

Gulzari and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Feb-26-1999

Reported in : 1999CriLJ2513

Judge : G.P. Mathur and ;K.D. Shahi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 148, 149, 307, 323 and 324;
Code of Criminal Procedure (CrPC) , 1974 - Sections 161

Appeal No. : Criminal Appeal No. 927 of 1980

Appellant : Gulzari and ors.

Respondent : State of U.P.

Advocate for Def. : S.D.N. Singh, Dy. Govt. Adv. and ;Satnal Gopal, Adv.

Advocate for Pet/Ap. : Ram Prasad Singh, ;R.R.K. Trivedi and ;A.K. Srivastava,
Advs.

Judgement :

K.D. Siiahi, J.

1. This appeal has been filed by Gulzari, Devi, both sons of Shhul, Vijay Bahadur alias Vijayee son of Ram Das, Prabhu son of Bhagwandeem, Guru alias Gaya Pd. alias Guru Prasad, Bawan alias Raj Bahadur and Babu Singh, all residents of

village Nakatoo Mazra Chatta ka Purwa, P.S. Sachendi, district Kanpur against the judgment and order dated 26-4-1980 passed by Sri D.K. Trivedi, the then VIIIth Addl. Sessions Judge, Kanpur, in Sessions Trial No. 65-M of 1979 convicting and sentencing them for various punishments including life imprisonment under Sections 148, 323 read with Sections 149. IPC and 302 read with Section 149. IPC for having caused the murders of Karan Singh and Dharmपाल and also injuries to Amar Singh, Prakash and Ram Autar on 23rd Oct. 1977 at 8 a.m. in village Chhattapurwa Hamlet of Kaktoo, police station Sachendi, district Kanpur.

2. In brief the facts of the case are:-- there was enmity between both the parties. On 30-10-1977 at about 8 a.m. the party of the complainant, namely, Umrao (informant), Karan Singh (deceased), Ram Ashrey, Amar Singh, (injured), Prakash (injured) and Ram Autar (injured) were going to play SHIKAR thunting). When they reached at a distance of 100 yards at the Chak of Lalta Lonia (father of appellant Babu Singh and Bawan alias Raj Bahadur), accused Babu Singh, Bawan alias Raj Bahadur, Gulzari and Devi, both sons of Shital Lonia, Vijayee and Guru alias Gaya Prasad and Prabhu came out. Babu Singh was armed with a gun, Bawan and Guru were armed with KATTA (country made pistol) and others were armed with lathis. All of them exhorted. At this, the assailants started to attack with their respective weapons. From the fire of Babu Singh, Karan Singh and Dharmपाल died on the spot and in the Mar-peeet Amar Singh, Prakash and Ram Autar suffered injuries. On an alarm the witnesses came and saw the occurrence.

3. The F.I.R. was lodged by the informant -- Umrao Singh at 9.15 a.m. on 30-10-1977 while the police station is at a distance of seven miles from the place of occurrence.

4. The case was registered as Case Crime No. 225 in the G.D. Side by side a cross-FIR was lodged by Bawan alias Raj Bahadur son of Lalta at about same time, at an interval of five minutes only. It was registered as Case Crime No. 225-A under Sections 147, 148, 149, 307, 323 and 324. IPC at the police station Sachendi, district Kanpur with the allegations that there was enmity between the two parties. The applicant is of the party of Gulzari. On 30-10-1977 at about 7 a.m. Lalta and Gulzari had gone to village Tool. Just after that he was informed that

Deo Singh, Amar Singh, Shital, Karan Singh duly armed with Lathi and Pharsa, and Umrao armed with gun had gone to kill Lalta and Gulzari. He took Pharsa, his brother Babu Singh took his licensed gun, Devi, Vijayee, Guru alias Gaya Prasad, and Ram Das took their lathis and went to defend their father Lalta and Gulzari. When they reached near their Chak, Karan and others started to assault the party of Raj Bahadur by Lathi, Pharsa and gun. His party also used their weapons in self defence. Babu Singh fired. In the meantime some friends of other party came and started to beat the party of Raj Bahadur. On an alarm several other persons came and then the other side ran away. Babu Singh suffered fire arm injuries Raj Bahadur also suffered injuries.

5. The I.O. investigated both the cases. He appears to have filed this charge sheet against the present appellants only. The learned Sessions Judge framed charges against the accused persons. The charges were read over and explained to the accused persons in Hindi who pleaded not guilty and claimed to be tried.

