

Kalu and ors. Vs. the State

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Court : Rajasthan

Decided On : Nov-02-1964

Reported in : AIR1965Raj74; 1965CriLJ478

Judge : L.N. Chhangani, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 96 and 326; [Probation of Offenders Act, 1958](#) - Sections 4

Appeal No. : Criminal Appeal No. 292 of 1964

Appellant : Kalu and ors.

Respondent : The State

Advocate for Def. : B.C. Chatterji, Deputy Govt. Adv.

Advocate for Pet/Ap. : D.C. Bajpai and; R.N. Surolia, Advs.

Disposition : Application to leave dismissed

Judgement :

L.N. Chhangani, J.

1. The three appellants, Kalu, Buchia and Delia of village Binds, have been convicted and sentenced as follows by the Additional Sessions Judge, Jhalawar, vide his order dated 21st April, 1964:--

U/s.328 r/w sec. 34 I PC7 years R.I.325 r/w sec. 34 IPC5 years R.I..324 r/w sec. 34 IPC1 year's R.I.323 r/w sec. 34 IPC6 months R.I.

All the sentences have been directed to run concurrently.

2. Six more persons were tried along with the appellants but they have been acquitted.

3. The facts leading to the prosecution of the appellants and the six others, may be briefly given as follows: One Mst. Kesar--daughter of Gorla of village Banda--was given in marriage to Panna--the elder brother of Manna PW/1 of village Pathria. According to the present prosecution, after Panna's death, Manna contracted a 'nata' marriage with Mst. Kesar on the 12th day of the death of his brother Panna. Thereafter, the prosecution case is that she went to her father Gorla at village Banda. The prosecution case further is that Kalyan son of accused Buchia of village Binda took her away from village Banda and kept her as his wife. Manna and others of village Pathria thereupon claimed some 'jhagra' money from Buchia and Ramkalyan. Although the controversy in connection with the payment of 'jhagra-money' had been going on for a year and a half before the present incident which took place on 24-5-1963, it could not be settled. Three days before the incident the complainant Manna collected 30 to 40 persons of three to four villages and went to village Baravda Binda and from there they sent Kanwerlal Chamar to Buchia accused demanding the payment of jhagra-money. Buchia seni Kalia Baret informing the persons collected at Baravda that he was prepared to pay Rs. 250/- as jhagra money and that the complainant-party should be satisfied with the amount. The complainant-party did not accept the amount and, therefore, the persons assembled went to their villages.

The prosecution case further is that on the date of the incident, Manna had gone to village Aklera to attend the market and when he was returning from that village, Chania deceased met him near village Tukaia and asked Manna to accompany him to enjoy a feast at Daikheda. When Manna and Chunia had proceeded beyond Baravda, nine persons including the three appellants, attacked them and inflicted injuries upon Chunia and Manna. Chunia was seriously injured and died on the spot. Manna PW/1 managed to escape. He, thereafter saw Mangilal and Kishore

and informed them of the assault upon Chunia and himself by the nine persons including the appellants. Mangilal and Kishore PW/3 and PW/2 respectively went to the spot to intervene but they were also seriously injured. Manna thereafter went to Daikheda obtained a bullock cart and eventually took the body of deceased Chunia to the Police Station, Aklera, and lodged a first information report Ex. P-1 at 11.30 P.M. It may be mentioned here that the members of the accused party also received injuries during the course of the incident and. Buchia also lodged information with the Police Station Aklera at about 12 night which was recorded as Ex. D-17. The police registered cases against both the parties and after investigation submitted charge sheet against the three appellants and six others in the court of Munsif Magistrate, Aklera and the case was after enquiry, committed by the said Munsif Magistrate to the court of Additional Sessions Judge, Jhalawar.

4. The prosecution examined nine witnesses to prove its case. Out of these witnesses, Manna PW/1, Kishore PW/2 and Mangilal PW/3 are the three eye witnesses who were also injured. All the accused pleaded. not guilty. The three appellants came forward with a counter version. Buchia appellant stated as follows:

'I had gone for the Hatt at Aklera in order to sell the bullock. And after that I, Kalu and Dola were returning to village Binda. Chhotia was also with us. Manna, Mangia, Kishore met us in the field of Kaiar and they had surrounded us, They were armed with Gandasi and Lehandt. They said to kill us and on that they attacked us with Gandasi. I received an injury of Gandai on my head. My hand was also fractured. We had also used lathi in our self defence.'

