

Jangi Pathak and ors. Vs. State

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Court : Allahabad

Decided On : Sep-26-1963

Reported in : 1965CriLJ373

Judge : B. Dayal and ;S.D. Khare, JJ.

Appellant : Jangi Pathak and ors.

Respondent : State

Judgement :

S.D. Khare, J.

1. These are two connected appeals, arising out of an order dated 28th February, 1962, passed by the learned Additional Sessions Judge, Varanasi, convicting all the seven appellants of both the connected appeals under Section 147 and Sections 302, 323 and 324 read with Section 149, I.P.C. and sentencing each of them to imprisonment for life under Section 302 read with Section 149, I.P.C. and for various terms of imprisonment, ranging from six months to two years, for the offences punishable under Sections 147, 323 and 324, I.P.C.

2. The prosecution case, briefly stated, is that there was a long standing enmity beginning from the year 1928, between the descendants of Shital Pathak on the one hand and those of Ajudhia Pathak, on the other. Shital Pathak and Ajudhia Pathak were real brothers, being the sons of one Hari Pathak, However from the

year 1928 onwards the relations between their descendants became very much estranged. In the year 1928 Ram Chandra, descendant of Shital Pathak, instituted proceedings under Section 107, Cri. P.C. against Kalika, Ram Kishun, Ramu, Batuk, Baldeo, Sat Narain, Bindeswari and Srinath, all descendants of Ajudhia Pathak. An effort was made by the opposite parties to drag in the complainant's party also by making a request that proceedings under Section 107, Cri. P.C. be started against them also, and also by filing a criminal complaint against them. However, both their application and their complaint case were dismissed. In the year 1936 one Ram Bharosey was murdered and Srinath, Namwar and Baldeo (descendants of Ajudhia Pathak) figured as accused persons. Ram Chandra, one of the descendants of Shital Pathak, appeared as a prosecution witness against them. That case ended in the conviction of all the three accused persons. Again, in the year 1946 there was a civil suit in respect of a pokhari, which was ultimately compromised in the Court of appeal. In the same year there was a fight between the members of the two branches of the family of Hari Pathak, and Srinath, one of the descendants of Ajudhia Pathak, was killed. Ram Chandra, Bachai and Bikrama, all descendants of Shital Pathak, figured as accused persons in that case. Bikrama died during the pendency of the trial and Ram Chandra was acquitted. Bachai was, however, convicted and sentenced to five years' rigorous imprisonment. Again, in the year 1956 there was a dispute between the members of the two branches of the family regarding the property of Sm. Marchhi, a widow of one of the sons of Hari Pathak, who died issueless. Then, in the year 1901 Panchayat elections took place. Jangi Pathak, a descendant of Ajudhiya Pathak, was a candidate for the office of Sabhapati. Ram Chandra, one of the descendants of Shital Pathak, supported his rival candidate and Jangi was defeated.

3. From what has been stated above, it is clear that no love was lost between the members of the two branches of the family of Hari Pathak. It was in this context that on the 25th March, 1961, on Ram Naumi day when a Mela at Ashth-bhuja temple was held in village Hindwari and Lallan (deceased), a descendant of Shital Pathak, had gone to see the fair, Jangi Pathak, Namwar, Ramjit, Babau, Baldeo, Sat Narain, Shobh Nath. Kishun and Raja Ram (descendants of Ajudhia Pathak) went to the mela armed with gandasas, and spears and made a search for Lallan

Pathak in order to cause his death. Information reached Lallan Pathak that a search was being made for him, and he quietly slipped away from the mela. He told his elders as to what had happened in the mela, but he was advised to keep quiet and not to go to the mela again. Lallan had, however, to relieve Ram Chandra, to keep night watch over his threshing-floor. He took his meals and proceeded towards the threshing-floor at about 10 p.m. As soon as he reached the field of one Hira Pathak all the seven appellants along with seven others, armed with one gun, three gandasas, three spears and several lathis, overtook Lallan and caused his death. On hearing the alarm raised by Lallan, Ram Chandra, Bachai, Babban and Parmatma (all the remaining descendants of Shital Pathak) reached the place of occurrence. They too received injuries at the hands of the appellants and their companions.

4. The first information report of the occurrence was lodged by Ram Chandra Pathak at police station Mughal Sarai on 26th March, 1961 at 1.10 a.m. No mention was made therein that members of the other party had also received injuries. The fact, however, was that six members of the other party had received injuries, out of whom Baldeo had succumbed to his injuries. The first information report about the occurrence had already been lodged by one of the members of the other party at the same police station ten minutes before the first information report of this case was lodged.

