

**Babu Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** Apr-27-2000

**Reported in :** 2000CriLJ4951

**Judge :** R.R.K. Trivedi and ;M.C. Jain, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 147, 148, 149, 302 and 307;  
Code of Criminal Procedure (CrPC) - Sections 313

**Appeal No. :** Cri. Appeal No. 2179 of 1980

**Appellant :** Babu

**Respondent :** State of U.P.

**Advocate for Def. :** A.G.A. and ;Rajul Bhargava, Adv.

**Advocate for Pet/Ap. :** P.N. Mishra, ;Tej Pal and ;Vinay Saran, Adv.

**Judgement :**

**M.C. Jain, J.**

1. These are two connected appeals arising out of the judgment and order dated 23-9-1980 passed by Sri M.P.S. Tomar, the then II Additional Sessions Judge, Mathura in Sessions Trial No. 18 of 1980. They are being decided by this common judgment treating Criminal Appeal No. 2179 of 1980 as the leading appeal. Six

persons were tried before the trial Court they were 1. Deep Chand, 2. Kalua alias Kali Charan, 3. Raman, 4. Bihari, 5. Bishambhar and 6. Babu. Kalua alias Kali Charan, Raman, Bihari and Bishambhar are the sons of Deep Chand whereas Babu is the son of maternal uncle of Deep Chand. Out of them, Deep Chand was acquitted, having been afforded the benefit of doubt. All the rest were convicted under Sections 147 and 302 I.P.C. read with Section 149 I.P.C. Each of them was sentenced to nine months' rigorous imprisonment under Section 147 IPC and life imprisonment under Section 302 I.P.C. read with Section 149 I.P.C. Criminal Appeal No. 2179 of 1980 has been preferred by Babu whereas the remaining convicted accused have preferred Criminal Appeal No. 2187 of 1980.

2. Broad spectrum of the prosecution case as emerging from the first information report and the evidence adduced in the Court may be set forth. The incident took place on 28-11-1979 at about 6 p.m. in Mohalla Rotigodam, Police Station Sadar Bazar, District Mathura. The victim and deceased of the incident was Charan Das. The first information report was lodged on 28-11-1979 at 6.45 p.m. at the concerned Police Station which was at a distance of 2.5 furlongs from the place of occurrence. The informant was Omwati PW 2, wife of the deceased. The victim was alive when the first information report was lodged and as such the case was initially registered under Sections 147, 148, 307, 149 I.P.C. However, the victim died the same day at 9.15 p.m. in the hospital and the case was converted, inter alia, under Section 302 I.P.C.

3. Charan Das deceased and accused Deep Chand were real brothers, latter being the elder. Deep Chand had five sons, namely, Kalua alias Kali Charan, Raman, Bihari, Bishambhar and Bhagwan Das. Out of them, Bhagwan Das was aged about 7 or 8 years only. The remaining four are the accused-appellants. Deep Chand and Charan Das were living in a house. Half eastern portion of the house was in occupation of Deep Chand whereas the other half of the western side was in occupation of Charan Das. The house originally belonged to Kundan-father of Deep Chand and Charan Das. After the death of Kundan a dispute started between the families of two brothers, Deep Chand and Charan Das over the said house. Kundan had allegedly executed a registered will in respect of the house in favour of five sons of Deep Chand, not giving any share to Charan Das.

As stated by Omwati PW 2, the said will had been got executed from Kundan by Deep Chand in a dubious way. Sons of Deep Chand had filed a civil suit which was pending for the last about 2 or 2 1/2 years before the incident. A Marpit had also taken place about 1 1/2 years before the present incident and on two other occasions. A case in that connection was pending before the trial Court and another before this Court. The two families were at loggerheads and the relations were strained owing to the background narrated above.

4. On 28-11-1979 at about 6 p.m. Omwati PW 2, her daughter Km. Radha PW 7 and two other younger children were at their houses. They heard hue and cry from the side of the shop of Ratan; whereupon they rushed up towards that place and found that the accused persons were beating and hitting Charan Das. They dragged him to their Chabutra below Neem tree, downed him there and started assaulting him severely. Kalua aias Kali Charan had a pointed iron rod. Babu and Deep Chand had lathis while others had Dandas. Charan Das's blood was oozing profusely from the injuries caused to him. Besides Omwati PW 2 and Km. Radha PW 7, the incident was witnessed by Roshan Lal PW 3, Beni Ram PW 5, Anant Sharma, Daya Nand, Chhotey Lal and others. When the persons collected around and accosted the accused, they ran away.