The statement of Kalu appellant is substantially on the same lines. Bola appellant, however, while naming Kishore, Manna and Mangia further stated that they along with six other persons surrounded them and attack-ed them, it is significant that two of them did not refer to the presence of the deceased Chunia whereas, the third accused also did not specifically name Chunia as one of the assailants, They examined three witnesses in defence.

5. The trial Judge did not accept the prosecution case in entirety. The learned Judge observed that the prosecution case that Manna and Chunia met at village Tukaria and then went to proceed to village Daikheda to attend a party could not be accepted. Similarly, the trial Judge held that the statements of Kishore and Mangilal to the effect that they were going from Aklera to Deori in order to realise some money from Kalia did not stand clearly established. On the contrary, the learned Judge accepted the suggestion of the Public Prosecutor that both the parties who had strained relations met and decided to fight and fought it out. According to the learned Additional Sessions Judge there was a free fight between the two parties and that none of them could, therefore, claim a right of private defence. He accordingly convicted the three appellants. He entertained doubt as to the presence of the other appellants because the prosecution case could not be confirmed against these six persons by the presence of injuries on their persons. It may also be incidentally stated as brought to my notice by the learned counsel for the defence, that on the report lodged by Buchia the police submitted charge sheet, against six persons including the three eye witnesses-Manna, Kishore and Mangia and that eventually all the six were tried by the Additional Sessions Judge. The Additional Sessions Judge by his order dated 1st of May, 1964, convicted Manna and Kishore, under Section 324 read with Section 34, Indian Penal Code, but released them under Section 4 of the Probation of Offenders Act of 1958.

6. The three appellants have filed the present joint appeal challenging their convictions and sentences.

7. In the first instance, the learned counsel for the appellants very strongly contended that the fight between the complainant Manna and the members of his party and the accused-appellants was unpremeditated and sudden and consequently the Additional Sessions Judge was wrong in holding that it was a free fight and that being so, no party could claim right of private defence. Strong reliance was placed upon the following observations made in *Dhoora v. State*, 1963 Raj LW 436:

'Every fight between two parties where both sides receive injuries cannot be called a free fight. Where the fight is not premeditated and there is no question of

vindication of right or supposed rights by force but is only spontaneous arising out of a sudden altercation, it would be incorrect to call it a free fight. It cannot be said. In the present case, that both parties were pre-determined to fight and had gone out to fight.'

The facts in the case were as follows :

That A, a Station House Officer, along with two camel sowars had reached Kabuli-ki-Dhani on the evening of 30th December, 1960 for the purpose of arresting B, J and H against whom warrants of arrest had been issued. The Station House Officer started for Haru's house in order to apprehend the persons sought to be arrested and took Surjan along with him to point out the house and entered the court-yard of Haru's house. The Station House Officer then called out Haru and asked him to surrender the three persons sought to be arrested. According to the Station House Officer, four persons carrying arms came out and Haru rebuked Surjan for having brought the police party to his house. These four persons attacked Surjan on which he cried out which brought the appellant including Dhoola to the place of occurrence. Dhoola was proved to have inflicted fatal injury with 'dharial' on the head of Haru. It was further found that when Dhoola and his companions reached the place of occurrence they had a reasonable apprehension that grievous injury was likely to be caused to Surjan with a dharial.

On these facts, it was held that Dhoola while inflicting injury to Surjan was justified in claiming the right of private defence and that there was no free fight between the parties.

No exception can be taken to the correctness of the decision of the learned Judge on the facts and the circumstances of the case. Considering, however, the observations in the background of the facts of the case, I am strongly inclined to think that the learned Judge did not intend to lay down a rigid rule of law that a sudden and unpremeditated fight can never be a free fight. It may be remarked that the learned Judge made these observations after noticing and discussing the case of Ahmad Sher v. Emperor, AIR 1931 Lah 513. In that case, Harrison J. referring to the free fight, observed as follows: From the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is

wholly immaterial and 'depends on the tactics adopted by the rival commanders.' These observations were cited with approval in *Gajanand v. State of Uttar Pradesh*, AIR 1954 SC 695. On the language used by Harrison J. In AIR 1931 Lah 513 it is hardly possible to carve out a clear-cut exception that a sudden and unpremeditated fight can never be a free fight. In my considered judgment the crucial and the decisive, or at any rate, a more appropriate test to determine whether a fight is a free one or not, is that both the parties should voluntarily enter into a fight and there should be a mutual intent to harm each other. A desire to fight and mutual intent to harm each other easily be entertained at the spur of the moment and the resulting fight will certainly be a free fight. A few illustrations will make the position clear in this behalf.

