

(2016) 09 AHC CK 0239

ALLAHABAD HIGH COURT (LUCKNOW BENCH)

Case No: Criminal Appeal No. 393 of 1996.

Bansh Raj and Others - Appellant
@HASH State of U.P.

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 29, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 149, Section 304(2)

Citation: (2017) 98 ACrC 143 : (2016) 10 ADJ 744

Hon'ble Judges: Mrs. Ranjana Pandya, J.

Bench: Single Bench

Advocate: R. Murtaza, Alok Singh, Ashok Singh, M.A. Khan and Mohd Altaf Mansoor, Advocates, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Partly Allowed

Judgement

Mrs. Ranjana Pandya, J. - Challenge in this appeal is to the judgment and order dated 20.08.1996, passed by Vth Additional Sessions Judge, Faizabad, in Sessions Trial No. 291 of 1991 (State v. Bansh Raj and others), under Sections 147, 304/149 and 323 I.P.C., Police Station Pura Kalandar, District Faizabad, whereby the appellants Ram Saware, Heera Lal, Jhurai, Nathu, Raja Ram and Raj Karan were acquitted for the charges under Sections 147, 304/149 and 323 I.P.C., whereas appellants Bansh Raj, Brij Lal, Jag Mohan, Hirdai Ram and Ram Nihor were acquitted for the charge under Section 323 I.P.C. but further each of the appellants were convicted and sentenced to 1 year rigorous imprisonment under Section 147 I.P.C. and 7 years rigorous imprisonment along with fine of Rs. 2000/- under Section 304(2)/149 I.P.C. with default stipulation.

2. Filtering out unnecessary details, the prosecution case in brief is that on 20.05.1987, a first information report was lodged by the informant Hari Prasad, the brother of the deceased stating that he has a grove towards west of the village

being grove no. 667 669, the lease of which was given to Ram Saware. There was various litigations between the family of the informant and Ram Saware due to the above mentioned property, both the parties were inimical towards each other. Proceedings under Section 107/16 were also pending between the parties. On 20.05.1987 at 10:00 A.M., the son of the informant namely Ram Shankar went with the buffaloes to the field to enable the buffaloes to graze in the grove. Bansh Raj Son of Ram Saware went to the spot and abused the son of the informant and hit him with a stick. At this the son of the informant raised hue and cry. Bansh Raj also raised hue and cry at which Ram Saware, Jag Mohan, Heera Lal, Jhurai, Nathu, Hirdai, Ram Nihore, Brij Lal, Ram Karan, Balbhadra, Ram Nath armed with lathi, danda reached the grove. On seeing the accused persons, the son of the informant ran towards his house. Shiv Prasad Patel, Shatrughan, Devi Prasad of the family of the informant coupled with Shiv Bahadur also reached the spot. All the accused persons assaulted the family members of the informant who all sustained injuries. The informant did not intervene due to fear. Shiv Prasad sustained injuries on his head and became unconscious. Some people on the side of the accused also sustained injuries which were caused by the family members and companions of the informant in self-defence, hence, the first information report was lodged.

3. On the basis of the written report, chik report was scribed by Constable Babu Ram who copied the details in the G.D. The Chik report and the G.D. were proved by PW-5 S.I. Hemraj as Exhibits Ka-7 and Ka-8. Investigation was conducted by PW-5 S.I. Hemraj. On that date i.e. 20.05.1987, the investigation of Case Crime No. 124A of 1987 under Sections 147, 323, 308 I.P.C. was entrusted to him. He recorded the statement of Hari Prasad and inspected the spot, prepared the site plan which was proved by this witness as Exhibit Ka-3. He collected blood stained and ordinary earth from the spot and prepared its memo which was proved by this witness as Exhibit Ka-4. He also took into possession the blood stained clothes of Shiv Bahadur and Devi Prasad and prepared its memo which was proved by this witness as Exhibit Ka-5. On 20.05.1987, he recorded the statements of Devi Prasad, Shatrughan and Shiv Bahadur. On 21.05.1987, he recorded the statements of Ram Shankar and injury report was received. After investigation, he submitted charge sheet against the accused persons which was proved by this witness as Exhibit Ka-6. PW-6 is Dr. R. P. Pandey who examined Shiv Prasad Pandey and found the following injuries on his body:-

1. Lacerated wound with blood clot 3 cm. X 1 cm. X 1 cm. X bone deep. 7 cm. above the left ear, X-ray was advised.
2. Lacerated wound with blood clot $\frac{1}{2}$ cm. X 0.3 cm. X 0.3 cm. on the outer aspect of left thumb.
3. Lacerated wound with blood clot 4 cm. X 1 cm. X bone deep on the head. 7 cm. above the right ear, X-ray was advised.

