

Jhamman and ors. Vs. State of Raj.

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Court : Rajasthan

Decided On : Jan-27-2006

Reported in : RLW2006(3)Raj1845; 2006(2)WLC716

Judge : Shiv Kumar Sharma and; Vineet Kothari, JJ.

Acts : Indian Penal Code (IPC) - Sections 147, 148, 149, 300, 302, 304, 307, 323, 325 and 447; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : D.B. Criminal Appeal No. 364 of 2000

Appellant : Jhamman and ors.

Respondent : State of Raj.

Advocate for Def. : Ashwini Kumar Sharma, Public Prosecutor

Advocate for Pet/Ap. : S.R. Bajwa, Senior Adv. and; V.R. Bajwa and; Brisingh Si

Judgement :

Shiv Kumar Sharma, J.

1. Out of fifteen accused indicated before learned trial Judge, Noor Mohammad, Kadar, Kanja @ Niwaz Khan and Patanga are dead and only eleven are before us who have been convicted and sentenced by the learned trial Judge as under:

Samshuddin:

Under Section 302 IPC:

To suffer life imprisonment and fine of Rs. 200/-, in default to further suffer two months imprisonment. Under Section 148 IPC:

To suffer rigorous imprisonment for two years. Under Section 323 IPC:

To suffer rigorous imprisonment for one year. Under Section 325/149 IPC:

To suffer rigorous imprisonment for two years and fine of Rs. 100/-, in default to further suffer one month imprisonment.

(1) Jhamman, (2) Gafoor, (3) Rustam, (4) Sahab, (5) Deenu, (6) Saddi, (7) Sattar, (8) Muddin, (9) Haroon and (10) Abdul Kareem:

Under Section 302/149 IPC:

Each to suffer life imprisonment and fine of Rs. 200/-, in default to further suffer two months imprisonment. Under Section 148 IPC:

Each to suffer rigorous imprisonment for two years. Under Section 323 IPC:

Each to suffer rigorous imprisonment for one year. Under Section v/v IPC:

Each to suffer rigorous imprisonment for two years and fine of Rs. 100/-, in default to further suffer one month imprisonment. Substantive sentences were directed to run concurrently.

2. The incident giving rise to this appeal is alleged to have taken place on March 28, 1986 at 8 A.M. The case of the prosecution is that when Guljari (now deceased), his sons Bhag Chand (PW. 10) and Prahlad (PW. 11) and one Jhabboo Jat (PW. 15) were on their field and reaping crop of Masoor, the appellants along with other persons came armed with Lathis, Pharsas and Guns. Kadar and Sattar inflicted Pharsa blows on the head of Guljari and other inflicted blows with Lathis. When Bhag Chand intervened Noor Mohd. opened fire that caused pallet injuries on his shoulder and foot. Prahlad and Jhabboo were also given beating with lathis and Pharsas. Guljari died on the spot and his dead body

was lifted and taken by Bhag Chand to his house. A written report (Ex. P. 19) was handed over by Bhag Chand to the SHO, Sikri, who came to the place of incident. On the basis of said report a case under Sections 147, 148, 149, 302, and 307 IPC was registered and investigation commenced. Autopsy on the dead body was performed, statements of witnesses were recorded, accused were arrested and necessary memos were drawn. On completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge Deeg District Bharatpur Charges under Sections 148, 323, 325, 302, 307 and 307/149 IPC were framed. The appellants denied the charges and claimed trial. The prosecution in support of its case examined as many as 20 witnesses. In the explanation under Section 313 Cr.P.C, the appellants claimed innocence. Five witnesses in defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. We have heard the rival submissions and scrutinised the record.

4. As per injury report (Ex. P. 17) deceased Guljari Sahai sustained following ante mortem injuries:

1. Incised wound 2' x 1/2' x bone deep on left side of frontal region with fracture of frontal bone on left side oblique.
2. Incised wound 1/2' x 1/4' x bone deep over left cheek with fracture of left maxilla bone
3. Bruise 1/2' x 1/8' on left side of nose.
4. Incised wound 1/2' x 1/16' x 1/16' on left eye brow.
5. Fire arm wound 1/4' x 1/4' x 1/4' on left side of occipital region direction posterior to anterior one pellet removed & sealed.
6. fire arm wound 1/8' x 1/8' x 1/4' on back left side lower 1/2 region direction of wound posterior to anterior two pellets removed and sealed.
7. Bruise 4' x 3/4' on back blow left scapula transversely.

