SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Chokhey and ors. Vs. State

Chokhey and ors. Vs. State

SooperKanoon Citation : sooperkanoon.com/448654

Court : Allahabad

Decided On : Aug-04-1966

Reported in : AIR1968All49; 1968CriLJ218

Judge : S.D. Khare and ;Yashoda Nandan, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 149 and 307; Code of Criminal Procedure (CrPC) , 1898 - Sections 367 and 423; Evidence Act, 1872 - Sections 9

Appeal No. : Criminal Appeal No. 2473 of 1963

Appellant : Chokhey and ors.

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : S.N. Mulla and ;Bhagwat Prasad, Advs.

Judgement :

1. This is an appeal by Chokhey and six others all of whom have been convicted under Sections 307 and 323 read with Section 149 of the Indian Penal Code and each sentenced to six years R. I. for the offence punishable under Section 307/149 and to one year's R. I. for the other offence. They have also been convicted for rioting. Babu Ram and Roop Lal who according to the prosecution case were armed with country-made pistols at the time they committed the offence

of rioting were convicted under Section 148 I. P. C. and each sentenced to two years R. I. while the remaining five appellants were convicted under Section 147 I. P. C. and each sentenced to one year's R. I. All the sentences were ordered to run concurrently.

2. This appeal first came up for hearing before a learned Single Judge of this Court, He referred the appeal to a larger Bench because in his opinion there was some conflict of decision on the point of presumption to be drawn from the use of fire arm in rases where injury dangerous to life is not caused. The learned Single Judge had referred Criminal Appeal No. 2560 of 1963 to a larger Bench on a somewhat similar point, viz., presumption to be drawn from the use of the fire arm even though the injury caused is not on any vital part of the body. That is how both these appeals came up before this Bench for decision.

3. The occurrence which gave rise to the Sessions trial out of which this appeal arises is of 31st of October, 1962. Sher Pal and Lila Dhar (P. Ws. 2 and 3) are residents of village Jagatpur within police circle Bhongaon District Mainpuri. At about 8 A.M. they were putting earth in the lane in front of the door of their place where they used to tether their cattle. Of the seven appellants Babu Ram and Roop Lal were armed with pistols and the rest were armed with lathis reached there and asked Sher Pal and Lila Dhar not to put earth there. Sher Pal and Lila Dhar did not accede to their wishes and told them that they would not stop that work.

Thereupon all the accused persons (appellants), who were holding lathis started beating Sher Pal and Lila Dhar. Both of them raised an alarm on hearing which Ben-chey Lal (P. W. 5) an uncle of Sher Pal, Smt. Lakshmi Devi (P. W. 6) the aunt of Sher Pal, Smt. Phool Mati (P. W 7) the wife of Sher Pal. Pritam (P. W. 4) and Jhunku (P. W. 8) a cousin of Pritam arrived there. At the instigation of Ulfat, appellant, all the accused persons, who were armed with lathis, started beating them and caused in-juries to them. Again Ulfat (appellant) instigated Babu Ram and Roop Lal who were armed with pistol to kill and both of them fired their pistols causing gun-shot injuries to Lila Dhar (P W 3) and Pritam (P W 4).

4. The first information report of the occurrence was lodged by Sher Pal (P W. 2) at police station Bhongaon on the same day at 5.30 P.M. The place of occurrence is at a distance of 10 miles from the police station The names of all the accused persons, the weapons with which they were armed and the main incident as it had taken place were mentioned in the first information report. However, there was no mention in it of any exhortation made by Ulfat to other accused persons either to beat Sher Pal and others or to kill them.

