

(1998) 05 AHC CK 0140

Allahabad High Court

Case No: Criminal Appeal No. 2683 of 1988

Raj Bahadur Singh and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 13, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 300, 302, 304, 34

Citation: (1999) CriLJ 1056

Hon'ble Judges: Giridhar Malaviya, J; B.K. Sharma, J

Bench: Division Bench

Advocate: P.C. Sharma, R.S. Tewari, Jitendra Singh and Raghuraj Kishore, for the Appellant; D.G.A., for the Respondent

Final Decision: Partly Allowed

Judgement

B.K. Sharma, J.

Heard counsel.

2. This is an appeal against the judgment and order dated 26-11 -1988 passed by Shri V.K. Jain, the then Additional Sessions Judge, Etah in S.T. No. 167 of 1987 (State v. Raj Bahadur and Ors.), whereby he convicted accused-appellants Raj Bahadur Singh and Ram Nath Singh for the offence u/s 302 read with Section 34 I.P.C. and sentenced them to suffer R. I. for life,

3. The deceased in the present case is Shri Pal Singh. Vijendra Singh informant (PW 1) was his son. Raj Bahadur Singh and Ram Nath Singh accused-appellants are real brothers inter se. Their brother Ashok Singh was also named in the F.I.R. in the present case but he was absconding during the investigation and so the present accused-appellants only were charge-sheeted and committed to the Court of Session and were tried by the Additional Sessions Judge about the murder of the deceased as aforesaid, Narendra Singh (PW 2) was another friend of the deceased. Ail

these persons were residents of village Hathaura Kheda, Police Station Patiyali, District Etah. In the said village a chak road belonging to the Gaon Samaj was running from East to West. There was house of Raj Bahadur Singh accused-appellant No. 1 towards its North and on the west of this house there was open land of Shri Pal deceased and to the west of which across the Rasta there was house of Ram Nath Singh accused-appellant No. 2. To the south of the Rasta there was an agricultural field of Shri Pal deceased.

4. The prosecution story was that on 11 -8-86 at about 6.30 p.m. the deceased and the informant were returning from their field to their house, that when they reached near the house of Raj Bahadur Singh accused-appellant they saw that both the accused-appellants and Ashok Singh co-accused were digging the foundation in the Rasta in front of their house, that the informant and the deceased forbade them from digging the foundation in the Rasta but they did not agree and started altercating, that on hearing the altercation Shyam Pal Singh the paternal uncle of the informant Narendra Singh brother of the informant and Govil Singh came there, that on seeing them Ashok Singh co-accused exhorted the accused-appellant No. 1 Raj Bahadur Singh to bring the gun, whereupon the accused-appellants Raj Bahadur Singh and Ram Nath Singh and Ashok Singh co-accused climbed on their roof, that both the accused-appellants Raj Bahadur Singh and Ram Nath Singh were holding their licensed gun, that Ram Nath Singh, accused, appellant, fired one shot on the deceased, which struck him, that Raj Bahadur Singh accused-appellant fired another shot on the deceased, which also struck the deceased, that the deceased fell down on receiving the firearm injuries and then both the accused-appellants and Ashok Singh co-accused ran away towards the east.

5. The deceased was injured but was alive and so he was sent on cot to District Hospital Patiyali for treatment, but the Medical Officer Patiyala Hospital referred the case to District Hospital Etah. The informant had got the F.I.R. scribed by Jaipal Singh and had lodged at the police station at 8.30 a.m. whereupon a criminal case was registered against both the accused-appellants and Ashok Singh co-accused. The deceased, however, died on the way to the Etah Hospital. Thereupon the case was converted into one u/s 302, I.P.C.

6. The inquest proceedings were taken and the dead body was sent for post-mortem to Etah Hospital. The post-mortem of the dead body of the deceased was performed by Dr. R. K. Sharma, Medical Officer, district Hospital Etah on 12-8-86 at 2 p.m. His material observations were as follows :

Probable age about 55 years.

Probable time since death about 1/2 day.

Muscularity,	Weak built with lean musculatures,
stoutness,	, R. M. Present in
Emaciation,	upper and lower limbs

Rigormortis	greenish discoloured over
Decomposition	Rt. iliac from P.M. lividity on back and buttocks, abdomen slightly distended.

