

**Moti and ors. Vs. State**

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**Court :** Allahabad

**Decided On :** May-17-1966

**Reported in :** AIR1967All437; 1967CriLJ1124

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

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 149, 302 and 326

**Appeal No. :** Criminal Appeal No. 323 of 1964

**Appellant :** Moti and ors.

**Respondent :** State

**Advocate for Def. :** Deputy Govt. Adv.

**Advocate for Pet/Ap. :** Pratap Narain Misra, Adv.

**Disposition :** Appeal partly allowed

**Judgement :**

**S.D. Khare, J.**

1. This is an appeal directed against an order dated 24th January, 1964, passed by the learned Additional Sessions Judge, Budaun, convicting all the five appellants, namely, Moti, Shiami. Madan Lal, Mohar Singh and Dambar under Ss. 148, 302/149, 324/149 I. P. C. and sentencing each of them to imprisonment for life

under Sec. 302/149 I. P. C., two years' rigorous imprisonment under Section 324/149 and one year's rigorous imprisonment under Section 148 I. P. C. all the sentences to run concurrently.

2. All the five appellants and also the members of the complainant's party are the descendants of one common ancestor namely, Jhandey. Het Ram, Hulli and Mewi were the sons of Jhandey. Moti, Shiami and Madan Lal are the descendants of Het Ram, while, Mohar Singh and Dambar (appellants) are the grandsons of Hulli. The person who lost his life was Harkeshi, a son of Mewi, while those injured in the incident were Khem Karan, Pitam and Kundan sons of Mewi. and Sm. Nanhi, wife of Khem Raran.

3. The prosecution case, briefly stated, is that the relations between the descendants of Mewi on the one hand and those of Het Ram and Hulli on the other had become strained because in the month of Kunwar 1962 one Sm. Sudama, wife of Fattu, a grand-son of Het Ram, had been seduced by Nandram, son of Harkeshi. She, however returned to her husband the very next day. On 24-6-1963 sometime in the morning Mansukh, son of Rundan, and Mathura, son of Pitam were grazing their buffaloes in the fields when Shiami appellant had slapped Mathura and given a lathi blow to Mansukh. That did not satisfy Shiami appellant, and he rushed back to his house to give his own version of the incident to the members of his family who in their turn became infuriated and they, in the company of Komil, Jisukh, Raghubir Nihali. Chu-nni and Ramnath, having armed themselves with kantas, gandasas, spears and lathis rushed towards the chaupal of Harkeshi and caused injuries to Khem Raran, Harkeshi. Sm. Nannhi, Pitam and Rundan. When they made that attack, they kept on shouting:

'Today we would take revenge for abducting a woman and for beating our boy; we would kill them'.

Jisukh (since acquitted) caught hold of Khem Karan (complainant) by his waist and made an attempt to throw him down on the ground. In the meantime Komil (since acquitted). Madan Lal and Mohar Singh caused injuries to him with Rantas and Nihali (since acquitted) with a lathi. Harkeshi was also attacked and injured by Moti and Shiami with Rantas and by Dambar appellant with a spear. On hearing the

cries raised by the two victims Sm. Nannhi, wife of Khem Raran, and Rundan and Pitam, brothers of the injured, also rushed towards the place of occurrence. Moti appellant caused injuries to Sm. Narihbi with a Kanta, while Madan Lal who also armed with a Kanta caused injuries to Pitam. Ramnath (since acquitted) is said to have caused injuries with his lathi to Rundan. Khem Karan tried to protect himself by wielding his lathi in self-defence and in that process caused some injuries to Moti, Shiami and Madan Lal.

4. Harkeshi had become unconscious. He and the other injured were taken in a bullock cart to Police Station Bisauli where the first information report was lodged by Khem Karan the same day at 3.45 p. m. The injured including Mansukh were sent to Bisauli Hospital for the examination of their injuries. They were examined by Dr. S. L. Agarwal the same evening. Harkeshi, however, succumbed to his injuries two hours after he had reached the Hospital.