5. The usual investigation followed. The dead body of Lallan was sent for post-mortem examination. Blood-stained earth was recovered from three places, in or near the field of Hira Pathak. A blood stained shoe belonging to Lallan was also recovered from that place. The blood-stained blade of a spear, Ex. 7, was also recovered from there. The house of Jangi accused was searched and a Wood-stained lathi was recovered from there.

6. The post-mortem examination on the dead body of Lallan was performed by Dr. S.G. Jhingaran (P.W. 14) at 4 p.m. on the 26th March, 1961. Rigor mortis was present. The deceased appeared to be about 22 years of age with a very well developed muscular body. There were two external ante-mortem injuries on his person as mentioned below:

(1) Incised wound 1' ' overlying the inferior border of inner and of right clavicle. Direction of the wound was horizontal and depth was directed downwards laterally and backwards making exit at injury No. 2

(2) Incised wound 1' ' in the 5/6 inter costal space just medial to scapula on the right side back. However, both of them were inter-connected and were the result of one single blow. The internal examination revealed that the first rib had cracked and the pleura had incised wounds corresponding to external injuries Nos. 1 and 2. The right lung had been punctured through and through. The pleural cavity was full of 36 ounces of blood. In the opinion of the doctor the death was caused due to shock and haemorrhage as a result of injury to lung and that the injury received by Lallan was sufficient in the ordinary course of nature to cause death.

7. The injuries received by members of both the parties were examined by Dr. S.C. Sahu (P.W. 15) on the 26th March, 1961. The following is a brief summary of his report:

Injuries received by members of the party of the complainant

Bachai: Two simple injuries, out of which one was an incised wound.

Parmatama: Five simple injuries caused by lathis.

Babban: Two simple injuries caused by lathis.

Ram Chandra: Six simple injuries caused by lathis and one incised wound by a gadasa.

Injuries received by the accused persons

Jangi: Four simple injuries, including two incised wounds.

Ramjit: Three simple injuries, including one incised wound.

Namwar: One incised wound.

Batuk: Six Injuries, out of which three were incised wounds. Condition reported to be serious.

Satya Narain: Three simple injuries all by lathi.

Baldeo: Four injuries, out of which one was

(deceased): a gaping incised wound caused by a gandasas.

8. The prosecution examined three out of the out injured namely, Ram Chandra Pathak, Babban Pathak and Parmatma Pathak, P. Ws. 1, 2 and 4 respectively, and two other witnesses, namely, Jairam Dube (P.W. 3) and Lullur (P.W. 5)., Jairam Dube is a resident of village Marchha and was returning from Hindwari fair when ha witnessed the occurrence from a small distance. Lullur (P.W. 5) was talking to Ram Chandra in his threshing floor when the alarm was raised and he had also run to the place of occurrence along with Ram Chandra.

9. Two witnesses, namely, Tribhuwan Misir and Ghunnu Tewari, were examined on the point of motive. Tribhuwan Misir stated that Jangi had lost the election in which Ram Chandra had worked against him. Ghunnu Tewari deposed that he had gone to Hindwari fair on that day, and there he learnt that Jangi, Batuk and others were making a search for Lallan to kill him.

10. The accused persons, while explaining the circumstances appearing against them, did not dispute that relations between the two branches of the family of Hari Pathak were very much strained for the last 30 to 32 years. They, however, pleaded not guilty and stated that Babau had gone to case himself, when he was attacked by the complainant's party, armed with spears, gandasas and lathis. Babau raised an alarm, and all the accused persons, who were subsequently injured, reached there. Baldeo deceased was armed with a spear. He along with others, who had gone to save Babau, were also attacked. Baldeo used his spear in self-defence causing injury to Lallan. Other accused persons who were subsequently injured, reached there. Other accused persons who were there also used' their lathis in self-defence. Jangi accused explained that he had picked up the gandasas of Lallan and had used it in self defence. Two of the accused persons, namely, Raja Ram and Shobh Nath, stated that' they had not taken part in the fight and had been falsely implicated due to enmity.

11. No oral evidence was produced in support of the defence case. It appears that reliance was placed on the fact that a similar cross case had been started against the members of the complainant's party also.

12. The learned Additional Sessions Judge, after having considered the entire evidence on the record, arrived at the conclusion that there could be no doubt that the accused persons were the aggressors. Jairam Dube and Lullur (P. Ws. 3 and 5) were considered to be independent witnesses and relied upon. The result was that all the accused persons were convicted and sentenced as stated above.