6. On the side of the complainant-Umrao Singh, it is said that, Karan Singh was killed and Dharampal received gun shot injury during fire and died. It is not the case of the prosecution that he was intentionally killed. Besides, on the side of the complainant, Amar Singh, Prakash and Ram Autar are said to have been injured.

7. On the side of the accused, accused Babu Singh and Raj Bahadur alias Bawan are said to have been injured. It is to be noticed here that the injuries of Babu Singh were examined by the same doctor who had examined the injuries of Prakash, Amar Singh and Ram Autar. Injuries of Babu Singh were examined at 4.10 p.m., Prakash Singh at 4.30 p.m. Amar Singh at 4.35 p.m. and the injuries of Ram Autar were examined at 4.35 p.m. All of them were produced by the police at the hospital for medical examination. It is also necessary to quote the injuries of both sides. Prakash, of prosecution side, has received the following injury:--

Abraded contusion 3 cm x 2 1/2 cm on Rt. infra scapula region. Red with moderate swelling around it

Amar Singh of the prosecution side has received the following injuries:

(i) lacerated wound 2V4 cm x 1/2 cm x scalp on frontal region, vertical, 7 cm above the bridge of nose. Clotted blood present. Bleeds on removing clots of blood

(ii) Contusion 12 cm x 2 cm on Rt. scapula region oblique, red.

(iii) Abraded contusion 6 cm x 2 Vi cm on Lt. iliac crest outer part.

(iv) Contusion 8 cm x 2 cm on front of Lt. high lower part, with swelling.

(v) Contusion 6 cm x 1 Yi cm on back of Lt. forearm middle. Red with moderate swelling.

Ram Autar of the prosecution side has received the following injury:

Lacerated wound 1 cm x Vi cm x scalp on Lt. frontal region 10 cm above Lt. ear. Clots of blood present. Bleeds on removing clots. Moderate swelling around the wound.

Babu Singh of the accused side has received the following injuries:--

(i) Lacerated wound 1 1/2 cm x 1 cm on occipital region. Bleeding.

(ii) Abraded contusion 3 1/2 cm x 2 xh cm on right back middle.

(iii) Contusion multiple 16 cm x 3 cm to 8 cm x 3 cm 16 cm x 3 cm x 13 cm x 2Vi cm on left side back.

(iv) Contusions 7 cm x 2 1/2 cm 4/2 cm 3 cm on outer part of Lt. arm. Red.

(v) Contusion 7 cm x 3 cm x 5 cm x 3 cm on outer part of Right Arm and elbow. Red.

(vi) Abraded contusion 6 cm x 4 cm on Dorsum of left hand inner part with diffuse swelling, clotted blood present.

Bawan Singh alias Raj Bahadur of the accused side has received the following injuries:

(i) Lacerated wound 1 1/2 cm x 1 cm scalp on top hand 13 cm above left ear. Bleeding.

(ii) Abraded contusion 3 cm x 2 cm on top of left shoulder inner side, clotted blood present.

(iii) Abraded contusion 4 cm x 2 Yi cm on top of left shoulder outer part 3 1/2 cm lateral to injury No. 2.

(iv) Multiple gun shot wounds 1/4 cm diameter to 112 cm diameter on outer and back part of left arm upper 1/2. Margins scorched. Bleeding present. Margins inverted.

(vi) Incised wound 9 cm x 1 cm x muscle and bone deep on volar aspect of left hand palm upper part. Transversely placed 4 cm below wrist, bleeding.

8. It is to be noticed that Babu Singh has also suffered simple gun shot wound and one incised wound.

9. We do not want to give the details of the post mortem examination but, admittedly, both the victims died out of gun shot injuries. They received one fire each. There is one injury to both the victims who died due to gun shot injury. To be more specific, Lathi, Ballam KANTA or any other blunt object was not used in that incident.