5. Omwati PW 2 got a report written by Anant Sharma and sent the same to the Police Station through Bal Kishan where a case was registered at 6.45 P.M. as stated earlier. She herself arranged a Rikshaw and carried Charan Das to the hospital. He was medically examined by Dr. Daulat Ram PW 4 on 28-11-79 at 7.15 p.m. The following injuries were found on his person as per injury report as Ext. Ka-4 :

1. Lacerated wound 5 cm x V2 cm x scalp deep (advised X-ray) on right side of head 10 cm above right ear.
2. Abrasion 1/2 cm x 1/4 cm on outer side of left upper eyelid.
3. Stab wound V2 cm x V2 cm muscle deep on medial side of mid of right arm.

4. Traumatic swelling 7 cm x 4 cm on the back of mid right forearm, advised for X-ray.
5. Abrasion V2 cm x V2 cm behind right wrist.
6. Contusion 7 cm x V2 cm on left (sic) muscle.
7. Lacerated wound 1/4 cm x 1/4 cm x bone deep on lateral side of lower end of left arm surrounded traumatic swelling 4 cm x 4 cm.
8. Contusion 2.5 cm x 1/2 cm on lateral side of mid of left arm.
9. Lacerated wound 0.75 cm x 0.25 cm x bone deep on back of upper part of left forearm 3 cm below from elbow joint, advised for X-ray.
10. Lacerated wound 1/2 cm x 0.25 cm x bone deep 7 cm below injury No. 9 surrounded by traumatic swelling 7 cm x 4 cm, advised for X-ray.
11. Lacerated wound 0.5 cm x 0.25 cm x muscle deep on back of left wrist surrounded by traumatic swelling 8 cm x 5 cm up to back of hand.
12. Contusion 8 cm x 3 cm outer side of lower half of left forearm, advised for X-ray.
13. Lacerated would 0.75 cm x 0.25 cm x muscle deep on front of mid of left leg.
14. Lacerated wound 1 cm v. 0.25 cm x muscle deep on lateral side of lower end of left leg and above left ankle joint, surrounded by traumatic swelling advised X-ray.
15. Lacerated wound 1 cm x 0.25 cm x muscle deep on front of right leg 5 on below knee joint.
16. Contusion 6 cm x 1 1/2 cm x medial side of right leg middle.
17. Abraded contusion 8 cm x 1 cm on lateral side of lower end of right leg.

6. The injured was semi conscious. The injuries Nos. 1,4,9, 10, 11, 12 and 14 were kept under observation and X-ray was advised. All of them had been caused by blunt object. Consequent upon the death of deceased, autopsy on the dead body of Charan Das was conducted on 29-11-79 at 3.30 p.m. by Dr. Shiv Shankar Saraswat PW 8. The outcome of the post-mortem may also be noted. The deceased was aged about 38 years and had died in District Hospital, Mathura on 28-11-79 at 9.15 P. M. The following ante-mortem injuries were found on his person :

1. Stitched lacerated wound 5 cm x 1/2 cm x scalp deep 10 cm above the right ear on head.
2. Abrasion 1/2 cm x 1/4 cm on the left upper eyelid.
3. Stitched wound 1/2 cm x 1/2 cm x muscle deep on the right arm at medial and middle part. Margins irregular.
4. Swelling with bruise 7 cm x 4 cm on back of right forearm.
5. Abrasion 1/2 cm x 1/2 cm on the back of right wrist.
6. Contusion 7 cm x 1 1/2 cm on the left deltoid region of left arm.
7. Lacerated wound 1/4 cm x 1/4 cm with surrounding traumatic swelling 4 cm x 4 cm on the lower part of left arm on lateral side, bone deep.
8. Contusion 2 1/2 cm x 1/2 cm on lateral side of left arm middle part.
9. Lacerated wound 3/4 cm x 1/4 cm x bone deep on the left forearm at back.
10. Lacerated wound 1/2 cm x 1/4 cm x bone deep with surrounding swelling with fracture of both bones of left forearm 7 cm below injury No. 9.
11. Lacerated wound 0.5 cm x 0.25 cm x muscle deep on the left wrist with swelling on wrist and left hand.
12. Contusion 8 cm x 2 cm on the lateral side of lower half of left forearm.