8. A and B suddenly quarrelled over a petty matter and during the verbal quarrel A throws a challenge to B. B accepts the challenge. Both of them fight. Evidently the fight must be treated as free fight and none of them can claim right of private defence. Similarly, if two enemies, each, shown to be determined to injure the other, meet suddenly and go to fight, it will be hardly proper to dispute the existence of a free fight and to assume right of private defence for both the parties. It must be remembered that the right of private defence is one of defences and not one of punishment or retaliation. While the grant of the right is intended to discourage cowardice and meek submission to aggression it cannot be extended to encourage private warfare and to substitute for the decision of the courts the decision by the use of weapons. In this view of the right of private defence, I am wholly unable to accept the tall proposition made on behalf of the defence that a sudden fight can never be a free fight. In this view, I am supported by observation made in a number of cases. In *Sundar Lal v. Emperor*, AIR 1935 All 438 there was a general fight and the three accused had received some injuries and thereafter they could succeed in hitting upon the head of the deceased which resulted in his death. The accused came forward with a plea of right of private defence. Repelling the right of private defence, Kendall J. observed as follows:

'There was in fact just such a sudden fight as is contemplated in exception 4 to Section 300, Penal Code. Everyone was trying to hit one of the opposite side and nobody thought about the private right of self-defence.'

9. In *Ghulam Haidar v. Emperor*, AIR 1934 Lah 512 also Agha Haidar J. expressed the same view, and summed up the position as follows:

'The case is a difficult one and as the learned Session's Judge has pointed out, the witnesses for the prosecution are not disinterested. In fact, there was a cross case and the accused in the one case were prosecution witnesses in the other. If it is impossible to determine which side attacked first. Both parties wanted a fight and they had it, and the question therefore as to who were the aggressors and which party acted in self-defence does not arise.'

10. In *re, Erasi Subba Reddi*, AIR 1943 Mad 492 It was held that 'where the two parties were spoiling for a fight and each person began to pick up stones and throw at the other party, then the accused's party cannot plead that because the other party was also intent on beating them, every blow they gave was given in self-defence. Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object.'

11. Lastly, I may refer to *Jumman v. State of Punjab*, (S) AIR 1957 SC 469 where the learned Judges laid down the law in the following terms:

'Where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, law does not permit the plea of private defence to be taken on either side.'

According to the learned judges, it would be a case of sudden fight and conflict and had to be dealt with under Section 300 1. P. C., Exception 4.

12. On a consideration of the basic principles underlying the law of private defence and examination of the decided cases I have no hesitation in overruling the contention of the counsel for the defence that a sudden and unpremeditated fight can never be a free fight, it ought to be added that I should not be understood to lay down that in no case a right of private defence can be claimed in the case of a sudden fight. Cases may arise where in the case of a sudden, fight between two persons one of them may decline from a further fight and retreat as far as he can

with safety and then faced with a dangerous situation causing reasonable apprehension of death or grievous hurt, recourses to violence, he can certainly claim the right of private defence. But the contention of the learned counsel placed in wide terms, in my opinion, has no force and is rejected.

13. It was next contended that in the facts and the circumstances of the present case this Court should hold that the accused did not voluntarily enter into a free fight and were merely acting defensively, it was further emphasised that the burden of proving the exception though on the accused, is not of a very heavy nature and the accused should be given benefit if they establish their case in a reasonable manner. The learned counsel placed four Important considerations in support of this contention--firstly, It was pointed out that the prosecution case has not been accepted in entirety. It was also added that the prosecution witnesses made no effort to explain the injuries received by the accused.

Secondly, the learned counsel also relied upon some observations made in the Judgment of counter case where the present complainants who were the accused in the counter case, were held liable to more, blame. The learned counsel placed before me the following observations from the Judgment in the counter case :

I have said above that the accused were to be blamed much more than the complainant and his party because, they had taken such actions which resulted in this murder and the death of Chunia and serious injuries on the complainant. The complainant and his party although could not escape their liability and for it complainant Buchla and his brother Kalia and his son Dola had been convicted under Sections 326, 325 and 323 I. P. C. for various Terms of rigorous imprisonment in Sess. Case No. 34/63. The complainant had received only simple injuries, but it is not for the fact that the accused would have shown mercy, but they (the complainants) were fortunate to have received simple injuries either on account of their luck or due to their good tactics of defence shown at the time of fighting. The accused cannot escape the liability for the offence which they have committed.'