Ante-mortem Injuries

1. Multiple fire-arm wounds on anterior abdominal wall in an area extending below sub costal margin and iliac fossa 27.5 cm x 25 cm Size 1/4 x 1/4 to 1/2 x 1/2. Most of the wounds are only skin deep few of them are grazed and few are cavity deep. Direction left to right.
2. Multiple fire-arm wounds of entry on left upper thigh in an area of 14 cm x 12 cm size 1/4 cm x 1/4 cm to 1/2 cm x 1/2 cm. Direction left to right depth varying from superficial layers of skin to muscle deep.
3. Multiple fire-arm wounds of entry on anteromedical aspect of right upper part of thigh in an area of 17 cm x 10 cm size 1/4 cm x 1/4 cm to 1/4 cm x 1/2 cm. Depth from superficial skin to muscle deep. Direction left to right.
4. 3 fire-arm wounds (abrasion) on front of penis, size 1/4 cm x 1/4 cm to 1/4 cm x 1/2 cm. Direction left to right.
5. Six fire-arm wounds of entry on the left back lower part, size 1/4 cm x 1/4 cm to 1/4 cm x 1/2 cm. Four wounds are grazed (only superficial layers of skin deep). Direction left to right.
6. Two fire-arm wounds (abrasion) on back of left lower leg upper part 1/4 cm x 1/4 cm. Direction left to right. Wounds are 4 cm apart from each other.
7. Two fire-arm wounds (abrasion) on back of right fire-arm 1/4 cm x 1/2 cm wounds are on upper part. Wounds are 6 cm apart from each other. There is no blackening or tattooing present on the wounds.

Internal Examination

Sixteen metallic pellets recovered from the various organs and handed over to police constable accompanying the body.

Abdomen

Nails : haematoma in three layers beneath the injury

Peritoneum : Lacerated;
Mesentry lacerated.

Cavity : Containing about 1 litre free & clotted

blood

Stomach contents : About 1/2 litre undigested
food material

Small intestine : Semi-digested semifluid food
material seen.

Large intestine : Faecal matter and gases.

7. In the opinion of the doctor the death was due to shock and haemorrhage as a result of ante-mortem injury No. I.

8. At the trial, the ocular testimony was given by Vijendra Singh informant (PW 1) and his brother Narendra Singh (PW 2).

9. Raj Bahadur Singh accused-appellant No. I claimed in his statement u/s 313, Cr.P.C. that a Gaddha (pit) had been dug 6 and 7 days prior to the occurrence, that the informant and Shri Pal deceased tried to remove the bricks and that, thereupon, he stated that he would remove the bricks in the morning. The prosecution story was denied by him and he gave the following version of the occurrence :

MERI NEEW 6-7 DIN PAHLE SE KHUDI PARI THI. SHRIPAL WA UNKA LARKA VIJENDRA EENTE HATWANA CHAHE THE. MANA KARNE PAR RAMANATHPAR LATHI KHURPI LEKAR DAURE JISASE RAM NATH KO CHONTEN AAYEE. UNHONNEN KHURPEE SE RAM NATH KO, JAN SE MARNE KE LIYE CHHATI PAR MAAREE TO USNE HATHELEE SE BACHAYA. ISPAR SHYAMPALWA SHRIPAL KE GHAR SE BANDOOK WA TAMANCHA LEKAR AAGAYE. SHYAMPALNE JAAN SE MAARNE KE LIYE HAM LOGON PAR BANDOOK SE FIRE KIYE ISPAR MERE LARKE-BHATEEJE NE BACHANE KE LIYE APNEE BANDOOK SE HAWAEE FIRE KIYA.

10. Ram Nath accused-appellant No. 2 repeated what Raj Bahadur accused-appellant No. had said about the pit and the removal of the bricks and denied the prosecution story and claimed that the witnesses gave false evidence as they were against him out of enmity. However, he did not say that he had received any injury in the occurrence and also did not put forward any counter- version of the occurrence.