13. There can be no doubt that on the night between the 25th and 26th March, 1961, at about 10 p.m. there was a fight between the descendants of Shital Pathak on the one hand and those of Ajudhia Pathak on the other, in or near the field of Hira Pathak, as a result of which two persons, namely, Lallan from the complainant's party and Baldeo from the party of the accused persons, lost their lives, while several members of each party were injured. Each of the two parties, however, came to Court with an altogether different version about the origin of the fight. If the complainant's version is believed, there can be no doubt that the accused persons were the aggressors and could by no stretch of imagination claim the right of self-defence. On the other hand, if the version put forward by the accused persons is held to be probable, whatever they did was in the defence of Babau, who had been seriously injured and, but for their intervention, might have been more seriously injured and died.

14. Earn Chandra Pathak (P.W. 1), Babban Pathak (P.W. 2) and Parmatma Pathak (P.W. 4) frankly admitted that they were accused persons in the cross case. All of them are highly interested persons and much reliance cannot be placed on the statements. The learned Additional Sessions Judge also has not placed much reliance on their statements. He has, however, held that Jairam Dube (P.W. 3) and Lullur (P.W. 5) are independent and reliable.

15. Jairam Dube (P.W. 3) is a resident of village Marchha. He claims to have been returning from Hindwari fair at about the same time when the occurrence took place. He claims to have passed near the threshing floor of Ram Chandra and to have heard the noise caused by the occurrence from that place. He claims to have

gone only up to the end of Hira Pathak's field. He stated that he went up to the place where Lallan had fallen down on the ground but did not go up to the place where Baldeo had fallen down. The reason given by him was that the place where Baldeo had fallen down was at a great distance from where he was standing. The witness has given a graphic description of the occurrence and has fully supported the prosecution case, even on the point as to how the members of the complainant's party, who were originally armed with lathis only were able to snatch away arms from the hands of the accused persons and inflict incised injuries on them. Jairam Dube had to admit in cross-examination that the regular way between villages Hindwari and Marchha lies at a distance of about 8 to 10 bighas from the threshing floor of Ram Chandra. Had he used that pathway he could have not been anywhere near the place of occurrence at the time of the occurrence.

16. Lullur (P.W. 5) had no reason to be present near the place of occurrence at about 10 p.m. However, he explained that Ram Chandra had called him, and as he could not meet him earlier, he had gone to see him at about 9 p.m. at his threshing floor, and had remained talking to him for about one hour when he heard the alarm being raised. The witness explained that Ram Chandra had called him only to do a very small bit of work for him and he had remained talking to Ram Chandra for about an hour or so on no particular subject.

17. Both Jairam Dube and Lullur (P. Ws 3 and 5) appear to be chance witnesses. Their testimony shall have to be properly scrutinized before it can be accepted.

18. The prosecution case was that fourteen persons, out of whom one was armed with a gun, three with spears, three with gandasas, and the remaining persons with lathis, had assaulted Lallan and tried to cause him injuries. It was, however, alleged that two accused persons, namely, Ramjit and Babau, caused spear injuries to him. The post-mortem examination performed on the dead body of Lallan revealed that he had received only one spear injury, although the spear had crossed the entire width of the body and had thus caused two external injuries. Two of the accused persons could not have caused that one injury to Lallan, The prosecution case on that point appears to be false. However, both Jairam Dube and Lullur (P.Ws. 3 and 5) have supported the prosecution case on that point also

and stated that spear injuries were caused to Lallan both by Babau and Ramjit.

19. An examination of the injury reports submitted by the doctor reveals that although the complainant's party is said to have been overwhelmed with such superior numbers and heavily armed with one gun, three spears, three gandasas and several lathis, only 17 injuries were caused to the members of the complainant's party, out of which two were spear injuries, one was a gandasa injury and the remaining 14 were lathi injuries. The accused persons sustained as many as 21 injuries, out of which six were incised wounds, being spear or gandasa injuries, and 15 were lathi injuries.

20. It is difficult to say from the nature of the injuries as to which party was the aggressor. However, the nature of the injuries caused to the accused persons clearly reveals that the prosecution-version, that the members of the complainant's party had gone there only with lathis in their hands and had been lucky enough to snatch away spears and gandasas from the accused persons, can hardly be believed.

21. There is nothing in the first information report to show as to what was the immediate motive for the accused persons to kill Lallan, a lad of 22 years only. Ram Chandra as P.W. 1 has, however, stated as hearsay evidence that both Lallan (deceased) of the complainant's party, and Babau (accused) who were Pahalwans used to go to the Akhara of Mahadeo Panda and two months prior to the occurrence Mahadeo Panda had arranged a bout between the two Babau could not stand Lallan, and therefore, he left the Akhara. It has been suggested by the prosecution that it was on this account that the accused person, who had felt insulted on account of the withdrawal of Babau from the Akhara, wanted to avenge his insult by killing Lallan.