10. At the very outset it is very relevant to say that, admittedly, enmity was going on between the parties and the occurrence took place at and near the plot of Lalta, father of main accused Babu Singh, and Bawan Singh informant of the accused side. Admittedly, both the sides were armed with deadly weapons. According to the F.I.R., informant side was going to play SHIKAR. It is not there in the F.I.R. of the prosecution side whether they had taken any weapon with them or not. It is also not there in the F.I.R. what SHIKAR they were going to play; they were going to kill birds, animals or man and with what weapon. According to the prosecution side, accused persons were armed with gun, Katta and Lathi. It is not there in the F.I.R. that any person of the accused side was armed with any KANTA Ballam or Pharsa. To the contrary, according to the accused side, both the parties had gone

duly armed with Lathi, Pharsa and Gun. In both the F.I.Rs. there is specific allegation of partybandi. In his F.I.R., the complainant stated the names of the members of his party. In his F.I.R. Raj Bahadur stated that he is of the party of Gulzari.

11. We have discussed these facts for the sake of appreciation of evidence that the occurrence took place in the plot of Lalta of the accused side, away from the village. Both the parties had gone there duly armed and the mar-peat took place. Although it is not in the F.I.R. that any person of the complainant side was armed with any weapon but in his statement, during cross-examination, Amar Singh PW 1 stated that all the six persons of his party were armed with lathis. He stated that they were going to play the Shikar of KH ARGOS (Rabbit). He stated that they were not armed with Pharsa, Ballam or Bandoon. Then, PW 2 Umrao Singh stated that the party of Karan Singh was armed with KANTA. Karan Singh is of the party of the complainant. He further stated that Amar Singh, Prakash and Karan were armed with Kanta. Rests of the persons were armed with lathi. This fact has been suppressed in the F.I.R. that three persons of the party of complainant were having KANTA. Umrao Singh stated that he had licence of a gun but was not having his gun at that time. It is clear, therefore, that deadly weapons were also with the members of the prosecution side.

12. As stated above, two persons of the accused side have received injuries. There is one gun shot injury to Babu Singh and he has also suffered one incised wound. There is no allegation that any person of the accused side was having any KANTA. Therefore, Kanta injury to Babu Singh must have been caused from the prosecution side. The prosecution has tried to suppress that there was any Kanta or gun with them.

In the light of the above, the entire prosecution evidence is to be appreciated.

13. Amar Singh PW 1 stated that it was 8 a.m. when he, along with Karan Singh, Lakhani Singh, Ram Autar, Ram Ashrey and Prakash were going to play Shikar. As soon as they reached at the chak of Lalta, accused persons came. Bubu Singh fired at Karan Singh, Karan Singh fell in the plot of Kishori. Raj Bahadur and Guru Prasad fired which hit Dharampal. This fire hit Babu Singh accused as well. He

further stated that the accused persons, who were holding lathi, started to beat him. He also plied lathi in self defence. He, Prakash and Ram Autar suffered injuries, Karan Singh and Dharampal fell down. In the cross-examination he stated that he had stated this fact to the I.O. that Raj Bahadur and Guru Prasad hit Dharampal and Babu Singh. This fact is not stated in his statement recorded under Section 161, Cr.P.C. He further stated that the fire, which was made by Babu Singh, did not hit Dharampal. He stated that he did not state to the I.O. that the fire, which was made by Babu Singh, hit Dharampal. Thus, this statement is totally in contradiction with the F.I.R. and the statement made under Section 161, Cr.P.C. It is in the F.I.R. that from the fire made by Babu Singh, Karan Singh and Dharampal suffered injuries and died. It is not in the F.I.R. that Babu Singh killed Karan Singh and Raj Bahadur and Guru Prasad fired at Dharampal which killed him and Babu Singh also received pellet injuries. The case, that Babu Singh, Gaya Prasad and Raj Bahadur fired at Dharampal, is totally in contradiction with the prosecution case. Then, he also admitted that the accused suffered injuries to which we will discuss later on.

14. PW 2 Umarao Singh also stated in the same fashion. He has narrated the prosecution story as has been narrated by Amar Singh. He also admitted the injuries to the accused side. Similar is the statement of Ram Autar PW 3.

