judges:** R.R.K. Trivedi, J; M.C. Jain, J

**Bench:** Division Bench

**Advocate:** S.A.N. Shah, for the Appellant; A.G.A., for the Respondent

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### **Judgement**

M.C. Jain, J.

This appeal is directed by Appellants Shyam Lal, Om Prakash, Ram Pal and Burmah against the judgment and order dated 18.9.1980 passed by Sri L.S.P. Singh, the then 4th Additional Sessions Judge, Kanpur in Sessions Trial No. 166 of 1979. Each of them has been convicted u/s 302, I.P.C. read with Section 34, I.P.C., u/s 324, I.P.C. read with Section 34, I.P.C. and u/s 323 read with Section 34, I.P.C. Each of them has been sentenced to undergo life imprisonment u/s 302, I.P.C. read with Section 34, I.P.C., six months" rigorous imprisonment u/s 324 read with Section 34, I.P.C. and three months" rigorous imprisonment u/s 323 read with Section 34, I.P.C. All the sentences have been ordered to run concurrently.

2. The prosecution case was that P.W. 4 informant Buddha used to look after the cultivation of P.W. 1 Raja Ram in village Bajaraha Purwa, Police Station Sheoli, district Kanpur as he was in service at Kanpur and thus unable to look after his cultivation. On 13.4.1979 at about 4 p.m. the accused-Appellant Om Prakash and Shyam Lal were digging earth from the drain situated by the side of the field of P.W. 1 Raja Ram. Bhagwan Din deceased who was the real brother of informant P.W. 4 Buddha forbade them from doing so, but to no effect. Bhagwan Din then came to

Kanpur and informed P.W. 1 Raja Ram about it. Raja Ram went to his village from Kanpur, enquired from Om Prakash on 14.4.1979 at about 9 a.m. the reason for digging earth from his drain. Om Prakash replied that he had dug the earth and he would dig the same again. He also held out that before digging any further earth, he would teach a lesson to Bhagwan Din who had made a complaint to him (P.W. 1 Raja Ram). Short while later, Om Prakash and Shyam Lal armed with spears and Burmah and Ram Pal armed with lathis came to the house of Bhagwan Din. Shyam Lal struck a blow with his spear on Bhagwan Din and the remaining three accused-Appellants assaulted Pooran-father of Bhagwan Din with lathis and spears. On hue and cry being raised by the victim, the informant P.W. 4 Buddha and the witnesses P.W. 1 Raja Ram, Ghaseetu, Ram Chandra and a number of other persons reached there and challenged the victims. The accused-Appellants then fled away towards the western side. Bhagwan Din and Puran sustained injuries. They were sent to P.H.C. Chaubepur for medical aid and examination. P.W. 4 Buddha went to Police Station, Sheoli and lodged a First Information Report at 11 a.m. The distance of the Police Station was ten miles. Bhagwan Din died at 10 a.m. the same day. Puran was medically examined by P.W. 6 Dr. Laxmi Sahai Johari. As per the injury report Ex. Ka.-8 the following injuries were found on his person:

1. One contusion 8" ? 1/2" at back upper part, on both sides of midline of back.
2. One punctured wound 1/8" ? 1/8" ?at medial aspect of lower half of left forearm, fresh and bleeding profusely.
3. One traumatic swelling in area of 2" ? 2" around injury No. 2.
4. One traumatic swelling in area of 2" ? 3" transverse in direction at upper half of post aspect of left forearm 3" below left elbow joint.
5. One traumatic swelling 1-1/2" ? 1" at middle part of left forearm at post aspect 1" below injury No. 4.
6. Complaint of pain in left forearm.

3. Injury Nos. 1, 3, 4 and 5 were simple which had been caused by blunt object while injury No. 2 was caused by sharp-edged weapon. X-ray was advised. Initially, a case had been registered u/s 308, I.P.C. but was ultimately converted inter alia u/s 302, I.P.C. The investigation of the case was taken up as usual. The dead body of the deceased Bhagwan Din was subjected to post-mortem by P.W. 7 Dr. P. C. Tiwari at Kanpur on 15.4.1979 at 2 p.m. He was aged about 18 years and the following ante-mortem injuries were found on his person:

1. Incised wound 5.5 cm. ? 1 cm. ? cavity deep (chest) on the left side of chest 1.5 cm. below and medial to left nipple and 7.5 cm. left to midline of sternum.
2. Abraded contusion 3.5 cm. ? 1 cm. on the upper middle of back 2.5 cm. below the 7th cervical vertebra.