22. On the other hand it has been suggested by the learned Counsel for the appellants that the motive for the attack on them has been furnished by the prosecution itself. According to the prosecution case, Lallan Pahalwan had been insulted in the mela of village Hindwari, and he had to quietly leave it in order to save his life. It must have been to avenge that insult that the member of the family of Lallan, accompanied by Lallan, must have tried to waylay Babau, the Pahalwan

of the other party, and to cause grievous injuries to him.

23. There is no clear evidence on the record about the immediate motive for the occurrence, particularly from the side of the prosecution. As already indicated, the statement of Ram Chandra (P.W. 1) on that point is merely hearsay, and, therefore, inadmissible in evidence.

24. The behaviour of the parties immediately after the occurrence is also somewhat significant. It has come in the prosecution evidence itself that Jangi accused was the first to lodge a first information report about the occurrence. The first information report of this case was lodged ten minutes later.

25. In the circumstances we find it difficult to place any reliance on the statements made by Jairam Dube and Lullur (P.Ws. 3 and 5), who have completely identified themselves with the complainant's cause. They are chance witnesses, and can, by no stretch of imagination, be called independent.

26. The result is that there is no reliable evidence on the record to establish that the accused persons were the aggressors, Babau had been seriously injured and had received as many as six injuries, three of which were incised wounds on his left arm, back of left hand and right axilla. The probability that he was attacked first and the other accused persons joined only subsequently and acted in the exercise of the right of self defence cannot be ruled out.

27. At this stage we might mention that our attention has been drawn to the fact that no evidence was led by the defence in support of its case. That is no doubt so. However, in the present case the absence of defence evidence will not matter so much, because it is not disputed that two cross cases, one against the members of each party, were started as a result of the same incident. The probability of the defence case can be determined from the circumstances of the case and from the weakness of the prosecution evidence.

28. In our opinion the prosecution must fail because it has not satisfactorily established the case put forward by it and the probability of the defence version being correct cannot, therefore, be ruled out.

29. It has been argued by Sri S.N. Mulla, the learned Counsel for the complainant, that the circumstances of the case would reveal that in any event it must have been a case of free fight between the members of the two parties, and, therefore, none of the accused persons could plead that he was acting in the exercise of the right of private defence. Reliance is placed on the case of *Jumman v. State of Punjab (S) : 1957 CriLJ586* In our opinion there is no force in this argument. Each case has to be judged on its own merits. In the case of *(S) : 1957 CriLJ586* the members of the two parties who were on inimical terms were admittedly going to court, heavily armed. They fell out on the way and members of each group caused injuries to the members of the other group. The explanation given, that members of one party were lying in ambush for the other, was not accepted but rest of the prosecution evidence was held reliable. It was held to be a case of free fight in which no member of any of the two parties could plead private defence. On the basis of the facts-found to be correct the question of one party or the other being the aggressor did not arise. The-question as to which party had inflicted the first blow was also considered to be not material. How ever, in the present case the facts and circumstances are entirely different. The case set up by members of each party is such that, if believed, it necessarily makes the other party the aggressor, and gives them the benefit of the plea of acting in the exercise of the right of private defence. The circumstances of the case are such that the defence-version could be true. The prosecution evidence-is weak and unreliable. It failed to explain satisfactorily so many severe injuries caused to the accused persons and Baldeo deceased by spears, gandasas and lathis. A cross case had also been committed to the court of session against the members of the complainant party. In the circumstances-the probability that the members of the complainant's party were the aggressors and the accused persons had acted in exercise of the right of private defence cannot be ruled out.

30. The facts of the present case are entirely; different from the facts of the case of *(S) : 1957 CriLJ586* and for that reason the principle of law laid down in that case will not apply to the facts of the present case. On the other hand, the case of *Shubrati v. State 1959 All LJ 423* will apply to the facts of the present case. It was held in *Shubrati's case, 1959 All LJ 423* that where the prosecution witnesses are disbelieved and no part of the prosecution case can be safely relied upon it will not

be safe to convict the accused persons the ground that as they were injured at the time and place of the occurrence, they must have taken part in the fight which must be a free fight. Where the prosecution evidence has been held to be totally unreliable, a new case cannot be made out for the prosecution and the accused persons cannot be convicted on the assumption that it must be a case of free fight between the members of the two rival parties.

31. Both the appeals are allowed. The conviction and sentences of all the appellants under Section 147 and Sections 302, 323 and 324, I.P.C. read with Section 149 I.P.C. are set aside. The appellants are on bail. They need not surrender. Their bail bonds are discharged.

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