5. The usual investigation followed. The injured were sent to Medical Officer In-charge, Bhongaon Dispensary, for the examination of their injuries. Dr G. K. Jhingran (P W 1) the then M O., In-charge of Bhongaon Dispensary, examined their injuries and found the following 12 gun-shot injuries on the person of Pritam:

1 Gunshot wound of entrance four in number in one line 5' long extending from the right of the midline of the front of the neck to the outer third of left clavicle upper part measuring each 1/10' x 1/10' x superficial

2. Gunshot wound of entrance 1/10' x1/10' x superficial on the front of the left deltoid.

3. Gunshot wound of entrance 1/10' x 1/10' x superficial on the left fictions outer margin about 1' below the arm pit.

4. Gunshot wound of entrance 1/10' x 1/10' x superficial 5 1/2' below the back fold of the left axilla.

5. Gunshot wound of entrance 1/10' x 1/10' x superficial li' inner to the left nipple.

6. Gunshot wound of entrance 1/10' x 1/10' x superficial 3' inner to the right nipple.

7. Gunshot wound of entrance 1/10' x 1/10' x superficial inner and right coastal margin, inner to midline of abdomen.

8. Abrasion li' x 1/6' on the right coastal margin in line with the right nipple.

9. Gunshot wound of entrance 1/10' x 1/10' x superficial li' below the umbilicus outer side of the left abdomen.

10. Gunshot wound of entrance 1/10' x 1/10' x 2' under the skin, outer to short on the right thigh back on upper third.

11. Gunshot wound of entrance 1/10' x 1/10' x 3/4' under the skin outer to short, on the right forearm in front upper l/3rd.

12. Abrasion 3/4' x 1/6' on the left arm on the back upper part

Lila Dhar had the following four gun shot injuries:

1 Gunshot wound of entrance 1/10' x 1/10' x superficial on the inner end of the left clavical.

2 Gunshot wound of entrance 1/10' x 1/10' x superficial on the left hip 2' above the iliac crust.

3. Gunshot wound of entrance 1/10' x 1/10' x superficial 3 1/2' outer and below the umbilicus on the right abdomen.

4 Gunshot wound of entrance 1/10' x 1/10' x 1/2' under the skin inner to short on the left groin front.

The doctor examined the injuries of Smt. Phool Mati, Benchey Lal, Jhunku, Sher Pal and Smt Lakshmi Devi the same evening and found that Smt. Phoolmati had received only one injury it being a contusion on the left forearm. Benchey Lal had received four injuries, out of which three were contused wounds one on the scalp and two on the right-hand fingers and the fourth a swelling on the back of the right hand. Jhunku had only one injury it being a contused wound on the left forearm. Sher Pal had three injuries one being a contused wound on the outer end of the left eyebrow the second being a contusion on the outer side of the right elbow and the third a sub conjunctival haemorrhage at 3'O clock position in the left eye. Smt. Lakshmi Devi had two injuries one being a contused wound on the left eye brow and the second a swelling on the left Zygoma (cheek bone).

6. All the injuries were simple and in the opinion of the doctor about 12hrs old at the time of the examination which tookplace between 6.20 P.M. and 7.30 P.M. on 31st October, 1962.

7. The prosecution examined 10 eyewitnesses of the occurrence out of them seven, viz., Sher Pal, Lila Dhar, Pritam, Benchey Lal, Smt. Lakshmi Devi, Smt. Phool Mati and Jhunku (P. Ws. 2 to 8) are those who had received injuries at the time of the occurrence. The witnesses, who had not received any injury at the tune of the occurrence, are Rameshwar (P. W. 9), Bhagwan (P. W. 10) and Kaptan (P. W. 11). Rameshwar (P. W. 9) is a cousin of Sher Pal while Bhagwan (P. W. 10) is his collateral. Kaptan is a brother of Pritam (P. W. 4). They all supported the prosecution case.