11. From the side of defence Dr. R. K. Sharma, Medical Officer of the District Hospital, Etah (DW 1) was examined. He proved the injury report of accused-appellant No. 2. He had recorded the following ante-mortem injuries on the body of Ram Nath Singh accused-appellant :

(1) Incised wound 3.5 cm x 1 cm x muscle deep on right head palm armpit at the root of thumb. Margins are irregular lacerated on inner side outer margin is clean out. Infection present.

(2) Abrasion on middle of front of left leg 1 cm x 1 cm.

12. In the opinion of the doctor the injuries were simple caused by (1) blunt edged object and (2) blunt object, duration about 11/2 days.

13. In his cross-examination he stated that these injuries could have come on 11-8-86 at 6 to 7 p.m. and that in the duration of the injuries there could be difference of 12 to 15 hours either way. He admitted that the injury No. 2 was superficial and that injury No. 1 was not dangerous to life. He also said that injury No. 1 could be caused on the palm of hand from a sharp-edged weapon, if caught by first (palm) of the hand.

14. The learned trial Court believed the prosecution story and rejected the defence version and also rejected the plea of private defence advanced before it. The learned Addl. Sessions Judge, Etah, consequently, convicted and sentenced both the accused-appellant as aforesaid.

15. Vijendra Singh informant (PW 1) has testified to the prosecution story about the occurrence as outlined above. The site plan which contains the factual observations of the Investigation Officer about the spot position is proved by the testimony of the I.O. Babu Ram Misra, who has been examined as P. W. 3 at the trial. The correctness of the site plan prepared by him has not been challenged anywhere in his cross-examination. The site plan shows that the foundation had been dug on the southern extremity of the house of Ram Bahadur Singh accused-appellant which extended into the east-west public Rasta and further that bricks were lying on the Rasta itself to the south of the house of Raj Bahadur accused-appellant. There is nothing in the statements of the accused-appellants to show that they were entitled to any part of the land of the Rasta running to the South of their house. From the site plan the encroachment over the Rasta is obvious and it is also clear from the cross-examination of the informant available at page 13 of the paper book. He testified that the vacant land is in front of the house of Raj Bahadur accused-appellant about 12 cubit towards east-west and 6 cubit from north to south but they had dug their pit in the land measuring 13 cubit from east to west and 8 cubit from north to south. It has also come in the evidence that bricks were lying on the public Rasta and also by the side of his agricultural field. It has also come in his evidence that on the date of occurrence the Rasta was cut and the dug portion was extended in an area of 8 cubit x 13 cubit. It was not suggested to this witness that no encroachment was made on the Rasta. It appears from the cross-examination that the foundation was dug 21/2 cubit in depth and the making of an underground room was intended and that the defence stand was that there would be no obstruction by making of that underground room there. This plea of the defence cannot be supported for the simple reason that if the said Rasta belonged to the Gaon Samaj, the land underneath it will also belong to the Gaon Samaj and so any foundation of the house dug on the Rasta would amount to encroachment on the Rasta and the accused-appellants cannot be allowed to make it claiming that they

only intended to make room underneath the Rasta and would cover it from above and that then it would not interfere with the use of the Rasta. This is an encroachment pure and simple which the accused-appellants were not at all entitled to make. In these circumstances of the case, there is no occasion to doubt the prosecution story.

16. Some discrepancies had been pointed out by the defence between the testimony of the informant and the testimony of Narendra Singh (P.W. 2) here and there. But these do not have any bearing on the merit of the case. It has been suggested to Narendra Singh (P.W. 2) in his cross-examination that he was not present at the spot. There is no reason to doubt the presence of Narendra Singh (P.W. 2) on the spot. Apart from it, the evidence of the informant itself supported by the surrounding circumstances is sufficient to sustain the conviction of the accused-appellants.

17. The place of occurrence is fixed by the ocular evidence and also the testimony of the I.O. coupled with the site plan prepared by him. The learned counsel for the accused-appellants has also not disputed the place of occurrence.

18. There is no specific challenge by the defence to the time of occurrence before the trial Court and before this Court also. The time of occurrence has not been challenged. The defence version of the occurrence also does not dispute the date, time and place of occurrence. The presence of the accused appellants at the time of occurrence is also not disputed before us by the learned counsel.