4. He also examined Ram Sundar Pandey on the same day and found the following injuries on his body:-

1. Swelling caused by injury. 4 cm. X 2 cm. on inner aspect of right ankle.

The injury report were proved As Exhibits Ka-9 and Ka-10 respectively.

5. PW-7 is Dr. K.U. Ahmad, who medically examined Devi Prasad on whose body the following injuries were found:-

1. Lacerated wound 4 cm. X 1 cm. X bone deep, in the right of the front side of the head, kept under observation and advised for X-ray.

6. Further he examined the injuries of Shatrughan Pandey on whose body the following injuries were found:-

1. Reddish contusion, 7 cm. X 1.5 cm., in the front of middle of the right forearm.

2. Reddish contusion, 6 cm. X 0.5 cm., on the outer margin of the $\frac{1}{3}$ rd upper part of the right forearm.

7. He also examined Shiv Bahadur on whose body the following injuries were found:-

1. Reddish contusion 10 cm. X 1 cm. on the middle of the back.

2. Superficial abrasion 4 cm. X 3 cm. on right scapular region.

3. Superficial abrasion 3 cm. X 3 cm., at 2 cm. from injury no. 2 on inner side.

4. Contusion with swelling 4 cm. X 3 cm. on the back of the right head, at the lower part of small finger. Kept under observation and X-ray was advised.

All the injury report were proved by this witness as Exhibits Ka-11, Ka-12 and Ka-13 respectively.

8. PW-4 Dr. Vijay Kumar Kannaujia has conducted autopsy on the body of the deceased Shiv Prasad on 22.05.1987. He noted the following ante-mortem injuries on the person of the deceased.

1. Lacerated wound 3 cm. X 1 cm. X bone deep on left scalp, 7 cm. above the left ear.

2. Lacerated wound 0.5 cm. X 0.3 cm. X 0.3 cm. on the left thumb on the outer aspect, bone was fractured.

3. Lacerated wound 4 cm. X 1 cm. X bone deep, on right side of scalp, 7 cm. above the right ear, bone of lower part was fractured.

4. Abrasion 6 cm. X 4 cm. on the right side of pelvis, 7 cm. below the pelvic bone.

9. On internal examination the parietal bone of the skull was found fractured. The membranes of the brain were ruptured. The right chamber of heart was full of

blood and left chamber was empty. The deceased died due to shock as a result of ante-mortem injuries.

10. Besides these, witnesses, the prosecution also examined PW-1 Hari Prasad Pandey, the informant who is also an eye witness of the occurrence. He proved the first information report as Exhibit Ka-1. PW-2 is Ram Shankar who is also said to be an injured witness and he is also a witness of the incident and the son of the informant. PW-3 is Mata Deen who is said to be a witness of the incident.

11. Further the prosecution filed 24 documents which were marked by the trial court as Exhibits Ka-15 to Ka-38.

12. After the prosecution evidence was closed, the statements of the accused persons were recorded under Section 313 Cr.P.C. in which they have denied the occurrence. The accused have stated that Ram Shankar abused Bansh Raj and started beating him. When Bansh Raj raised alarm, his family members came who were also beaten by the son of the informant. In defence the family members of Bansh Raj snatched the lathi from the family members of the informant and defended themselves due to which the injured sustained injuries. However, no evidence in defence was adduced.

13. After perusal of all the evidences available on record and hearing the counsel for the parties, the learned trial court has passed the impugned judgment as specified in para one of the judgment.

14. Feeling aggrieved, the accused persons have come up in this present appeal.

15. I have heard Sri R. Murtaza, learned counsel for the appellants, Sri Pawan Kr. Yadav, learned A.G.A. and perused the material available on record.