3. Multiple abraded contusion in area of 20 cm. x 14 cm. on the middle of back, 19 cm. below injury No. 2.

4. In the opinion of the doctor, injury No. 1 had been caused by sharp-edged weapon while injury Nos. 2 and 3 by blunt object. The cause of death was shock and haemorrhage as a result of injury to heart (injury No. 1). Shyam Lal also allegedly got recovered to the Investigating Officer P.W. 12 S.I. Siya Ram Sharma the blood-stained blade of the spear from the house of Om Prakash which was subjected to scientific examination and was found to contain human blood. The investigation was subsequently taken over by P.W. 3 S.I. Chhote Lal, S.O. of Police Station Sheoli who submitted charge-sheet against the Appellants.

5. The accused-Appellants pleaded not guilty. The defence of Shyam Lal was that he was escorting his niece Smt. Tapeshwari to her second husband's place ; that the deceased Bhagwan Din who was present at the door of P.W. 1 Raja Ram passed indecent remarks against her by asking her to go to the house of Machhalu ; that he (Shyam Lal) took exception to these remarks whereupon Bhagwan Din attacked him with spear ; that in order to ward off the spear he wielded his lathi as a result of which blade of the spear fell down that both he and Bhagwan Din tried to take up that blade ; that Puran also joined them in a bid to take up the blade and thus sustained injuries therefrom ; that he succeeded in catching hold of the blade but finding no way out to save himself, he thrust the blade in the chest of Bhagwan Din ; that his niece Smt. Tapeshwari had been abducted earlier by Bhagwan Din, Machhalu, P.W. 4 Buddha, Puran and Ram Chandra. It was on this account that her first husband had deserted her and she had been married again. The remaining three accused-Appellants even denied their presence at the spot.

6. The prosecution examined in all 13 witnesses besides relying on documentary evidence. Yashoda mother of Om Prakash was examined in defence in support of the defence theory put forth by Shyam Lal. Out of the witnesses examined by the prosecution, P.W. 1 Raja Ram, P.W. 2 Puran and P.W. 4 Buddha were examined as eye-witnesses. P.W. 10 Devi Din was the witness of recovery of spear got made by accused Shyam Lal to the Investigating Officer. The rest were the doctors and formal witnesses including two Investigating Officers. The learned Additional Sessions Judge believed the prosecution evidence and convicted and sentenced the accused-Appellants as stated in the earlier part of the judgment.

7. We have heard Sri S. A. N. Shah, learned Counsel for the Appellants in support of the appeal and the learned A.G.A. on behalf of State in opposition of the same. We have also carefully gone through the material and evidence on record. The argument of the learned Counsel for the Appellants is that the Court below ought to have believed the defence theory that Shyam Lal struck spear blow on the chest of Bhagwan Din in self-defence. It has next been submitted that the remaining three Appellants were not at all present at the spot. Criticism has been levelled against the prosecution evidence that the same did not prove the prosecution story at all. In the

alternative, it has been urged that the offence did not travel beyond Part II of Section 304, I.P.C., as against the accused-Appellant Shyam Lal only. It would be proper to deal with the arguments of the learned Counsel for the Appellants in this very order in the succeeding discussion.