8. Bruise 5' x 3/4' below injury No. 7 transversely.
9. Bruise 4' x 3/4' on lateral side of injury No. 8 oblique.
10. Bruise 8' x 3/4' in middle of back vertical.
11. Bruise 1 1/2' x 1' on back of left arm upper half.
12. Abrasion two 1/4' x 1/4' on back of left elbow joint.
13. Bruise 4' x 3' on back of neck with fracture of 7th servical vertibra.
14. Bruise 5' x 3' on lateral side of left arm vertical.
15. Abrasion three 1/4' x 1/4' to 1/2' x 1/4' on back of right elbow joint.
16. Abrasion 1/4' x 1/4' on lateral side of right thumb.
17. Lacerated wound 1/2' x 1/4' x 1/4' between left ring finger & left little finger.
18. Bruise 7' x 2' on back of left thigh lower half vertical.
19. Bruise 3 1/2' x 1' on back of left leg transversely.
20. Incised wound 1' x 1/8' x 1/8' on back of right knee joint.

As per postmortem report (Ex. P. 18) the cause of death in the opinion of Dr. Laxman Singh (PW. 2), who performed autopsy on the dead body, was injury to brain as a result of injury No. 1 and shock due to injury No. 13 to spinal cord and shock de to cumulative effect of all injuries.

The injuries sustained by Prahlad (PW.11) were examined vide injury report (Ex. P.11):

- (1) Lacerated wound swelling 1 1/4' x 1/4' x 1/8' over scalp left parietal region
- (2) Swelling 1' x 1' on Rt. Mastoid bone.
- (3) Swelling diffused around left arm.

(4) Bruise 6' x 3/4' on back Rt. side oblique.

(5) Swelling 2' x 2' on Rt. Scapular region.

(6) Fire arm wound 1/8' x 1/8' x 1/4' on fronto medial aspect of Lt. leg lower 1/2 directed anterior to posterior

(7) Swelling 3' x 3' on lateral side of let ankle joint

(8) Lacerated wound 1' x 1/4' x 1/4' on front of right leg.

(9) Firearm wound 1/8' x 1/8' x 1/4' on medial side of right leg directed anterior to posterior.

(10) Firearm wound 1/4' x 1/8' on medial side of right leg posterior to injury No. 9.

(11) Bruise 1/2' x 1/4' on top of right thumb.

Rajan (PW. 8) vide injury report (Ex. P. 12) sustained one incised wound of 1/2' x 1/4' x 1/8' on right supra scapular region vertical.

Samandar (PW. 13) vide injury report (Ex. P. 13) received one bruise of 3' x 1 1/2' on front of chest.

Bhagchand (PW. 10) vide injury report (Ex. P. 14) sustained following injuries:

1. Firearm wound 1/4' x 1/8' x skin deep on front of right thigh directed below upwards.

2. Firearm wound 1/8' x 1/8' on lateral side of lt. soulder joint.

3. Bruise 6' x 1' on front of left thigh transversely.

Jhabbu (PW. 15) vide injury report (Ex. P. 15) received following injuries:

1. Swelling 4' x 4' on Rt. side of face.

2. Bruise around Rt. eye diffuse.

3. Bruise diffuse around Lt. eye.
4. Swelling 4 1/2' x 4' over Rt. parieto temporal region of scalp.
5. Lacerated wound 3/4' x 1/8' x 1/8' over nose.
6. Lacerated wound 1 1/2' x 1/8' x 1/8' on right side of posterior frontonally.
7. Swelling diffused over Rt. Calf region.
8. Swelling diffused around left thumb.

Bhagwan Singh (PW. 18) vide injury report (Ex. P. 16) received following injuries:

1. Lacerated wound 2 1/2 x 1/4' x 1/4' on Lt. side of posterior frontonally.
2. Bruise 6' x 3' on right scapular region oblique.
3. Bruise 3' x 3/4' on Rt. side of back below scapula vertical.
4. Bruise 3' x 1/2' between both scapular vertical.
5. Bruise 4' x 1/2' on back Lt, side transversely in middle.
6. Bruise 1' x 1' on back below Lt. Scapula
7. Abrasion 1' x 1/2' on back Rt. Side lower 1/3
8. Bruise 2' x 1' on left hip.
9. Bruise 5' x 2' on lateral side of Rt. Forearm upper 1/3
10. Abrasion 1/2' x 1/2' on lateral side of Lt. Elbow joint
11. Abrasion 1/4' x 1/4' on left iliac crest.