15. It is not there in the F.I.R. or in the statements of the witnesses made under Section 161, Cr.P.C. that the accused side has also suffered any injury in this incident. The case of the prosecution is not this that the injuries of accused side are false or superficial and were not caused in this incident; rather, in the statement before the Court, they admitted the injuries of the accused side. PW 1 Amar stated that from the fire of Raj Bahadur and Guru Pd. he received injury and he also plied lathi. It appears that he wanted to say that Lathi injuries to Babu Singh and Raj Bahadur had been caused by him. In his further statement he stated that from his lathi Gulzari and Guru Pd. were injured. This is totally a false statement. Gulzari and Guru Pd. had not received any injury. He further stated that Ram Autar also used his Lathi by which accused Vijayee suffered injuries. Accused Vijayee has received no injury. Then, in the cross-examination, accused wanted to know whether Guru Pd. alias Gaya Pd. or Vijayee are self injured and,

therefore, they cross-examined about bleeding. The witness stated that the injuries of Guru Pd. and his brother were bleeding. When there was no injury to them where is the question of bleeding. The witness stated that Babu Singh did not suffer any Pharsa injury. Babu Singh had got Pharsa injury. He stated that he did not see any Lathi injury to Babu Singh. Babu Singh had suffered lathi injury. He further stated that he did not see any lathi injury to Raj Bahadur. Raj Bahadur had suffered lathi injury. Thus, this witness has totally demolished and shattered the prosecution story by stating that Guru Pd., Gaya Prasad and Vijayee had suffered lathi injuries whereas they have got no such lathi injury. He further stated that Babu Singh and Raj Bahadur have got no lathi injury whereas they have lathi injury. He again stated that Babu Singh has got no Pharsa injury whereas Babu Singh has got Pharsa injury. Again to emphasize that the same doctor has examined the injuries of the accused side as well. No two scales can be adopted to say that when the doctor examined the injuries of the informant side he was a believable witness and when he examined the injuries of the accused side he was not a believable witness; rather, both the parties were produced in the hospital at one and the same time together and in the presence of one, the other was examined by the doctor.

16. PW 1 further stated that he had informed this fact to Umrao informant that he used his lathi in self defence. If it was so, it should have been there in the F.I.K. He further stated that he had informed this fact to the I.O. that he had used lathi in his self defence which should have been written by the I.O. He further stated that he was assaulted by four LATHIWALAS after surrounding him. He stated that from his side, Prakash and Ram Autar had also used lathi. It is not there in the F.I.R.

17. PW 2 Umrao Singh, who is informant of the case, has stated that he has seen the occurrence. He has narrated the entire prosecution story from beginning to the end. He stated that Babu Singh exhorted that the enemy has come, he should be killed. There is nothing in the F.I.R. regarding individual exhortation of Babu Singh. He stated that Raj Bahadur and Guru Pd. fired from behind Babu Singh which hit Babu Singh. If he ever stated this fact it should have come in the F.I.R. He further stated that these fires hit Dharampal but in the F.I.R. which was lodged by him, this fact is not mentioned that the fire of Raj Bahadur and Guru Pd. killed

Dharampal. To the contrary, the allegations in the F.I.R. are 'Babu Singh ke bandook se Karan Singh wa mauke ke pas dhhan katne men maujood Dharampal umra 12-13 saal putra Chhote La urf Bhattu Lonia mauk par mar gaya'. -Then, PW 2 Umrao Singh further stated that after these fires both the parties started to fight with Lathi and Kanta. His actual words are 'phir iske bad log aapas men lathi Kanta chalane Jage'. He further stated that the members of the party of Karan Singh were armed with Kanta. It is not there in the F.I.R. He, in the cross-examination, further stated that Amar Singh, Prakash and Karan Singh were armed with Kanta and rests of the persons of his party were armed with Lathi. It is not in the F.I.R. that his party was also armed with deadly weapons. He admitted that he was having a licensed gun at that time. One is unable to understand that if they were going to play Shikar why they will not take the gun with them which is, besides being a weapon of killing, also a weapon of hunting. It appears that Umrao Singh, being the informant, suppressed this fact that he was going there along with the gun so that he may not be implicated.

18. PW 1 Amar Singh stated that they were going to play shikar of rabbits. Then PW 3 Ram Autar stated that they were going to play Shikar of fish and rabbit. There is neither anything in the evidence that there was any pond nearby nor in the F.I.R. or in the statement of PW I that they were going to play Shikar of fish. All these major contradictions made the case doubtful that, in fact, they were going to play Shikar of rabbit but they were going for hunting of roan and it cannot be ruled out that on an information that the other side was at their Chack, the informant had reached there. It is to be remembered that the parties are not stranger to each other. They are of the same family. Out of the same family, one man is in one party; the other man is in the other party. Accused Prabhu and Dharampal were cousin brothers, Prabhu will never like' that his cousin brother should be killed. Not only this, informant Umrao Singh is the real nephew of accused Ram Bahadur and Babu Singh. In his statement recorded on 12th Sept. 1979 P. W. 1 stated that Umrao Singh has colluded with the accused side. Thereafter, Umrao Singh was examined. He supported the prosecution story in the examination-in-chief but shattered the prosecution case in the cross-examination and he stated that he does not know how mar-peet originated and who was the aggressor.