16. During the pendency of this appeal appellants Jag Mohan and Ram Nihor have died, hence, the appeal in context of appellants Jag Mohan and Ram Nihor stands abated.

17. Counsel for the appellants while castigating the judgment has stated that the trial court has imposed a harsh and excessive sentence on the accused persons. The injuries were caused in exercising right to private defence, hence the appeal is liable to be allowed.

18. Per contra learned A.G.A. has submitted that the findings of the fact recorded by the trial court is based on evidence available on record. He has further contended that there was nothing to falsely implicate the accused and the appeal is liable to be dismissed.

19. As far as the first information report is concerned in cases of prompt first information report, the chances of false implication of the accused are very remote.

20. In **2001 (1) JIC 9143 Allahabad, [Jai Lal (dead) and others v. State of U.P.]**, it has been held that if the first information report is prompt, eye-witnesses are named in the first information report and vivid account of incident is given, then it is sufficient for the prosecution.

21. Perusal of the chik report makes it clear that as per the prosecution case, the occurrence took place on 20.05.1987 at 10:00 A.M. whereas the report was lodged on the same day at 12:40 P.M. The police station being 6 kms. Away from the place of occurrence, thus keeping in view the number of injured persons, nature of injuries, there is no delay in lodging the first information report which is prompt.

22. As far as the motive for committing the offence is concerned, it is proved on record that there was a series of litigations between both the parties. Even in the first information report, motive has been assigned. Motive has also been proved by the witnesses, hence the prosecution has been able to establish the motive. Even in the statements of the accused recorded under Section 313 Cr.P.C., differences between both the parties have been admitted by the accused.

23. Counsel for the appellants has further submitted that the witnesses examined by the prosecution namely PW-1 Hari Prasad and PW-2 Ram Shankar are father and son. They are related and interested witnesses, hence, they cannot be relied upon.

24. As far as related and interested witnesses is concerned, in the case of **Dalip Singh and others v. State of Punjab, (AIR 1953 SC 364)**, it has been laid down as under by the Hon"ble Apex Court:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts."

25. Observations of the Hon"ble Apex Court **Masalti and others v. State of U.P., A.I.R. 1965 SC 202**, are worth mentioning:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence, but the plea that such evidence should

be rejected because it is partisan cannot be accepted as correct."

26. The above decision has been followed in **Guli Chand and others v. State of Rajasthan, 1974 (3) SCC 698**, in which **Vadivelu Thevar v. State of Madras, AIR 1975 SC 614** was also relied upon. The following observations were made by the Hon'ble Apex Court in **Israr v. State of U.P., [2005(51) ACC 113]** in para-12 of the judgement are also important:-

".... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

27. The above position has been highlighted again in the case of **Galivenkataiah v. State of A.P., 2008 (60) ACC 370**, in which reference has been made to some other cases also.

28. No doubt, PW-1 and PW-2 are father and son but PW-2 being an injured witness, his presence at the place of occurrence is not doubtful and PW-1 Hari Prasad, his presence is also not doubted because his reaching the place of occurrence on hearing the shrieks of his son is not unnatural.

29. PW-1 has categorically stated that all the accused persons assaulted Devi Prasad, Ram Shankar, Shatrughan, Shiv Bahadur and Shiv Prasad. Although, there are minor contradictions in the statements of PW-1 Hari Prasad and PW-2 Ram Shankar but these minor contradictions are natural and do not strike at the root of the case. He was subjected to a lengthy cross-examination in which besides proving motive, he has stated that all the accused were beating his brother by lathi. The deceased sustained three or four visible lathi injury but he could not state as to which accused caused the fatal blow on the skull. He was fair enough in admitting that from the side of the informant Shiv Bahadur, Shatrughan, Ram Shankar were armed with lathi.

30. PW-2 is Ram Shankar, although in the injury report his name has been mentioned to be Ram Sundar, but as far as the incident is concerned, he has categorically stated that all the accused caused injuries to the deceased and other injured persons but he could not see particularly as to which accused cause the blow on the skull. PW-3 Mata Deen has also stated that the deceased and the injured persons were beaten by the accused persons. Thus, it is proved that the accused persons did cause injuries to the deceased and the injured persons.

31. It has been submitted on behalf of the appellants that there were cross cases and the injuries on the person of the accused have not been satisfactorily explained by the prosecution.