8. All the accused persons pleaded not guilty and stated that they had been falsely Implicated due to enmity. It was explained by some of them that Sher Pal, Lila Dhar, Pritam and their family members had been outcasted because the wives of Pritam and Lakshmeshwar, members of their family, had run away. It was on that account that they bore grudge towards the appellants two of whom, viz., Ulfat and Laltu had acted as Panches of the Panchayat by whom they had been outcasted. It was suggested on behalf of the accused persons during the course of the cross-examination that somebody had caused these injuries to Sher Pal and others but the assailants could not be identified, Two witnesses, viz., Nassu Singh (D. W. 1) and Ram Lal (D. W 2) were examined in support of the defence case. Nassu Singh stated about the Panchayat while Ram Lal deposed that no occurrence whatsoever had taken place as alleged by the prosecution

9. The learned Additional Sessions Judge, after having considered the entire evidence on record, arrived at the conclusion that the prosecution witnesses were reliable and no reliance whatsoever could be placed on the negative evidence of Ram Lal (D. W. 2). He, therefore, convicted and sentenced all the seven appellants aforesaid.

10. We have disposed of Criminal Appeal No. 2560 of 1963 = (AIR 1967 All 580) only the other day. In our decision we have discussed in detail about the conflict in two decisions of this Court given by learned Single Judge on the point as to what presumptions could be drawn when firearms had been used in the course of attack. As pointed out in our judgment in Criminal Appeal No. 2560 of 1963 = (AIR 1967 All 580) there is no real conflict between the two decisions. The decision in

each case depended on its own facts and circumstances. The finding whether or not a certain act amounts to an attempt of murder punishable under Section 307 I. P. C. is essentially a finding of fact. The mere use of a pistol or gun at the time of the attack by the assailants will not necessarily bring the case under S 307 I. P C. We need not repeat our reasons which we have given in detail in Criminal Appeal No. 2560 of 1963 = (AIR 1967 All 580).

11. Ten eye-witnesses were examined in support of the prosecution case. Out of them P. Ws. 2 to 8 are those who had received injuries at the time of the occurrence. Theii presence at the time of the occurrence cannot, therefore, be doubted. Rameshwar, Bhagwan and Kaptan (P. Ws. 9 to 11), the remaining three eye-witnesses, live close to the place of occurrence and, as stated by them, they could have easily come on hearing the alarm raised by Sher Pal and Lila Dhar who are attacked first. They are most probable and natural witnesses of the occurrence.

12. It has been contended that inasmuch as it has come in the prosecution evidence itself that all the witnesses of the occurrence either belong to the same family or are closely related their testimony should not be accepted without due care and caution and without proper corroboration. There is some force in this argument. We, however, find that there is ample corroboration available from the medical evidence and also from other facts and circumstances of the case. The injuries to Lila Dhar and Pritam could have been caused with country-made pistols, as alleged by the prosecution, while the injuries to Sher Pal, Benchey Lal, Lakshmi Devi and Phoolmati and Jhunku could be caused with lathis It is also clear from the medical evidence that all these injuries must have been caused at the time alleged by the prosecution.

13. The first information report was lodged by Sher Pal (P W. 2) at 5,30 P.M. the same evening So many persons had been injured and a distance of 10 miles had to be covered on slow moving vehicles. In the circumstances there was no undue delay in lodging the first information report which had been written out before it was lodged. All the facts of the prosecution case were mentioned in that report.

14. The testimony of Ram Lal (D. W. 2) is of no value. So many persons received Injuries and there can be no doubt that an occurrence had taken place in the village at the time and place alleged by the prosecution. The negative statement made by Ram Lal that no incident whatsoever had taken place therefore leads us nowhere.

15. It is not disputed that two women of the complainant's family had not returned to theit father-in-law's place after they had gone to their father's place. None of the prosecution witnesses, however, admitted that their family members had been excommunicated from the Biradari on that account. However, assuming that the statement made bv Nassu Singh (D. W. 1) is correct and the Biradari Panchayat. of which Ulfat and Laltu were Panches, ex-comrnuni-cated the members of the family of the complainant several years ago, it could hardly constitute a strong motive for lodging a false complaint against the appellants.

16. In all cases where the eye-witnesses belong to one and the same family or some of them are distantly related to the members of the complainant's family the prosecution evidence has to be scrutinized to see whether or not some of the persons named as accused persons have been unnecessarily implicated because of their close relationship or association with the real assailants. The evidence of the prosecution witnesses will have, therefore, to be scrutinized from that point of view also.

