

Ram Asrey and ors. Vs. State

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Court : Allahabad

Decided On : Jan-07-2003

Reported in : 2003CriLJ2276

Judge : Vishnu Sahai and ;R.C. Pandey, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Cri. Appeal No. 441 of 1980

Appellant : Ram Asrey and ors.

Respondent : State

Advocate for Def. : Rakesh Srivastava, A.P.P.

Advocate for Pet/Ap. : Mukul Rakesh, Adv.

Disposition : Appeal allowed

Judgement :

Vishnu Sahai, J.

1. Through this appeal, the six appellants namely, Ram Asrey, Khelawan, Bhagwati, Ram Harakh, Raja Ram and Kallu have challenged the judgment and order dated 21-7-1980 passed by the Sessions Judge, Rae Bareilly in Sessions Trial No. 4 of 1980 whereby they have been convicted and sentenced in the

manner stated hereinafter :--

1. Ram Harakah :

(i) under Section 148, I.P.C. to two years' R. I.; and

(ii) under Section 302, I.P.C. to imprisonment for life.

2. Kallu :

(i) under Section 148, I.P.C. to two years' R. I.; and

(ii) under Section 326, I.P.C. read with 149, I.P.C. to three years' R. I.

3. Ram Asrey, Khelawan, Bhagwati and Raja Ram :

(i) under Section 147, I.P.C. to one year's R. I.; and

(ii) under Section 326, I.P.C. read with 149, I.P.C. to three years' R. I.

The substantive sentences of the six appellants have been ordered to run concurrently.

2. The informant Sardar, his sons Babu Lal, P. W. 3 and Sunder (not examined), deceased Rameshwar and wife of the deceased Smt. Sukha, P.W. 4 and the six appellants at the time of the incident were living in Kanpuriyan, hamlet of Lodhwari within the limits of P.S. Deeh in district Rae Bareli. The deceased Rameshwar was nephew (sister's son) of appellant Bhagwati, father of appellants Ram Harakh and Raja Ram. The first marriage of Rameshwar's mother Umrai was performed with Ghirrau and Rameshwar was born from the wedlock. About 15-16 years prior to the incident Ghirrau died. On his death Bhagauti's father gave 14th portion of his land to Umari who continued living with her son Rameshwar. Thereafter Umrai married for a second time and went to Jagatpur, but Rameshwar continued living in the village and cultivating 1/4th land given to his mother. During consolidation, he got the said land entered in his name.

Ram Asrey alias Asrey wanted to sell some of his land to Onkar Murai and took on credit some money from Rameshwar.

On 14-9-1978 at about 6-7 p.m. appellant Raja Ram son of Bhagwati was playing Jhavar with some boys. Rameshwar told them to go away and reprimanded him for making noise. Raja Ram went and told this to his father Bhagwati. At about 7.30 p.m.-9 p.m. Bhagwati instigated that Rameshwar be killed. He was accompanied by Raja Ram, Ram Asrey, Ram Harakh, Kallu and Khelawan. Out of them, Ram Harakh and Kallu were armed with axe and the remaining with lathis. Bhagwati and others surrounded Rameshwar. Thereafter Ram Harakh inflicted an axe blow on Rameshwar's person which resulted in his intestines protruding out. At that juncture, the informant (Sardar), his sons Sunder and Babu alias Babu Lal reached there and questioned them for assaulting Rameshwar. Thereupon Kallu with axe and Bhagwati with lathi assaulted the informant. They also assaulted Sunder and Ram Asrey. Raja Ram, who had iron ring in his lathi, assaulted Babu with lathi. After assaulting Rameshwar, Sunder, Babu and Sardar, the appellants ran away.

Apart from Sardar, Babu and Sunder, this incident was also seen by Smt. Sukhha, P. W. 4 wife of Rameshwar. Since the incident had taken place during night time, the informant did not proceed to the police station to lodge the F.I.R. Next morning after sunrise, he went and lodged his F.I.R.