19. Although Ram Autar is not said to have gone hostile but he also stated in the same fashion as the other witnesses have stated. He is the real nephew of deceased Karan Singh. He has suffered only one injury. He stated that he was going to play Shikar without taking any food. As soon as he reached 100 yards, mar-peat started. Nobody will go to play Shikar without taking any food. Hunting takes several hours at a time. It can, therefore, safely be presumed that they proceeded duly armed. He also admitted the injuries of Babu Singh and Raj Bahadur.

20. It is not necessary to discuss the formal evidence and the statement of the doctor but clear cut appreciation of entire evidence on record shows that the prosecution has not come before the Court with true case but has tried to suppress the injuries of accused side. It did not explain the injuries of the accused side although they have admitted that accused side also suffered injuries in this very incident. The injuries of Babu Singh and Raj Bahadur were also seen by the informant side but still this fact was not mentioned in the F.I.R. that how the accused side suffered the injuries.

21. We have heard learned counsel for the complainant -- Sri S.D.N. Singh, and have gone through the judgment recorded by the learned Sessions Judge. It is apparent that the learned Sessions Judge has discussed the case in such a way as if the entire burden was on the defence to prove its case and if the case of the defence is not proved, defence side was held to be the aggressor presumably on the analogy that two persons on the complainant side have died. But the fact is that no assault was made on Dharampal. He was rather of the accused side and incidentally he got fire injury and died. Since the case of the accused was disbelieved by the learned Sessions Judge, he found that the case of the prosecution is proved.

22. The law, as it is, is that it is the prosecution which has to prove its case. The prosecution has to stand on its own leg. Infirmity of the defence case will not lead to the proof of the prosecution case. The prosecution has to prove, by cogent evidence, that it was the accused side which was the aggressor and if they are unable to prove it merely because the accused side had failed to prove its case,

the case of the prosecution will not find any support. If both the parties are unable to prove their case and if any doubt is created in the case of the prosecution, benefit would go to the accused side and the accused persons are to be acquitted; their case-may or may not have been proved.

23. Seeing with the above angle, the prosecution has come with totally, a false case. It did not lodge correct F.I.R. and the following facts were never mentioned either in the F.I.R. or in the statement recorded under Section 161, Cr.P.C.

(i) Informant side used Lathi, Kanta and gun in self defence;

(ii) Babu Singh and Raj Bahadur of the accused side suffered any injury;

(iii) there was any Kanta on the prosecution side although three Kantas are admitted; and,

(iv) the of Karan Singh and Guru Prasad killed Dharampal. To the contrary, it is alleged that Babu Singh killed Dharampal.

24. It is settled principle of law that if the prosecution has not come before the Court with i rue case, it has tried to suppress the origin and genesis of the mar- peet, it did not explain the in-juries of the accused side and did not come before the Court with a true case regarding the mode and manner of assault, the accused side is to be acquitted.

25. As discussed above, there is every doubt to the effect that the accused side was aggressor. In the circumstances of the case, an inference can reasonably be drawn that what the accused side has narrated may also be true. Accused persons have not to prove their case to the hilt. If they are able to create doubt in the case of the prosecution they are entitled to be acquitted. On the evidence on record, although two persons have died but it is not proved that it is the accused side which had been the aggressor and, in these circumstances, they deserve to be acquitted of the charges for which they have faced trial. We do not agree with the findings recorded by the learned Sessions Judge and, accordingly, the judgment, conviction and order of sentence passed by the learned Sessions Judge are hereby set aside.

26. As per report of the C.J.M., Kanpur dated 2-1-1999 appellants Devi and Guru Prasad are said to have died. Their appeal abates. As regards rests of the accused, they are acquitted of the charges of which they have faced trial. Accused Bawan alias Raj Bhajadur and Babu Singh are said to have been arrested in connection with this case. They shall be released forthwith, if no longer required in connection with any other case.

27. Accused Vijai Bahadur alias Vijayee, Guru alias Gaya Pd. alias Guru Pd. and Prabhu are on bail. Their bail bonds are cancelled and sureties are hereby discharged.

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