5. The usual investigation followed. Blood-stained and unstained earth from the place of occurrence and the clothes of the injured were sent to the Chemical Examiner and Serologist for examination and report. The Chemical Examiner reported that all the items were stained with blood, and the report of the Serologist was that the blood in them was of human origin. The post-mortem examination on the dead body of Harkeshi revealed that he had received as many as 13 injuries, out of which six were incised wounds on the left ear left mastoid region, left side neck, left cheek bone and temple, on the neck above the thyroid cartilage and on left side of the front of the neck, two stab wounds, one in front of the upper part of the left thigh and the other on the right side of the upper part of the abdomen, two contusions. one superficial linear cut and two abrasions. The internal examination revealed that oesophagus was cut to the extent of 3/4' X 1/2' X cavity on the left side of the gullet. There was also a wound in the peritoneum 1/2' x 1' x thickness of the peritoneum. In large intestines there was ecchymosis of mesentery of large bowels. In the opinion of the doctor death was due to shock and haemorrhage caused by injuries to stomach gullet and windpipe as well as injuries to neck.

6. The injuries received by Khem Karan and others were simple. Khem Karan had received six injuries out of which five were incised Wounds (two on the head, one

on the right shoulder, one on the outer side of the upper part of the right ear and the fifth on the back of left fore-arm) and two contusions, both on the back. Pitam had one contused wound on the right side of the head and one small punctured wound 3/20' X 1/20' X 1/4' in front of left thenar eminence with swelling around. Sm. Nanhi received only these injuries, of which two were incised wounds on the top of head and the third was a contusion over the right shoulder blade. Mansukh who had been injured in the morning incident had only one contusion on his head.

7. The prosecution examined all the four injury witnesses, namely, Khem Karan; Sm. Nandi Pitam and Kundan (P. W. 1, 2, 13 and 14) in support of its case. Kundan (P. W. 14) was declared hostile because, contrary to what he had stated at the time of the investigation, he deposed that as soon as he was injured he ran away from the place of occurrence and did not see the attack on Harkeshi.

8. All the accused persons had pleaded not guilty. All of them except Shiami, Madan Lal and Moti denied their presence at the place of occurrence and explained that they had been implicated due to enmity. Shiami did not admit that Sm. Sudama wife of Fattu had been abducted by Nandram in the month of Kunwar, 1962. He, however, stated that on the morning of 24th June, 1963 a quarrel had taken place between him and Mansukh and he had inflicted a lathi blow on Mansukh. According to Shiami, that was the reason why Khem Karan and others attacked him while he was sitting near the cattle trough. He explained that Khem Karan came with a Kanta and caused him an injury with that weapon.

Moti appellant arrived there and Khem Karan injured him also with the Kanta which he had with him. In the meantime Pitam and Kundan, brothers of Khem Karan, arrived there, Shiami and Madan Lal accused, in the exercise of the right of private defence, caused injuries to Khem Karan, Pitam, and Kundan with their lathis only. Shiami and others also went there to lodge a report but they found that in order to falsely implicate them. Khem Karan and others had murdered Harkeshi on their way to the Police Station. As soon as Shiami learnt that he returned to his own village and did not dare to go to the police Station. Madan Lal and Moti (appellants) adopted the same defence.

9. Five witnesses were examined in support of the defence case, Chet Ram (D. W. 1) stated that at about 11 a.m. on the day of the occurrence he saw Moti running away with a bleeding head injury. At that time Harkeshi was also near the witness. When the witness went towards the place of occurrence he saw that Khem Karan was bleeding from his injury and the wife of Khem Karan was supporting her husband and saying that her husband has been killed. The witness also saw Madan Lal and Shiami both of whom had received injuries. Blood was coming out of the injury on the head of Madan Lal. Chet Ram stated that he did not stay there as he had some breathing trouble. He also stated that Harkeshi had not been beaten in his presence. When cross-examined the witness admitted that he had seen that Pitam and Kundan had also received injuries.

10. Ram Singh (D. W. 2) claimed to be present at the place of occurrence before the trouble started. He stated that Khem Karan was the first to attack Shiami appellant and after saying: 'Would you dare to beat Mansukh again'. Khem Karan attacked Moti also. At that time Shiami was armed with a lathi and Madan Lal with a spear and both of them attacked Khem Karan with the weapons held by them. Pitam and Kundan also arrived and they attacked Shiami and Madan Lal. This witness also stated that Harkeshi did not receive any injury at the place of occurrence at that time. He even went to the length of stating that Harkeshi was not at all present at the time of the occurrence.

11. Naubat (D. W. 4) and Banwari Lal Gaur (D. W. 5), Collection Amin, were examined to prove that they had seen Khem Karan being taken towards the Police Station on that day. They stated that they had seen Harkeshi and others walking behind the car and that Harkeshi had received no injury.