32. In this regard, counsel for the appellant has placed reliance upon **2013 (80) ACC page 622, (Mohd. Khalil Chisti v. State of Rajasthan)**, in which relying upon the case of **Lakshmi Singh and others v. State of Bihar, (1976) 4 SCC 394**, the Hon'ble Apex Court has observed as under :-

"...It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence....."

33. It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

34. It is further clear that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

35. In the above ruling, itself it has been held that if the injuries of the accused are superficial and minor, it out-raises the effect of omission, on the part of the prosecution to explain the injuries.

36. In the present case, learned A.G.A. has submitted that the injuries caused to the accused were caused by the informant and his family members in exercising of right

of private defence. In the first information report itself it has been mentioned that the informant also caused injuries to the accused. Even crime no. mentioned in the chik report is 124A of 1987, under Sections 147, 323, 308 I.P.C. which was altered vide report no. 20 of 18:20 hrs. On 20.05.1987 into Section 304 I.P.C. This itself is indicative of the fact that earlier a case was lodged by the accused persons which was registered at crime no. 124 of 1987. Although the defence has failed to bring on record anything pertaining to case crime no. 124 of 1987. But since the prosecution has itself come up with a case that during the incident the accused also sustained injuries. The injuries on the body of the accused were simple and superficial.

37. In **Puran Singh & Others v. The State of Punjab, (1975) 4 SCC 518** this court observed that in the following circumstances right of private defence can be exercised :-

- i. There is no sufficient time for recourse to the public authorities.
- ii. There must be a reasonable apprehension of death or grievous hurt to the person or danger to the property concerned.
- iii. More harm than necessary should not have been caused.

38. In **Bhagwan Swaroop v. State of Madhya Pradesh, (1992) 2 SCC 406** this court had held as under:-

"It is established on the record that Ramswaroop was being given lathi blows by the complainant party and it was at that time that gun-shot was fired by Bhagwan Swaroop to save his father from further blows. A lathi is capable of causing a simple as well as a fatal injury. Whether in fact the injuries actually caused were simple or grievous is of no consequence. It is the scenario of a father being given lathi blows which has to be kept in mind and we are of the view that in such a situation a son could reasonably apprehend danger to the life of his father and his firing a gun-shot at that point of time in defence of his father is justified."

39. The facts of this case are akin to the facts of the instant case. In **Kashmiri Lal & Others v. State of Punjab, (1996) 10 SCC 471**, this court held that "a person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat."

40. Thus, on the basis of evidence on record and taking into the view of statements of Mata Deen PW-2, it has specifically stated that both the parties were hurling lathies on each other. I think it was not a pre planned crime but the incident took place at the spur of the moment.

41. Counsel for the appellant has lastly submitted that the occurrence took place in the year 1987. About 29 years have passed. Since the incident took place. Presently the surviving appellants Bansh Raj is more than 55 years of age, the appellant Hirdai

Ram is more than 71 years of age and appellant Brij Lal is more than 61 years of age. At this juncture of age, keeping in view the totality of the circumstances, the appellants should not be sent to jail and the sentences should be reduced.

42. However, the conviction of the appellants is liable to be upheld but the sentence is liable to be reduced from 7 years rigorous imprisonment, under Section 304 part II read with Section 149 I.P.C. to a fine of Rs. 25,000/- each. The further sentence of one year rigorous imprisonment under Section 147 I.P.C. is reduced to a fine of Rs. 1,000/- each.

43. Accordingly, the appeal is partly allowed.

44. The accused appellants Bansh Raj, Hirdai Ram and Brij Lal are sentenced to fine of Rs. 25,000/- under Section 304 part II read with Section 149 I.P.C. and Rs. 1,000/- under Section 147 I.P.C. which they should deposit within two months from the date of delivery of judgment. In default, they shall undergo rigorous imprisonment for 7 years under Section 304 part II read with Section 149 I.P.C. and 1 year rigorous imprisonment under Section 147 I.P.C. 50% of the fine, deposited, shall be paid to the legal representative of the deceased Shiv Prasad. The time for deposition of fine shall not be extended on any ground whatsoever.

45. Let the copy of this judgment be sent to the trial court concerned for compliance.