17. Out of the seven accused persons two, viz., Babu Ram and Roop Lal, are said to have used country made pistols. As regards Roop Lal the evidence for the prosecution is consistent that he had it from the very beginning and that he had used it towards the close of the fight. We see no reason to doubt the prosecution evidence as against Roop Lal.

18. So far as Babu Ram appellant is concerned, it has come in the prosecution evidence that he is a District Board teacher. One of the prosecution witnesses, viz., Sher Pal (P. W. 2) stated that there had been some litigation between his grand-father and the ancestors of Babu Ram. The relations between Sher Pal and the members of his family on the one hand and Babu Ram appellant on the other could have been somewhat strained. It was stated by Lila Dhar (P. W. 3) that Babu

Ram did not have the pistol from the very beginning and that he had gone back home and brought it to the place of occurrence immediately before the guns were fired. Lila Dhar was not declared hostile and his testimony on that point makes the deposition made by the other prosecution witnesses that Babu Ram had a pistol with him from the very beginning somewhat doubtful.

19. It is true that two persons had received gun shot injuries. However, the dimensions of all the injuries of both the persons being similar it is difficult to say whether both of them received those injuries as a result of one shot being fired from some firearm or as a result of two shots. In case both Lila Dhar and Pritam received injuries as a result of only one pistol being fired there could be no occasion for Babu Ram to have gone back to his house and brought out his pistol to cause injuries to some of the members of the complainant's party. In the circumstances the participation by Babu Ram in committing the alleged offences is not free from doubt and he is entitled to benefit of doubt and acquittal.

20. Ulfat is a man 70 years old. It has come in the prosecution evidence that he is the oldest person alive in the village. The prosecution case against Ulfat was that he had exhorted the Lathiwalas to beat Sher Pal and others and had also instigated Babu Ram and Roop Lal who had country made pistols with them to fire their pistols and kill members of the complainant's party. It was also said that he was armed with a lathi and had used it at the time Sher Pal, Lila Dhar and others were attacked by the accused persons. The prosecution evidence on the point of exhortation is somewhat discrepant. Lila Dhar, Pritam, Jhunku and Rameshwar (P. Ws 3, 4, 8 and 9) did not depose in their statements about any such exhortation. It is true that they have not said in their statements that no exhortation was made by Ulfat but the omission on their part to state anything about the exhortation by Ulfat leads us to think that they had nothing to say on that part of the prosecution case. Benchey Lal (P. W. 5) stated that the only exhortation made by Ulfat was to beat the members of the complainant's party. On the other hand Smt. Lakshmi Devi, Smt. Phool Mali, Bhagwan and Kaptan (P. W. 6, 7, 10 and 11) deposed that exhortation made by Ulfat was to kill Lila Dhar and others.

21. It is significant to note that although Sher Pal (P. W. 2) who is an eyewitness of the occurrence and was also injured had lodged the first information report he mentioned nothing whatsoever about the exhortation by Ulfat in that first information report. However, when examined in court he stated that Ulfat had exhorted his companions thrice. In the very beginning he exhorted them to beat Sher Pal and Lila Dhar. A few minutes later when Pritam, Benchey Lal, Lakshmi Devi, Phool Mati and Jhunku arrived to save Sher Pal and Lila Dhar he exhorted his companions to beat them also. Ultimately towards the close of the fight he exhorted Babu Ram and Roop Lal to use their pistols against the members of the complainant's party. Had Ulfat taken such an active part at the time of the occurrence and exhorted his companions thrice as alleged by Sher Pal (P. W. 2) during the course of his statement before the court, there could be no reason to omit that fact in the first information report which is a fairly detailed one.