3. The evidence of Head-moharrir Kundan Singh, P.W. 6 shows that the F.I.R. of the incident was lodged on 15-9-1978 at 9.15 a.m. at P.S. Deeh by Sardar and on its basis he registered a case in the general diary vide Exhibit Ka-14. His evidence shows that he thereafter sent the victims for medical examination.

4. The injuries Of Sunder Lal, Babu Lal and Sardar were examined on 15-9-1978 at 10.10 a.m. 10.40 a.m. and 11 a.m. respectively by Dr. S. K. Tarkayastha-PW 5.

On the person of Sunder Lal the doctor found 1 incised wound, 4 contusions, and 3 lacerated wounds.

On the person of Babu Lal, the doctor found 2 lacerated wounds and two abrasions.

On the person of Sardar the doctor found 1 lacerated wound, 2 incised wounds, and 2. abrasions.

In the opinion of Dr. Tarkayastha, the lacerated wounds and contusions suffered by the victims were attributable to blunt weapons and the incised wounds to a sharp edged weapon.

5. The autopsy on the corpse of deceased Rameshwar was conducted on 16-9-1978 at 4.30 p.m. by Dr. N.N. Bhatnagar, P. W. 2 who found on it the following anti-mortem Injuries :--

1. Lacerated wound horizontally placed, scalp deep slightly to left on top of head.
2. Contusion 2 c.m. x 1 c.m. on front of forehead right side.
3. Multiple abrasions in an area of 3 c.m. x 3 c.m. back of right elbow.
4. Stab wound on left side front of chest and abdomen 27 c.m. x 15 c.m. Chest and abdominal cavity deep with intestines protruding out of it.

The cause of death spelt out in the post mortem report was shock and haemorrhage as a result of injury No. 4.

6. It is significant to point out that appellants Bhagwati and Ram Harakh also sustained injuries in the same incident, which were medically examined. Their injuries were medically examined by Dr. K.N. Mehrotra, D. W. 2 on 16-9-1978 at District Jail, Rae Bareli. Ram Harakh was medically examined at 5.10 p.m. and on his person Dr. Mehrotra found the following injuries :--

1. Contusion 3 c.m. x 1 c.m. on the right scapula medial to lower angle of it.
2. Lacerated wound 4.5 c.m. x 1.5 c.m. x muscle deep on back of left right finger over first intra phalange joint.

In the opinion of Dr. Mehrotra, the said injuries were attributable to blunt object.

While examining Bhagwati Dr. Mehrotra found that his right forearm was fractured. Consequently, he referred him for treatment to the District Hospital, Rae Bareli.

Injuries of Bhagwati were examined at District Hospital, Rae Bareilly on 16-9-1978 at 2.50 p.m. by Dr. D.N. Misra, P. W. 3, who found on his person the following injuries.

1. Lacerated wound 4.5 c.m. x 5 c.m. on the left parietal bone, 7 c.m. above left ear.
2. Incised wound 2 c.m. x 5 c.m. on the left pinna upper ear, 4.5 c.m. above lobule of ear.
3. Lacerated wound 1 c.m. x 5 c.m. on the right forearm medial border, 8 c.m. above wrist. There was clear deformity of the forearm at the level of the wound suggesting compound fracture of the bone.
4. Contusion all over the back of right hand.
5. Contusion 25 c.m. x 6 c.m. on the left scapula.

In the opinion of Dr. Misra, injury Nos. 1, 3, 4 and 5 were attributable to a blunt weapon and injury No. 2 to a sharp edged weapon.

7. The case was investigated in the usual manner by Inspector Tribhuwan Nath Pandey, P. W. 7. His evidence shows :--

The F.I.R. was lodged in his presence, he thereafter interrogated Sardar, Sunder and Babu Lal under Section 161, Cr. P. C. at the police station and then proceeded to the place of incident. He found the corpse of Rameshwar on the latter's door and performed the inquest. He then inspected the place of the incident and prepared site plan. From the place of the incident, he recovered plain and blood stained earth under recovery memos. On 15-9-1978 he arrested appellants Raja Ram and Ram Harakh. On 28-10-1978 after completing investigation he submitted the charge sheet.

8. The case was committed to the Court of Sessions in the usual manner where the appellants were charged on various counts and then put up for trial.