13. Lacerated wound 0.7 cm x 0.25 cm x muscle deep on the middle front of left leg with fracture of left tibia underneath the injury.
  14. Lacerated wound 1 cm x 0.2 cm x muscle deep on the left leg lower end lateral side with swelling of ankle joint.
  15. Lacerated wound 1 cm x 1/4 cm x muscle deep on right leg front 5 cm below knee joint.
  16. Contusion 6 cm x 1 1/2 cm on the medial side of right leg middle part.
  17. Abraded contusion 8 cm x 1 cm on the lateral side of right leg in lower part with fracture of both bones of right leg above ankle joint.
7. The cause of death was shock and haemorrhage with coma due to ante-mortem injuries with head injury.
8. The investigation had been conducted by S. I., M. N. Jafari PW 10. However, the inquest report had been prepared by S. I. Kishan Gopal Goswami PW 6. After conclusion of investigation, a charge sheet was laid against all the six accused. At the trial, the prosecution produced ten witnesses besides relying on documentary evidence. Bhagwan Sahai was examined as DW 1 to prove an application (Ext. Kha-6) moved by Bakshi Ram before the District Magistrate, Mathura on 4-3-78. Out of witnesses examined by the prosecution, Omwati PW 2, Roshan Lal PW 3, Beni Ram PW 5 and Km. Radha PW 7 were the eyewitnesses of fact. The rest were formal witnesses including Doctors, Investigating Officer etc. The defence was of denial. The trial culminated into the impugned judgment which convicted and sentenced five accused persons who have felt aggrieved thereby and have lodged these appeals.
9. We have examined the record and evidence of the case and have heard the arguments of Sri P. N. Mishra assisted by Sri Vinay Saran from the side of the appellants and learned A.G.A. Having scrutinized the evidence on record in the light of the arguments advanced across the bar, we are of the opinion that the benefit of doubt should be afforded to Babu accused-appellant also and further that no charge can be found to have been substantiated against the accused-

appellants Behari and Bishambhar. We wish to elaborate in the succeeding discussion.

10. It has been stated by Omwati PW 2 that Babu accused-appellant is the son of maternal uncle of accused Deep Chand (acquitted). She also admitted that Babu did not get any share in the house of Kundan over which there was dispute between Deep Chand and Charan Das. To say in other words, Babu is not a beneficiary in the will executed by Kundan in respect of the disputed house (which had been executed in favour of the sons of Deep Chand). It also came down from her that he was with Deep Chand in Partibandi. We also note that in her cross-examination, Km. Radha PW 7 did not name Babu as one of the assailants of her father. It is obvious that Babu accused-appellant was equally related to both the sides. Possibility cannot be ruled out that he came to be named as one of the assailants as the prosecution side believed him to be thick with Deep Chand and his sons. The experience shows that there is a tendency on the part of prosecution and witnesses to rope in innocent persons also. On overall appreciation of the prosecution evidence on record together with attending circumstances, there persists a doubt over the actual participation of the accused-appellant Babu in this incident. We would, therefore, afford him the benefit of doubt and would acquit him. Learned Trial Judge erred in not giving the benefit of doubt to him, though he rightly gave such benefit to the accused Deep Chand for the justifiable reasons detailed in paragraph 36 of the impugned judgment.

11. So far as the accused-appellants Behari and Bishambhar are concerned, we are of the clear opinion that they were children of the age of about 14 and 12 years respectively at the time of incident and it does not stand to reason at all that they participated in this incident. We note that the statements of Behari and Bishambhar under Section 313 Cr. P.C. were recorded on 7-8-80. They gave their age as 15 and 13 years respectively. Learned Trial Judge has not recorded any observation to the contrary as regards their age. That would mean that Behari was aged about 14 years and Bishambhar was aged about 12 years when this incident occurred. It is not acceptable that boys of such tender age would have participated in assaulting their uncle Charan Das, when the job could be well performed by their elder brothers Kalua alias Kali Charan and Raman. We should point out that

the Investigating Officer M. H. Zafari S. I. PW 10 had visited the spot and the house of the accused-appellant on 28-11-99 itself. Accused-appellants Behari and Bishambhar were found to be there. According to him, they had concealed themselves in a Kothari behind a heap of wooden sticks. It appears to us that these children (boys) of tender age had nothing to do with the incident but they were very much scared after the incident had taken place. They were in a helplessness state and simply took refuge behind the heap of wooden sticks in a Kothari of their houses. Omwati PW 2 herself stated that the fifth son of Deep Chand, namely, Bhagwan Das was aged about 7 or 8 years. She also stated that her father-in-law Kundan died about 11 or 12 years back and at that time, all the sons of Deep Chand were minors. Barring him, all the four sons of Deep Chand including himself were made accused in this case. Thus, the attempt was to implicate all the male members of the family of Deep Chand excepting Bhagwan Das who was aged about 7 or 8 years. It was simply a compulsion that he could not be implicated because of his very tender age of 7 or 8 years. But the truth has surfaced on record that Behari and Bishambhar were also small children aged about 14 years and 12 years respectively at the time of incident and their participation in this incident is highly improbable. It is for this reason that we would acquit Behari and Bishambhar also.