12. These witnesses were examined in support of the defence theory that Harkeshi had received no injury at the place of occurrence and that he must have been murdered by the members of the complainant's party themselves on the way to the Police Station in order to falsely implicate the appellants and others, who were accused with them.

13. One more witness, namely, Dr. R. P. Gulathi, the jail Doctor, was examined to prove that he had examined Moti, Madan Lal and Shiami on 18th July, 1963; and

found that there were marks of injuries which had healed on the heads of all the three appellants named above. The witness could not say at what time these injuries must have been received. He further stated that it was not possible for him to say with which weapon those injuries must have been caused. 14. The learned Additional Sessions Judge, after having considered the entire evidence on the record, arrived at the conclusion that on the three prosecution witnesses, namely, KhemKaran, Sm. Nanhi and Pitam were reliable and that no reliance whatsoever could be placed on the testimony of Chet Ram, Ram Singh, Naubat and Banwari Lal Gaur (D, Ws. 1, 2, 4 and 5). He, therefore, convicted and sentenced the five appellants as aforesaid. He gave the benefit of doubt to the remaining six accused persons, one of whom, namely, Jisukh was alleged to be armed with a Gandasa. another, namely, Komil is said to have been armed with a Kanta and yet another, namely Raghbir was alleged to be armed with a spear and the remaining three, namely, Nihali, Jhunni and Ramnath were said to be armed with lathis, because (1) they did not belong to the family of the appellants and therefore did not share with them the motive for the crime, and (2) there was enmity between them and the prosecution witnesses.

15. It has been contended by the learned counsel for the appellants that the prosecution witnesses should not have been believed, because

(1) they are interested witnesses and none of them can be regarded to be wholly reliable;

(2) no independent witness was examined; and

(3) the immediate cause of occurrence is said to be the beating of Mansukh by Shiami (appellant) and therefore the complainant's party should have felt more aggrieved and must have been aggressors.

16. The prosecution has led evidence to show that the present appellants felt very much aggrieved because of the abduction of Smt. Sudama which had taken place about one year prior to the occurrence. On the morning of the date of the occurrence a quarrel also took place between Shiami on the one hand and Mansukh on the other in which Mansukh received a lathi injury. It has also come in

the prosecution evidence that Shiami returned to the village and told the other appellants his version of the incident. That could have infuriated the appellants and could very well be a motive for an attack on Harkeshi and others.

17. The existence of a strong motive is not at all material. After the abduction of Sm. Sudama feeling between the two branches of the same family must have become very much strained and the incident which took place that very morning might have further infuriated the appellants. Some motive for giving Harkeshi and others a chastisement, therefore, did exist.

18. The main question for consideration for this appeal is whether reliance can be placed ON the injured witnesses all of whom belong to the family of Harkeshi deceased.

19. It is true that the occurrence took place in day-light and other residents of the village have not been examined in support of the prosecution case. However, that circumstance is not very material in the present case, because the appellants attacked their neighbours and kinsmen at a time when only the two victims, namely, Harkeshi and Khem Karan were there. It is apparent from a perusal of the first information report and evidence led by the prosecution that other residents of the village arrived there only after Harkeshi and Khem Karan had been injured.

20. All the three prosecution witnesses, who have been relied upon by the learned Additional Sessions Judge, are injured ones. Their presence at the time of the occurrence cannot be doubted. Apart from Harkeshi deceased Khem Karan alone was present at the place of occurrence when the attack was launched. Other injured prosecution witnesses came later. Therefore, Khem Karan alone could tell about the origin of the fight. His statement is duly corroborated by (1) the recovery of the blood from the place of occurrence, (2) the number and nature of injuries received by Harkeshi and other members of his family, (3) the injuries received by Sm. Nanhi, and (4) the fact that it was not disputed by three of the appellants, namely, Moti, Shiami and Madan Lal that an occurrence had taken place at the time and place alleged by the prosecution in which Khem Karan and others (but not including Harkeshi) were injured. The contention raised on behalf of the defence that Harkeshi had not been injured at the time and place of the

occurrence appears to be without substance.

21. It is true that Sm. Nanhi who became unconscious immediately after she arrived near the place of occurrence and received the first injury could not see the attack on Harkeshi. But she saw him in an injured condition, when she regained consciousness, Pitam (P. W. 13), who had not become unconscious, stated that he had seen Harkeshi being injured by some of the assailants. According to Pitam, Harkeshi fell down unconscious at the time of the occurrence and did not regain consciousness till the time of his death.