8. So far as the defence theory is concerned, on a thoughtful consideration and on weighing the evidence on record, we are of the opinion that the defence theory is a cock and bull story coined by the accused-Appellant Shyam Lal which has rightly been discarded by the learned Additional Sessions Judge. Indeed, if the deceased Bhagwan Din was armed with a spear and in a fighting mood from before and had actually attempted a blow on Shyam Lal, in all probabilities he would have received spear injuries before he could think of warding off the blow by wielding lathi as he alleged. The fact is that he did not receive any injury at all. In case he had really made an attempt to catch hold of the spear, he would have ordinarily sustained some injury from that blade. It is further to be noted that Tapeshwari had not been examined against whom Bhagwan Din had allegedly passed indecent remarks. She could have been the best witness to support the defence theory. It has to be taken note of that Tapeshwari is the real sister of accused-Appellant Ram Pal. D.W. 1 Smt. Yashoda being mother of Om Prakash accused-Appellant is an interested witness. She is also closely related to the other accused-Appellant as has come in her testimony. The defence theory being against the inherent probabilities of the situation is not worthy of a moment's attention. Resultantly, there could be no question of Shyam Lal causing the death of Bhagwan Din in exercise of right of private defence.

9. Now, on subjecting the prosecution evidence to the judicial scrutiny, it is beyond every shadow of doubt that all the four accused-Appellants participated in the incident and the criticism advanced against the witnesses is unfounded. It is significant to find out that the background forming the foundation of the incident has clearly been spelt out by the prosecution in its evidence. It has come down from the own testimony of D.W. 1 Smt. Yashoda that P.W. 1 Raja Ram was in service at Kanpur. The presence of P.W. 1 Raja Ram at that time of the incident has very well been explained by him that Bhagwan Din had come to inform him at Kanpur about the digging of earth from the drain of his field by Om Prakash and Shyam Lal the day preceding the incident and it was for this reason that he had accompanied Bhagwan Din to the village on the day of occurrence and had questioned Om Prakash in this behalf who remonstrated, went back and reappeared with the remaining three Appellants duly armed with the weapons as mentioned in the earlier part of the judgment. He had gone after holding out that Bhagwan Din would be taught a lesson for making a complaint to him. One of the eye-witnesses, namely, P.W. 2 Puran is himself an injured. The names of all the witnesses examined by the prosecution find place in the first information report promptly made at 11 a.m. on the day of the incident by P.W. 4 Buddha by oral narration. P.W. 1 Raja Ram, P.W. 2 Puran and P.W. 4 Buddha have also stated that the two accused-Appellants Burmah

and Ram Pal armed with lathis had each struck a lathi blow also on Bhagwan Din. The learned Counsel for the Appellants has argued that this factum does not find place in the first information report. It may be pointed out in this regard that the first information report had been lodged by P.W. 4 Buddha by oral narration and it could be owing to some confusion in narration or understanding of the Head Constable that this fact got omitted from the first information report. Two injuries of blunt weapon were found also on the dead body of the deceased at the time of post mortem which could have been caused by lathis. It is further worthy of mention that there is no ground or reason for the false implication of the accused-Appellants. There was no other enmity between the prosecution witnesses on the one hand and the accused-Appellants on the other which could have tempted the former to falsely rope in the accused-Appellants. The eye-witnesses examined by the prosecution are the most natural witnesses having regard to the scene of occurrence which was outside the house of P.W. 4 Buddha and P.W. 2 Puran. The presence of P.W. 1 Raja Ram stands explained as he had come from Kanpur and had questioned Om Prakash for having dug earth from the drain of his Nali the previous day, immediately whereafter he had gone after holding threat of teaching lesson to Bhagwan Din and had reappeared with the remaining three accused-Appellants. Therefore, we endorse the view of the learned Sessions Judge that all the four accused-Appellants participated in the commission of this crime on the given date, time and place, the background whereof was the digging of earth from the drain of P.W. 1 Raja Ram the previous day by the accused-Appellants Om Prakash and Shyam Lal. The field of Raja Ram had been taken on batai by P.W. 4 Buddha. It has come down from the testimony of D.W. 1 Yashoda that all the accused-Appellants are closely related. On Prakash accused-Appellant is her son and what she has testified in her cross-examination is "Ram Pal mera naati, Shyam Lal Bhanja, Burmah mere Jethani ka ladka hai...."