During trial, the prosecution examined seven witnesses. Three of them, namely, Sardar, Babu Lal and Smt. Sukkha, P. Ws. 1, 3 and 4 respectively were examined as eye-witnesses. The defence suggestion which was given to these witnesses during the course of their cross-examination was that the deceased Rameshwar, informant Sardar, informant's sons Sunder and Babu came to the house of Bhagwati and assaulted him and appellants Ram Harakh and Ram Asrey in order to defend Bhagwati assaulted them. The said suggestion was denied by these witnesses.

In defence, three witnesses, namely, Dr. M. Pratap (Radiologist, District Hospital, Rae Bareli), Dr. K.N. Mehrotra (Medical Officer, District Jail, Rae Bareli) and Dr. P.N. Misra (Medical Officer, District Hospital, Rae Bareli), D. Ws. 1, 2 and 3 respectively were examined.

The trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated in paragraph 1.

9. Hence, this appeal.

10. We have heard learned counsel for the parties and perused the entire record. In our view, this appeal deserves to be allowed.

11. The learned trial Judge has based the conviction of the appellants on the ocular account furnished by Sardar, Babu Lal and Smt. Sukkha, P. Ws. 1, 3 and 4 respectively. In our view it would not be safe to accept it. Since in paragraph 2 of our judgment, we have set-out the prosecution case on the basis of the recitals contained in the examination-in-chief and brevity is the order of the day, we do not intend reiterating the details.

12. We make no bones in observing that we have grave doubts about the presence of Smt. Sukkha, wife of deceased Rameshwar on the place of incident. It is significant to point out that in the F.I.R. when was lodged after nearly 12 hours of the incident taking place (the incident took place on 14-9-1978 at about 7.30-9 p.m. and the F.I.R. was lodged on 15-9-1978 at 9.15 a.m.) and not in haste, she has not been named. There is another reason as to why we have reached this

conclusion. In her examination-in-chief, she candidly stated that after Ram Harakh had inflicted an axe blow on her husband Rameshwar, she fell upon his (Rameshwar's) person. Naturally blood must have fallen on her clothes. In her cross-examination she stated that the investigating officer took her clothes in possession. However, the evidence of Inspector Tribhuwan Nath Pandey, P. W. 7, the investigating officer belies this inasmuch as he has not stated that he seized blood stained clothes worn by Smt. Sukkha.

13. We make no bones in observing that we have no hesitation in believing that Sardar, P. W. 1 and Babu Lal, P. W. 3 were present on the place of the incident and saw the incident. The reason is simple. They had injuries on their person and the manner of assault as deposed to by them in corroborated by the medical evidence.

14. But in the instant case, since two of the appellants, namely, Bhagwati and Ram Karakh sustained injuries, which have not been explained by the prosecution, the circumstances of Sardar and Babu Lal being injured does not ensure their credibility.

In the earlier part of our judgment we have reproduced the injuries sustained by Bhagwati and Ram Harakh. We do not wish to burden our judgment by graphically reiterating their injuries, but would only like to say that Ram Harakh sustained 2 blunt weapon injuries, one of which was on the head and Bhagwati sustained 1 incised wound, 2 lacerated wounds and 2 contusions and two of these injuries, i.e. one lacerated wound and incised wound were situated on the head region and one of them resulted in fracture of the right forearm. We have also seen that the incised wound in the opinion of Dr. P.N. Misra, D.W. 3 was attributable to sharp edged weapon.

15. It is significant to point out that in ,the F.I.R. there is a partial explanation with respect to the injuries sustained on the side of the defence inasmuch as informant Sardar has stated that he plied lathi in defence We say partial because apart from blunt object injuries, appellant Bhagwati sustained an incised wound which in the opinion of Dr. Misra was caused by sharp edged weapon and since Dr. Misra was not cross-examined, the prosecution cannot wriggle out of the fact that it was

caused by a sharp edged weapon. In paragraph 6 we have mentioned the dimensions of the incised wound and it appears to be a typical sharp edged weapon injury.