22. In our opinion the alleged exhortation by Ulfat is not established.

23. The next point that arises for consideration is whether Roop Lal carried the country-made pistol in his hand which could be seen by his companions and also by the members of the complainant's party from the very beginning of the attack or whether he had kept it concealed and whipped it out only at the time too many persons arrived to save Sher Pal and Lila Dhar. The prosecution case that the country made pistol held by Roop Lal could be seen from the very beginning is not free from doubt. It is not very likely that there would have been so much insistence and resistance on the part of the complainant's party after they had seen that one of the assailants was armed with a pistol. The probability that Roop Lal had the pistol with him from the very beginning but he exposed it to viewonly towards the close of the fight is not absolutely free from doubt.

24. According to the prosecution case itself there was at first some altercation and then Sher Pal (P. W. 2) was injured. Sher Pal received three injuries only which could be the result of two lathi blows only. Other members of the family of Laltu and Sher Pal arrived 3 to 5 minutes later. They were also beaten with lathis as a result of which some of them received a few injuries. It was at that stage that a country made pistol is said to have been fired. In the circum-cumstances the

probability that the fire of the pistol by Roop Lal was an individual act and that a common object of unlawful assembly had been only to cause hurt to Sher Pal and others cannot be ruled out.

25. Roop Lal used his pistol from a very close range. According to Benchey Lal (P. W. 5) Roop Lal was at a distance of about 7 or 8 paces from the victims. Smt. Phool Mati (P. W. 7) estimated the same distance as 5 or 6 paces and Smt. Lakshmi (P. W. 6) as two or three paces. It is, therefore, clear that the pistol was fired from a very close range and it is established from the medical evidence that the injuries were caused to Lila Dhar and Pritam on vital parts of their body. It appears that due to faulty nature of ammunition the pellets did not go very deep. However, from the facts and circumstances of the case no doubt is left that the intention of the assailant must have been to cause the death of his victims, or he should have at least known that as a result of his act he was most likely to cause the death of his victims. There is nothing on record to show that Roop Lal was aware that his ammunition was defective and incapable to cause any harm. It can, therefore, be safely inferred from the evidence in the case that the intention of Roop Lal was to cause the death of the victims. There can be no doubt that, the offence committed by Roop Lal was punishable under Section 307 I. P C. Being also a member of the unlawful assembly he was in addition liable to be convicted under Section 148 of the Indian Penal Code.

26. We see no reason to disbelieve the prosecution evidence on the point that Cho-khey, Bijai, Ulfat, Laltu and Mukut were armed with lathis of which some must have been used at the time of the occurrence All of them and Roop Lal had gone to the place of occurrence together In the circumstances from which it can be inferred that their common object was to cause injuries to Sher Pal and Lila Dhar and any other person who might come to resist. The appellants other than Babu Ram were, therefore, rightly convicted for rioting and also under Section 323/149 I. P. C. for causing simple hurt to several persons. In view of our findings Chokhey, Bijai Ulfat, Laltu and Mukut could not, however, be convicted under Section 307/149 of the Indian Penal Code.

27. The result is that the appeal so far as it relates to Babu Ram is allowed and his conviction and sentence is set aside on all the counts. We are informed that Laltu is dead. So the appeal against him abates. The appeal so far as it relates to Chokhey, Bijai, Ulfat and Mukut is partly allowed. Their conviction and sentence under Section 307/149 I. P. C. are set aside. However, their conviction and sentence under Section 147 I. P. C. and 323/149 I. P. C. are maintained. The appeal of Roop Lal is dismissed. His conviction and sentence under Section 148 and 323/149 I. P. C. are maintained. His conviction under Section 307/149 I. P. C. is set aside and instead he is convicted under Section 307 I. P. C. simpli-citer. We have examined the record and the charge against Roop Lal and we are satisfied that from what has been mentioned in the charge itself an alternative charge under Section 307 simpliciter as against Roop Lal was possible. No question of prejudice is, therefore, involved.

28. All the appellants are on bail. Thebail-bonds of Babu Ram are discharged.Chokhey, Bijai, Ulfat, Mukut and Roop Lalmust surrender forthwith to their bail-bonds to serve out the sentences awarded tothem. Their bail-bonds are cancelled.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com