22. The first information report of the occurrence was lodged without any delay and it was mentioned therein that Harkeshi had received serious injuries. Harkeshi was taken to the Police Station in an injured condition. The statement made by the defence witnesses that Harkeshi could walk and had not received any injury till the cart left the village carrying Khem Karan and other injured persons appears to be wholly false and untrustworthy. The suggestion made by the defence that Harkeshi must have been murdered by the complainant's party on their way to the Police Station has to be stated only to be rejected.

23. It has been argued by the learned counsel for the appellants that the prosecution witnesses should not be believed because (1) Moti, Shiami and Madan Lal who had also received injuries--and according to the defence witnesses on their heads--might have acted in the exercise of the right of private defence, and (2) it was stated by Pitam (P. W. 13) that he saw Moti running away from the place of occurrence empty-handed.

24. Dr. R. P. Gulathi (D. W. 3), who examined the marks of injuries on the heads of Moti, Shiami and Madan Lal at the time they were admitted in jail clearly stated that in view of the fact that the aforesaid three appellants had come to jail more than one month after the occurrence it could not be ascertained when and with which weapon the injuries whose marks appeared on the heads of the three appellants named above could have been caused. It is, therefore, not possible to say with certainty when the three appellants had received the injuries on their heads. The admission made in the first information report that these three appellants had also received injuries at the time of the occurrence does not go to

show that the injuries which had been caused to them were on their heads. Even if it be assumed that some or all of the appellants had received some injuries on their heads it would be difficult to say that they had been acting in the exercise of the right of private defence.

25. The prosecution witnesses whom the learned Additional Sessions Judge has believed and whom we also consider to be reliable have clearly stated that the three appellants who received injuries along with others were the aggressors, and it was Khem Karan who had wielded his lathi in the exercise of the right of private defence.

26. Pitam (p. w. 13) stated that he saw Moti running away from the place of occurrence empty-handed. That must be towards the close of the occurrence. That statement does not establish that Moti had no weapon when the attack on Khem Karan and others started. It is fully established from the statements made by Khem Karan and Sm. Nannhi that Moti was armed with a Kanta. Moti had been hit and it is understandable that he might have left his weapon of attack at the place of occurrence and run away from there empty-handed. There were others also who had joined him in the attack. It is, therefore, immaterial that no Kanta was recovered at the place of occurrence after all the accused persons had run away. Others, who had attacked Khem Karan and his brothers, could have taken away with them the Kanta left by Moti. The fact that Moti had no Kanta with him at the time he was running away from the place of occurrence will not in our opinion, entitle him to acquittal under Section 148 I. P. C.

27. Khem Karan, Sm. Nanhi and Pitam (P. Ws. 1, 2 and 13) received injuries at the time of the occurrence. Their presence at the time of the occurrence cannot, therefore, be doubted. The Statements made by them are sufficiently corroborated by the recovery of the blood from the place of occurrence and also by the number and nature of the injuries received by Harkeshi and others. They have been relied upon by the learned Additional Sessions Judge and we see no reason to differ from him. The injured witnesses could not be expected to leave out the real culprits and falsely implicate members of their own family. In our opinion these three witnesses can be safely relied upon so far as the appellants are concerned.

28. There is a good deal of discrepancy in the statement made by the prosecution witnesses on the point of details of the occurrence, that is to say, who beat whom during the course of the occurrence. It was difficult to remember those details and we do not attach any importance to the aforesaid discrepancy.

29. The result is that after having thoroughly scrutinized the entire evidence on the record we have no hesitation in affirming the findings of the learned Additional Sessions Judge that the occurrence had taken place in the manner stated by Khem Karan (P W 1) and that all the appellants had taken part in the attack on Harkeshi, Khem Karan, Sm. Nannhi, Pitam and Kundan.

30. The next point that arises for consideration is what was the common object of the unlawful assembly. The prosecution case is that the common object was to cause death of Harkeshi and injuries to others, because (1) Harkeshi died as a result of the attack on him, and (2) the assailants had used spears and Kantas.

31. Harkeshi received as many as 13 injuries, out of which two, namely, one on the neck and the other on the abdomen proved to be fatal. These two injuries have been described by the Doctor who performed the post-mortem examination as mentioned below:

'7. Incised wound 1 3/4' x 3/4' x 1/2' deep on left side of front of neck 1/2' below injury No. 6 with superficial linear cut on the skin on both ends of wound each about 1' long.'