10. It has now to be considered as to what offence(s) has/have been committed by the accused-Appellants within the ambit of law. It is trite that a person is supposed to know the natural consequences of his act. Further, the intention of a person is to be gathered from his act. Unless the intention is translated into an act, it remains thought only which is not actionable at law. So far as the accused-Appellant Shyam Lal is concerned, he struck a forceful spear blow on the chest of Bhagwan Din. The blow was so intense that it turned to be fatal causing the death of the victim. He chose chest (vital part) as the seat of striking spear blow. It caused intensive internal damage and there was found to be incised wound 2.5 cm. x 0.75 cm. x cavity deep on the left side of the chest wall (under the ante-mortem injury No. 1). The death had occurred due to haemorrhage as a result of the injury to the heart. He had no justification whatsoever to cause such injury to the victim. It does not admit of slightest doubt that he caused this injury to him with the intention of causing his death. He, therefore, committed an offence punishable u/s 302, I.P.C. However, it was his individual act and having regard to the broad circumstances of the case as

emerging from the evidence on record, we are impelled to hold that the remaining three Appellants cannot be held vicariously liable for this murder with the aid of Section 34, I.P.C.

11. So far as the remaining three Appellants, namely, Om Prakash, Ram Pal and Burmah are concerned, their common intention with Shyam Lal was only to voluntarily cause hurt to the deceased Bhagwan Din as well as P.W. 2 Puran by blunt object as also by sharp-edged weapon-spear (wielded by one of them Om Prakash). Therefore, they only committed offences under Sections 323 and 324, I.P.C. both read with Section 34, I.P.C. Of course, Shyam Lal accused-Appellant is equally liable for committing these two offences with them. To say in other words, causing of murder of Bhagwan Din was the individual act of Shyam Lal who committed his murder by striking a forceful spear blow on his chest (vital part) which proved to be fatal. But all the four accused-Appellants shared common intention of one another for voluntarily causing hurt to Bhagwan Din as well as Puran by lathis and sharp-edged weapon-spear. The reason for our such finding is that despite being armed with a spear, Om Prakash struck only a single spear blow on Puran on non-vital part (left forearm). Apart from it, he did not strike spear blow either on Puran or on the deceased Bhagwan Din. The other two accused-Appellants Ram Pal and Burmah also struck only one lathi blow each on Bhagwan Din and a few lathi blows on Puran causing simple injuries only. It appears that their intention was simply to chastise Bhagwan Din so as to teach him a lesson. Puran happened to be assaulted as aforesaid as he was the father of Bhagwan Din and being present at the spot had raised shouts to save his son Bhagwan Din from the accused-Appellants. It may be stated at the risk of repetition that the causing of death of Bhagwan Din by a forceful spear blow was the individual act of Shyam Lal accused-Appellant who exceeded the common intention of all of them. The offence of Section 324, I.P.C. being graver than that of Section 323, I.P.C., for practical purposes it would comprise in itself the offence u/s 323, I.P.C. also.

12. In view of the above discussion, we are of the opinion that the accused-Appellant Shyam Lal committed the offence punishable u/s 302, I.P.C. and 324, I.P.C. read with Section 34, I.P.C. Further, the remaining three accused-Appellants namely, Om Prakash, Burmah and Ram Pal committed the offence punishable u/s 324, I.P.C. read with Section 34, I.P.C.

13. In the net result, we partly allow this appeal and modify the conviction and sentence of the accused-Appellants as under:

The accused-Appellant Shyam Lal is convicted u/s 302, I.P.C. and 324, I.P.C. read with Section 34, I.P.C. He is sentenced to life imprisonment u/s 302, I.P.C. and to pay a fine of Rs. 2,000 u/s 324 read with Section 34, I.P.C. In default of payment of fine he shall undergo rigorous imprisonment for three months which shall run concurrently with his life imprisonment. Each of the remaining three accused-Appellants is convicted u/s 324, I.P.C. read with Section 34, I.P.C. and sentenced to pay a fine of

Rs. 2,000 each. In default of payment of fine, each of them will undergo rigorous imprisonment for three months. The Appellants are on bail. They shall surrender forthwith to serve out the sentences passed against them. The last three Appellants need not surrender in case they deposit the fine imposed on them.