19. A counter version of the occurrence has been attempted by Raj Bahadur Singh accused-appellant in his statement u/s 313, Cr.P.C. In his statement u/s 313, Cr.P.C. Ram Nath accused-appellant did not dispute his presence at the spot at the time of occurrence. His presence at the spot is clear from his replies given to questions Nos. 1 and 2 put to him about the altercation about the bricks. He did not give any counter version of the occurrence nor was any witness examined to depose to the counter version. However, the injury report of the injured accused-appellant Ram Nath has been got proved by the defence from the Medical Officer, Dr. R. K. Sharma, D.W. 1.

20. The learned counsel for the accused-appellants has stressed on the counter-version as given by Ram Bahadur Singh accused-appellant in his statement u/s 313, Cr.P.C. as reproduced in the body of this judgment and claimed that both the accused-appellants had the right of private defence of person because Ram Nath @ accused-appellant had been assaulted with khurpi, which was enough to create a reasonable apprehension in the mind of Ram Nath Singh accused-appellant and Raj Bahadur Singh accused-appellant that unless the right of private defence is exercised, death will be the inevitable result. The counter-version stated by Raj Bahadur Singh accused-appellant in his statement u/s 313, Cr.P.C. cannot be allowed to stand even for a moment. As noted above, not a single witness has been examined

from the side of the defence to establish the counter-version given by Raj Bahadur accused-appellant. The medical report in respect of Ram Nath accused-appellant right have been proved by the defence but from the evidence of the doctor, it is clear that there could be variation of 12 to 15 hours in the duration of the injuries either way. Furthermore, the Investigating Officer has made an entry in G.D. No. 12 at Serial No. 12 on 12-8-1986 at 7.30 a.m. and it has been elicited by the defence in the cross-examination of the Investigating Officer in para 12 that the injuries of Ram Nath accused-appellant were recorded therein as per his claim. However, all this becomes immaterial when the accused-appellant Ram Nath did not claim in his statement u/s 313, Cr.P.C. that he had received the injuries on his body in the occurrence at the spot and did not give his version of the occurrence.

21. The injuries of Ram Nath accused-appellant as recorded by the Medical Officer were simple and superficial in nature and could be received in the process of arrest and could even be self-inflicted or self suffered for the purposes, of making a defence. Be that as it may, since Ram Nath Singh accused-appellant did not claim that these injuries had been received by him in this occurrence it follows that his injuries were not caused in this present occurrence, and it becomes immaterial in what other manner he had received these injuries and consequently, the defence version falls to the ground.

22. It may be mentioned here that the suggestion made to the informant in his cross-examination about the counter-version (available at page 14 of the paper book) was to the effect that he assaulted Ram Nath Singh accused-appellant with Lathi and that the deceased assaulted Ram Nath Singh accused-appellant with Khurpi and that his paternal uncle Shyam Pal had fired on the accused-appellant with gun and that the fire struck the deceased. A further suggestion to the informant in his cross-examination was that Shyam Pal fired one shot and Anil had fired one shot at him and at the deceased. The informant denied all these suggestions and claimed that Anil was not present at the spot at all at the time of occurrence. He also categorically stated that Ram Nath accused-appellant did not receive any injury in this occurrence. The fact that Ram Nath accused-appellant No. 2 did not claim in his statement u/s 313, Cr.P.C. that his injuries recorded at the District Jail Hospital Etah had been received by him at the time of the occurrence by itself as a good ground to reject the counter-version of the occurrence as given by Ram Bahadur accused-appellant in his statement u/s 313, Cr.P.C. Otherwise also it is difficult to believe that the fire made by Shyam Lal, paternal uncle of the informant, would hit the deceased and would not hit any one of the accused-appellants. In the suggestions to the informant in the cross-examination there is no mention of the coming of any other person of the household of Shyam Lal and Shri Pal deceased armed with gun and Tamancha. The only allegation is about the fire by Shyam Pal, paternal uncle of the informant with his Tamancha any yet in his statement given by Raj Bahadur accused-appellant u/s 313, Cr.P.C. it has been stated that the household of Shyam Pal and the deceased had come with gun and Tamancha. Furthermore,