'10. Stab wound 1/2' X 1/4' abdominal cavity on the right side of the upper part of the abdomen about 1' to the right of the umbilicus.'

These injuries were dangerous and sufficient in the ordinary course of nature to cause death. The injury to the neck could have been caused with a Kanta while the injury to the abdomen appeared to have been caused with a spear. There can be no doubt that the accused persons who caused those injuries to Harkeshi must have intended to cause his death.

32. Several appellants were armed with spears and Kantas and it cannot be said who amongst them had caused the fatal Kanla or spear injury to Harkeshi. It must

be for these reasons that no charge under Section 302 I. P. C. simpliciter was framed against any appellant.

33. The question as to what was the common object of the unlawful assembly is essentially a question of fact which has to be determined on the facts and circumstances of each case. The motive for the crime, the weapons used in the attack, the conduct of the assailants, both before and at the time of the attack are relevant considerations.

34. It has been contended by the learned counsel for the appellants, and in our opinion there is good deal of force in it, that the common object of the unlawful assembly could not be to cause the death of Harkeshi. The reasons are:

(1) The appellants belong to the same family as Harkeshi and could have no strong motive to cause his death. They might have felt aggrieved with what Nand Lal son of Harkeshi had done about a year ago. That could be a motive to commit any offence against Nand Lal but there could be no strong motive for causing the death of Harkeshi;

(2) the immediate motive is said to be the quarrel which had taken place between Munsukh and Shiami in the morning that very day. It is however to be noticed that both Munsukh's father and his other brothers escaped with minor injuries. The appellants had ample opportunity to cause their deaths if they had so intended. However, they contented themselves with causing minor injuries only to Pitam, Kundan and Khem Karan.

(3) Khem Karan was attacked first but he too escaped with minor injuries.

(4) it is no doubt true that lethal weapons were used in an attack on Harkeshi and others. The members of the complainant's party received five injuries which could have been caused with lathi. However, it has come in the prosecution evidence itself that at least three of those injuries were caused with the lathi part of the Kantas held by the assailants.

35. The fact that lethal weapons were used by the appellants is no doubt a circumstance which weighs against them, but in our opinion that circumstance

alone cannot determine what the common object of the unlawful assembly was. Much depends upon other circumstances of the case.

36. In the case of *Hanif v. State* : AIR1962 All272 the weapons used were one spear and several lathis. However, taking into consideration all the facts and circumstances of the case it was held that the common object of the unlawful assembly was only to cause grievous hurt punishable under Section 326/149 I. P. C.

37. Again, in the case of *Shambhu Nath Singh v. State of Bihar* : AIR 1960 SC725 the members of the unlawful assembly were armed with one gun, several spears, gandasas, lathis. However, taking into consideration all the facts and circumstances of the case it was held that the common object of the unlawful assembly was to cause grievous hurt only One appellant, who was proved to have caused death. was convicted under Section 302 while the remaining appellants were convicted under Section 326 read with Section 149 I. P. C. It was held that the offence under Section 326 of the Indian Penal Code is in its relation to the offence of murder a minor offence and the language used in Section 149 does not prevent the Court from convicting some of the appellants for that minor offence even though an aggravated offence, i. e., one of murder was committed by one or more members of the unlawful assembly. It was also observed:

'Members of an unlawful assembly may have a community of object up to a certain point, beyond which they may differ in their object, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly (*Jahiruddin v Queen Empress*. (1895) H.R. 22 Cal 306).'

38. In the circumstances of the present case the common object of the unlawful assembly must be to cause grievous hurt to Harkeshi. The two fatal injuries could very well have been the last acts of one or two assaitants and in the state of the evidence that we have on the point it cannot be ascertained as to who had inflicted

those injuries. All the appellants can, therefore, be convicted only under Section 326/149 I. P. C. and, in our opinion, a sentence of five years' rigorous imprisonment to each will meet the ends of justice.

39. The result is that the appeal is partly allowed. The conviction and sentences of all the five appellants under Section 302/149 I. P. C. are set aside and they are instead convicted under Section 326/149 I. P. C. and sentenced to five years' rigorous imprisonment. The conviction and sentences of all the five appellants under Sections 148 and 324/149 I. P. C. are maintained. All the sentences shall run concurrently. Moti and Shami appellants, who are on bail, must surrender to their bail and serve out their sentences.

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