Thirdly, it was pointed out that on 15th January, 1963 one of the accused Kalu had already submitted an application to the Sub Divisional Magistrate, Aklera, for

taking proceedings under Section 107, Criminal P. C. against ten persons including the two prosecution witnesses Kishore and Mangilal. On the basis of this application it was contended that the complainant-party had been acting aggressively and that the accused-party should be treated to have acted defensively.

Fourthly, it was argued that the place where the incident took place does not lie on the way from Aklera to village Pathria. The incident took place very near the village Bindi where the accused reside. Consequently, it should be held that the complainant-party had gone deliberately to assault the members of the accused-party on account of their claim for 'jhagra money' having not been satisfied.

14. It will be proper to deal with each consideration separately. Dealing with the first consideration, it will be pertinent to observe that on account of counter cases between the parties and the accused in the one case being the prosecution in the other, none of the parties had cared to put forward straightforward version. The prosecution witnesses did not state that their party met the accused and quarrel arose on account of the demand of 'jhagra money' and that that quarrel led to a free fight. Besides the prosecution witnesses did not come forward with any satisfactory explanation for the injuries received by the appellants. Similarly, the accused also did not put forward a proper version. The two accused Buchla and Kalu merely stated generally that they were assaulted and that they used lathies in their own defence. They named only three persons as their assailants. Dolia while naming three, referred to the presence of six other persons although in other aspects his version is the same. They led practically no evidence to prove their counter version. One Motilal was examined by them but he gave no direct evidence as to the manner in which the fight started and developed. There is thus lack of reliable and acceptable evidence on either side as to the manner in which the fight started and progressed.

The Additional Sessions Judge merely recorded the conclusion that both the parties had fought with each other. The question that arises is whether on account of the suppression on the part of the prosecution the accused can derive any substantial advantage. This has to be examined in two aspects (i) whether the

suppression, on the part of the prosecution can throw any doubt as to the participation of the accused in the incident? This question must be answered in the negative. The presence of the accused at the time of the incident has been satisfactorily proved not only by the statements of the prosecution witnesses but also by the presence of injuries on their persons. They themselves admit their presence at the time of the incident and also having used lathis although they alleged that the lathis were used in self-defence. Participation of the accused in the incident, therefore, stands clearly proved and the suppression of the details of the fight on the part of the prosecution cannot have any material bearing with regard to this aspect of the case.

15. The second question that deserves to be considered is whether the suppression by the prosecution can advance the case of the accused with regard to their claim of right of private defence. It is true that the prosecution has failed to explain the injuries on the persons of the accused. But at the same time there is no reliable evidence on the side of the defence also to prove that the entire injuries inflicted upon the prosecution witnesses during the course of the incident were caused in the exercise of the right of private defence. It is true that the burden of proving the exception on the part of the accused is not so heavy as the burden on the prosecution to prove its case beyond all reasonable doubt. At the same time, the defence has to make out a *prima facie* case to bring its case within the exception. Considering the number of injuries and the nature of the injuries and the location of the injuries, the Additional Sessions Judge appears to be right in his conclusion that none of the parties acted defensively and that both the parties had engaged themselves in the free fight.

The consideration relied upon by the defence cannot succeed in making out the case of absence of free fight and the accused having acted merely defensively. The finding as to free fight can be arrived at not only on the basis of direct evidence but also on the basis of circumstantial evidence. It may be mentioned that the relations between the parties had been strained and the accused had been anticipating some trouble from the complainant's side. It may be also mentioned here that in the first information report Ex. D-7 filed on behalf of the accused Kalu they had referred to there having been force by some persons

before they left for the Hatt of Aklera that they might be attacked by the members of the complainants' party. They consequently went armed with sharp edged weapons to the Hatt of Aklera. Looking to the surcharged atmosphere in which the parties had been labouring and the fact that both of them were armed with lathies and sharp edged weapons it clearly indicates that both of them had the determination to fight out and vindicate their respective claims with regard to the payment of the 'jhagra' money. On a careful consideration of all the circumstances of the case, I agree with the finding of the Additional Sessions Judge and place no serious weight to the consideration relied upon by the defence counsel.