16. In the trial Court, the three eye-witnesses referred to earlier, have failed to explain the injuries sustained by Bhagwati and Ram Harakh. As mentioned above, the explanation in the F, I. R. is partial. That apart, since the F.I.R. can only be used to contradict and corroborate the maker of the F.I.R. and is not a substantive piece of evidence, the situation which emerges is that there is no explanation of the injuries sustained by Bhagwati and Ram Harakh. We have seen that the injuries of Bhagwati and Ram Harakh include head injuries, the incised wound was suffered by Bhagwati on the head; and the injuries of Bhagwati include fracture of the right forearm. It is significant to point out that these injuries cannot be manufactured and it was not suggested to the doctors who examined Bhagwati and Ram Harakh that these injuries could be manufactured.

17. We may also mention that although the incident took place in front of the door of Rameshwar, but the site plan shows that no blood was found there and instead was found in front of door of Ram Charan.

18. It is significant to point out that there is a counter version of the incident which was put to the three eye-witnesses of the incident, though denied by them namely, that deceased Rameshwar, informant Sardar and informant's sons Babu and Sunder came to the house of Bhagwati and assaulted him and appellants Ram Harakh and Ram Asrey in order of defend Bhagwati assaulted them.

19. We are not obvious to the fact that the site plan shows that the investigating officer did not find any blood at the house of Bhagwati but in stead found it in front of the house of Ram Charan. But in our view, this circumstance would not enure to the advantage of the prosecution. At the highest what can be said is that both the prosecution and the defence are suppressing their aggression and not coming out with the whole truth. But in a situation like this, it is not the prosecution which is the gainer because it is well-settled that the prosecution has to swim or sink depending on the strength or infirmities of its case and it does not bask in the sunshine of the frailties of the defence.

In this connection, we feel it apposite to refer to the observations contained in paragraph 12 of the decision of the Supreme Court reported in AIR 1974 SC 1822 : (1974 Cri LJ 890) (Jamuna Chaudhary v. State of Bihar) and a Division Bench decision of this Court, i.e. 1959 All LJ 423 (Subrati v. State).

Paragraph 12 of Jamuna Chaudhary's case (supra) reads thus (at page 1826) :

'12. As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case.'

In Subrati's case (supra), a Division Bench of this Court observed thus :

'It is well settled principle of criminal law that an accused can be convicted only when on the evidence produced the Court is in a position to come to a definite conclusion beyond the possibility of reasonable doubt that the accused committed the offence with which he stood charged. No conviction can be based on mere possibilities. Nor is it permissible for the court to speculate as to what had really happened. If both the parties come to court with untrue facts and conceal the real truth they have themselves to blame and they cannot expect the Court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. In such a case the Court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances it may be found to be an impossible task. That is particularly so when the evidence of both the parties is thoroughly unreliable and cannot be accepted even in part with safety. In such a case it is not open to the Court to make out a third case which is different from the case set up by both the parties. In such a case the Court can only say that the matter is doubtful in the extreme and it is not possible to arrive at any conclusion one way or the other. The result of such a finding may be that all the persons who stand as accused in the case may have to be given the

benefit of doubt. But that cannot be helped. The defective investigation and the conduct of the parties themselves are really responsible for that regrettable result. In such a case there can be no question of recording any conviction.'

20. In our judgment the ratio down in Jamuna Chaudhary's case (supra) and Subrati's case (supra) would be squarely applicable to the instant case. We feel that since the three eye witnesses have failed to explain the injuries suffered by appellants Ram Harakh and Bhagwati which injuries if caused to them were sufficient to give the appellants the right of private defence of person to kill Rameshwar and all the three eyewitnesses are interested; Sardar and Babu Lal being victims themselves and Smt. Sukkha (though in our view she was not present) being wife of the deceased Rameshwar, it would be hazardous to sustain the conviction of the appellants on their evidence. Consequently we give the appellants the benefit of doubt.

21. In the result, we allow this appeal; set aside the conviction and sentence of the appellants on all the counts; acquit them thereunder; direct that they need not surrender to their bail; and their bail bonds stand cancelled and sureties discharged.