5. At this juncture it will be appropriate to consider the injuries sustained by the members of accused party. Appellant Abdul Kareem received following injuries vide injury report (Ex. D.11):

1. Four punctured wounds 0.5 x 5 cm on left hand
2. 1 punctured wound 0.5 x 5 cm on left wrist.
3. 13 punctured wounds 5 x 5 cm on left arm.
4. 1 punctured wound 5 x 5 cm on left wrist.
5. 14 punctured wounds 5 x 5 cm on left arm.
6. 1 punctured wound 5 x 5 cm on chest left side.
7. 22 punctured wounds 5 x 5cm on chest lateral side
8. 3 punctured wounds 5 x 5 cm on back
9. 1 punctured wound 5 x 5 cm on neck back side
10. 1 punctured wound 5 x 5 on hip.

Appellant Shamsuddin received following injuries vide injury report (Ex. D-4):

1. 1 wound 2 x .5cm on head right side.
2. 1 abrasion 5 x .5 cm below right eye.
3. 1 abrasion 1 x 5 cm on right hand.

6. The prosecution in support of its case examined Phool Singh (PW. 6), Tulsi (PW. 7), Rajan (PW. 8), Karan (PW. 9), Jhabboo (PW. 15) and Chet Ram (PW. 18) as eye witnesses of the occurrence, but they did not support the prosecution case and were declared hostile. Learned trial Judge in convicting and sentencing the appellants placed reliance on the testimony of Bhag Chand (PW. 10), Prahlad (PW. 11.) and Bhagwan Singh (PW. 18). Supporting the written report, Bhag Chand (PW. 10) in his deposition stated that the land on which they had sown crop of Masoor was owned and possessed by them from his very childhood. Noor Mohd. Jhamman and Haroon armed with Guns, Kadar and Sattar armed with Pharsi and others armed with Lathis came over there and started beating them.

Noor Mohd. and Jhamman opened fire. Handal gave lathi-blow on the neck of Guljari and Kadar inflicted Pharsi-blow on the right side of his head, Sattar gave Pharsi-blow on the left cheek just below eye of Guljari. Noor Mohd. opened fire at Bhag Chand that hit on his shoulder and foot. Pallets of the fire opened by Noor Mohd. and Jhamman also hit Guljari and Prahlad. Guljari died on the spot. His dead body was taken to the house. Police was informed on wireless and on arrival of the police he handed over the written report (Ex. P.19) to the police. In the cross examination a suggestion was made to him that the land was entered in the name of Kamruddin, Samsuddin, Jamil and Sabuddin to which this witness pleaded ignorance. He also denied this fact that the land was ever entered in his name or the names of Prahlad and Om Prakash. He also stated that the witnesses came after the injuries were inflicted. He also denied the suggestion that appellant Samsuddin and other persons were reaping crop and he along with other persons came to the field armed with weapons and started beating them. He also denied this fact that Abdul Kareem had received 30-40 pallet injuries and Samsuddin sustained injuries with lathis. He pleaded ignorance about medical examination of Samsuddin and Abdul Kareem. He also did not know about the report lodged by appellants against him and complainant party. Prahlad (PW. 11), another son of deceased, corroborated the testimony of Bhag Chand. He categorically stated that the land bearing khasra No. 172, where the incident had taken place, was entered in their name and it was in their possession. He also denied the suggestion that they inflicted injuries with Guns and lathis on the person of Abdul Kareem and Samsuddin. Bhagwan Singh (PW. 18) also corroborated the testimony of Bhag Chand and Prahlad. In his cross examination he however admitted that he is nephew of the deceased.

7. Bharat Singh (PW. 17), who conducted investigation of the cross case, in his deposition stated that he did not seize from the complainant party the papers pertaining to land in question.

8. Appellant Samsuddin appeared as DW. 1, in his deposition he stated that the land where the incident occurred had been in their possession for the last two years and ten months and on the date of incident they were reaping crop of Masoor, Guljari, Bhag Chand, Prahlad, Radha, Rajan, Bhagwan Singh, Ram

Khilari, Munesh, Ramesh and Karan came over there and surrounded them. Guljari, Bhagwan Singh, Karan and Bhag Chand were armed with Guns and others had lathis. Guljari exhorted others and Bhag Chand opened fire at Abdul Kareem and Guljari opened fire at him (Samsuddin), but he escaped. Thereafter other assailants started inflicting blows with lathi. He lodged the report (Ex. D.3), against assailants. His injuries were examined vide injury report Ex. D-4, In his cross examination Samsuddin stated that prior to the incident there was a litigation between his father and Guljari on the said field. The case was pending and it was wrong to suggest that Guljari had won the case. It was he, who sown the crop of Masoor 3-4 months prior to the incident. He denied to have caused injuries on the person of Guljari, Prahlad and Jhabboo. Appellant Abdul Kareem has also examined himself as DW. 2, He also stated that the land in question was in possession of Sabuddin and Samsuddin for the last three years and on the day of incident around 8 AM while he, Samsuddin, Jhamman, Mamreg, Kamruddin along with women were reaping crop of Masoor Bhag Chand, Prahlad, Guljari, Karan, Bhagwan Singh, Rajan, Radha, Sodan and Samander came over there armed with guns and lathis. Bhag Chand opened fire at him that caused pellet injuries on his person. His injury report is Ex. D.11. Ashok Kumar Gupta (DW. 3) had examined the injuries sustained by Abdul Kareem and Samsuddin vide injury reports Ex. D-4 and Ex. D-11. Ibrahim (DW. 4) also supported the defence story.