16. Dealing with the second consideration. I may point out at the outset that the finding in the counter case is not a legally admissible evidence in the present case. The finding was arrived at on a consideration of the evidence in that case, and cannot be accepted as evidence in the present case. Besides, the finding in the counter case is not that the complainants in the present case who were accused in the counter case were, aggressors. The learned Judge has recorded an ambiguous finding that the prosecution witnesses in the present case were more to be blamed. The learned Judge perhaps appears to be of the view that the prosecution witnesses in the present case having made out a demand for the 'jhagra' money invited the present fight. That ambiguous finding cannot warrant a conclusion in the present case that the prosecution witnesses were aggressors and that the accused were merely defensive and that they could cause all the injuries while acting defensively.

The second consideration relied upon by the defence counsel also does not make out a case propounded by him. Taking up the third consideration. It is true that one Kalu had submitted an application on 15th January, 1963 against a number of persons including the two prosecution witnesses for taking proceedings under Section 107, Criminal P. C. From that application, it is difficult to hold decisively that the accused must be deemed to have acted defensively at the time of the incident. The application is consistent even with a hypothesis on the part of the accused to act aggressively. Further, the application was filed on 15th January, 1963 and the incident took place on 24th of May, 1963. The accused led no evidence to show how the application was dealt with in the court of the 'Sub

Divisional Magistrate. It is not clear whether the application was registered and whether any notices were issued to the persons sought to be proceeded against including the two prosecution witnesses. The application, in my opinion, only provides a basis for a mere conjectural argument which cannot be of any substantial weight.

17. The last consideration that the incident took place near about the village of the accused is also of no great help in supporting the claim of the accused that the prosecution witnesses and other persons had gone there to commit an assault upon the accused. It is not understandable that the members of the complainant's party would pick up a place near the village of the accused to initiate an assault on them.

18. None of the considerations relied upon by the defence counsel individually or collectively can justify a finding that the accused were acting merely defensively. It appears to me that the parties had a controversy on account of the claim of the complainant party to 'jhagra-money' on account of son of the accused Buchia having contracted a nata-marriage with Mst. Kesar widow of the brother of Manna P W. 1 and both the parties were determined to settle this controversy by the use of force. They suddenly met and fought with each other and in that fight the complainant-party suffered more serious injuries than the accused party. One of the members of the complainant-party even lost his life on account of the injuries caused during the course of the incident.

19. In the light of the foregoing discussions the conclusions arrived at by the Additional Sessions Judge Jhalawar that the fight between the parties was free and that none of them could claim right of private defence is perfectly justified on a consideration of the materials on record and the circumstances of the case. Conviction of the appellants for various offences, in the circumstances, is justified and calls for no interference.

20. Arguing the question of sentence the learned counsel emphasised very much the observations of the Additional Sessions Judge in the judgment in counter case that the prosecution witnesses were more to be blamed in bringing about the fight which resulted in the death of Chunna and injuries to members of the

complainants party and also to the accused. He also emphasised that in the counter case the accused had been dealt with under the provisions of [Probation of Offenders Act, 1958](#). It was also stressed that the two appellants Buchia and Kalu had remained undertrial prisoners for quite a long period, that is, from May, 1963 to April, 1964. Having considered the various circumstances of the case, I consider that some reduction in the sentences passed against the appellants will be appropriate. The sentences are accordingly reduced as follows:-

Sentences of Buchia and Kalu under Section 326 read with Section 34, Indian Penal Code, are reduced to three years rigorous imprisonment.

As regards the accused Dolia, it is on record that he was less than 18 years of age at the time of the incident. As he is made liable for an offence under Section 326 read with Section 34, Indian Penal Code, he cannot be dealt with under the provisions of Probation of Offenders Act. At the same he deserves to be treated leniently in the matter of sentence bearing in mind that he was a junior member of the family and was acting more under the influence of the senior member of the family. An imprisonment for a period of one year will be sufficient for him under Section 326 read with Section 34 Indian Penal Code. Under Section 325 read with Section 34 Indian Penal Code the sentence of three years rigorous imprisonment is reduced to two years rigorous imprisonment, in the cases of Kalu and Buchia and one year's rigorous imprisonment against Dolia. The sentences under other sections shall stand. The sentences shall run concurrently.

21. The counsel for the appellants prays for leave to appeal to the Supreme Court. No case for leave has been made out. The application for leave is dismissed.