there was no suggestion made to the informant in his cross-examination that the assault had been aimed at the chest of Ram Nath accused-appellant No. 2 but he avoided it on his palm as has been claimed by Raj Bahadur accused-appellant in his statement u/s 313, Cr.P.C. Furthermore, while it has been claimed by Raj Bahadur Singh, accused-appellant in his statement u/s 313, Cr.P.C. that his son and nephew had fired with his gun in the air, there was no such suggestion made to the informant at any stage in his cross-examination. Since an encroachment had been made on the public land, it cannot be said that any right of private defence of property arose to the accused-appellants or any of them in respect of the same. The right of private defence of person also cannot be said to have been arisen when the prosecution categorically claims that Ram Nath accused-appellant did not receive any injury in the occurrence and Ram Nath accused-appellant never claimed that he had received any injury in the occurrence. There is nothing in the evidence on record to lead the Court to draw the inference that the fires made by the accused-appellants by their weapons were made in the exercise of any right of private defence of person. There was no question of any apprehension of grievous injury or death. In fact, there was no apprehension of any injury. Since no right of private defence arose, the accused-appellants cannot be given any relief even on the basis that the accused-appellants had exceeded the right of private defence of person or property.

23. Then it has been claimed that this was a case of sudden quarrel. The accused-appellants could not get the benefit of Exception No. 4 of Section 300, I.P.C. because for getting it it has to be shown that there was a sudden quarrel or sudden fight in the heat of passion. Here the injuries are only on one side (prosecution side) and on the defence side no one had received any injury in the occurrence. So it cannot be called a case of sudden quarrel or sudden fight, which is always a bilateral transaction in which injuries are inflicted on both sides.

24. Then it has been argued by the learned counsel for the accused-appellants that admittedly there was no previous enmity between the parties. The informant Vijendra Singh (PW 1) has admitted in his cross-examination that there was no enmity between him and the deceased on the one hand and the accused-appellants on the other before the present occurrence. It has also been pointed out that though gun shots as alleged by the prosecution, had been fired, once by each of the accused-appellants by licensed guns but there was no effort made by any of the accused-appellants to reload the licensed weapons and to fire further shots. Furthermore, there was no effort made to aim the fires on the head or chest of the victims. Furthermore, the fires had been shot from a distance and no effort was made to fire from close range. It has been argued and with some substance that even though it was not a case falling under Exception 4 of Section 300, I.P.C. but it was certainly a case of sudden quarrel taking place about the encroachment of the public Rasta, in which there was no intention to commit murder. It is true that the Medical Officer has given his opinion that the injuries found on the body of the

deceased were sufficient to cause death in the ordinary course of nature but in the circumstances of this case, it is doubtful that these very injuries were intended to be inflicted or that the intention was to commit murder. The intention of the accused-appellants appears to have been causing such bodily injury as is likely to cause death and so the offence made out would not be murder but would only one u/s 304, Part I, I.P.C. as a homicide not amounting to murder as the act was such that was done with the intention of causing bodily injury as is likely to cause death. In our view, a sentence of 7 years R. I. in the case of each accused-appellant for the offence u/s 304, Part I, I.P.C. would be sufficient to meet the ends of justice.

25. For the reasons aforesaid, the appeal is partly allowed. The conviction and sentence of the accused-appellants Raj Bahadur Singh and Ram Nath Singh accused-appellants for the offence u/s 302, I.P.C. is set aside but both of them are convicted of the minor offence u/s 304, Part I, I.P.C, and sentenced to undergo R.I. for a period of 7 years. Both the accused-appellants are on bail from this High Court. Their bail is cancelled. They shall be taken into custody forthwith by issuing a warrant of arrest and sent to the District Jail concerned to serve out their sentence according to law.

26. Let a copy of this judgment be sent to the Sessions Judge concerned for information and compliance. The compliance report shall be submitted by the Sessions Judge concerned to this Court within a period of one month from today.

27. The record of this case shall be listed before this Bench on 8-7-98 along with the compliance report of the Sessions Judge for further orders.