12. So far as the remaining two accused-appellants Kalua alias Kali Charan and Raman are concerned, there is not the slightest doubt that they were the assailants of the deceased. As per the testimony of eyewitnesses, Kalua alias Kali Charan was armed with an iron rod whereas Raman had a lathi, i.e. each of them had a blunt weapon. A glance at the initial injury report and the post-mortem report of the deceased would show that all the injuries sustained by him were of blunt weapon. Thus, the ocular testimony reconcile with the medical evidence. The main incident took place at the Chabutra of these accused-appellants regarding which all the eyewitnesses have delivered satisfactory evidence. Roshan Lal PW 3 and Beni Ram PW 5 were also residents of the same locality and had rushed to the spot on hearing hue and cry as observed by the learned trial Judge. At the best, Beni Ram PW 5 could be deemed to be affiliated with Charan Das deceased as he was earlier an eye-witness of Charan Das in a case against Deep Chand which ended in acquittal and he was also a defence witness of Charan Das in a case

initiated against him by Kampoori sweepress. But even if his testimony was ignored, there was clinching and satisfactory evidence of the remaining three eye-witnesses, namely, Omwati PW 2, Roshan Lal PW 3 and Km. Radha PW 7 to prove to the hilt the fact that the accused-appellants Kalua alias Kali Charan and Raman were assailants of the victim. Out of them, Roshan Lal PW 3 sounded to be an independent witness. There was nothing to indicate either that he was thick with the deceased or inimical against the accused-appellants. Looking to the injuries sustained by the deceased a feeble suggestion was also made that possibility of there being some more assailants cannot be ruled out. But we do not find any substance in this submission. From the evidence on record it is fully borne out that assault on the deceased continued for some time, and the two assailants, whose participation is proved to the hilt, could cause 7, 8 injuries each to the assailant. The benefit of doubt has to be afforded only to those whose participation appears to be doubtful.

13. The result would be that the accused-appellants Babu, Behari and Bishambhar would be acquitted. Only accused-appellants Kalua alias Kali Charan and Raman are liable to be punished for committing the murder of their uncle Charan Das. They were acting in concert and with previous meeting of minds. They had a common dispute against the deceased concerning the house property which actuated them to commit this crime. A number of injuries were inflicted by them on the deceased. One of them, namely, Kalua alias Kali Charan wielded iron rod, whereas the other accused Raman inflicted lathi injuries on the victim. The injuries were inflicted on different parts of the body of the deceased including vital part head. The cause of death was also shock and haemorrhage with coma due to ante-mortem injuries with head injury. The blows were so forceful that the deceased sustained a number of fractures also. Dr. Shiv Shankar Saraswat PW 8 who conducted autopsy on the dead body of the deceased clearly stated that the injuries inflicted on the victim were sufficient to cause death in ordinary course. Therefore, accused-appellants Kalua alias Kali Charan and Raman are guilty of committing an offence punishable under Section 302, I.P.C. read with Section 34, I.P.C.

14. We shall pause here for a moment to observe that the conviction under Section 302, I.P.C. read with Section 34, I.P.C. is possible when the charges were framed for offence under Section 302, I.P.C. read with Section 149, I.P.C. It was held by the Supreme Court in the case of Amar Singh v. State of Haryana AIR 1973 SC 2221 that when the facts proved and evidence adduced would have been the same if the accused had been charged under Section 302, I.P.C. read with Section 149, I.P.C, it is not illegal to convict him under Section 302, I.P.C. read with Section 34, I.P.C. In such a case, failure to charge the accused read with Section 34, I.P.C, cannot result in any prejudice. The said principle perfectly applies in the present case.

15. In conclusion and for the reasons mentioned above, we allow Criminal Appeal No. 2179 of 1980 filed by accused-appellant Babu and partly allow the other Criminal Appeal No. 2187 of 1980. We modify the impugned judgment and order. We acquit the accused-appellant Babu of Criminal Appeal No. 2179 of 1980 and accused-appellants Behari and Bishambhar of Criminal Appeal No. 2187 of 1980. We dismiss the appeal in respect of accused-appellants Kalua alias Kali Charan and Raman of Criminal Appeal No. 2187 of 1980 but modify their conviction only to Section 302, I.P.C. read with Section 34, I.P.C. (instead of under Sections 147 and 302, I.P.C. read with Section 149, I.P.C). Each of them shall undergo life imprisonment under Section 302, I.P.C. read with Section 34, I.P.C.

16. All the accused-appellants are on bail. Accused-appellant Babu of Criminal Appeal No. 2179 of 1980 and Behari and Bishambhar of Criminal Appeal No. 2187 of 1980 having been acquitted, they are not required to surrender. Their personal bonds and bail bonds are hereby cancelled.

17. The bail of convicted accused-appellants Kalua alias Kali Charan and Raman is cancelled. The Chief Judicial Magistrate, Mathura is directed to get both of them arrested and to commit them to prison to serve out the sentence of life imprisonment passed against each of them.

18. Let a copy of this judgment along with the record of the case be immediately sent to the Court below needful compliance under intimation to this Court within two months positively.

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