9. Mr. S.R. Bajwa, learned Senior Counsel vehemently criticised the impugned judgment of learned trial Judge and raised following contentions:

(i) Judgment of Revenue Board dated April 18, 1992 was received by learned trial Judge at the back of the appellants and it was not put to the appellant while recording their statements under Section 313 Cr.P.C.

(ii) It was the complainant party which was aggressor and tried to dispossess the appellants from the land on which they were in possession and cultivating the same for the last many years. On the date of incident the complainant party attempted to dispossess the appellants, upon which the appellants protested. This provoked the complainant party and it assaulted the appellants as a result of which appellants Abdul Kareem and Samsuddin received injuries on vital parts of their

body. Apprehending danger to their life the appellants defended themselves with whatever they had in their hands in exercise of their rights of defence of person and property.

(iii) Charge under Section 447 IPC for trespassing the land was not framed against the appellants which shows that the appellants were not trespassers. There was no criminal trespass since the land in question was in possession of the appellants and in fact it was the complainant party who had trespassed upon their land.

(iv) The prosecution was guilty of suppressing material facts of the case, as it has not explained the injuries suffered by Abdul Kareem and Samsuddin on their vital parts of the body and it gives the impression that only the appellants had assaulted and they had not caused injuries to any one.

(v) The prosecution has presented distorted version to support its concocted case. Subsequent to the occurrence the land was sold by registered sale deed in favour of Bhag Chand and Prahlad.

(vi) Injured eye witnesses Jhabboo (PW. 15) and Rajan (PW. 8) did not-support the prosecution story.

(vii) Finding of learned trial Court is based on surmises and conjectures. Even the injury reports of Abdul Kareem and Samsuddin were ignored on the ground that the injuries sustained by them were simple in nature.

(viii) There are material contradictions in the statements of Bhag Chand (PW. 10), Prahlad (PW. 11) and Bhagwan Singh (PW. 18) and they cannot be termed as wholly reliable witness.

10. In support of these contentions reliance is placed on Subramani v. State of TN : 2002 CriLJ4102 , Vajrapu Sambayya Naidu v. State of AP : 2003 CriLJ4433 and State of UP v. Ram Bahadur Singh : (2004)9SCC310 .

11. Per contra, Mr. Ashwini Kumar Sharma, learned Public Prosecutor and Mr. Birisingh Sinsinwar, learned Counsel for the complainant supported the impugned judgment and urged that the appellants had pre arranged plan limiting mind to

dispossess the appellants from the land in question and they formed unlawful assembly and came armed with deadly weapons. Since appellants were aggressor the plea of private defence was not available to them. Reliance is placed on Preetam Singh v. State of Rajasthan : (2003)12SCC594 , Hardial Singh v. State of Punjab 1996 SCC (Cri) 660, Dani Singh v. State of Bihar 2004 (IV) Apex Decision (SC) 1 and Bishna v. State of West Bengal 2005 (8) Supreme 180.

12. Fact situation appears from the the material on record may be summarised thus:

(i) Documents pertaining to land bearing khasra No. 172, where the incident occurred, were not seized by the investigating officer.

(ii) No opportunity was afforded to the appellants by the learned trial judge to controvert the judgment dated April 18, 1992 of the Board of Revenue. Question about the said judgment was not put while examining the appellants under section 313 Cr.P.C.

(iii) Although learned trial court observed that the appellants were the assailants but it failed to consider this aspect that charge under Section 447 1PC for committing criminal trespass was not framed against the appellants.

(iv) Appellant Abdul Kareem although had sustained as many as sixty one punctured wounds on various parts of his body including the chest, those injuries were not explained by the prosecution witnesses.

(v) The land in question appears to have been sold after the incident, to informant Bhagchand and his brother Prahlad by the appellants but Bhagchand and Prahlad denied to have purchased the land.

(vi) It is not borne out from the record as to who was in actual possession over the land in dispute. It however appears that the complainant party and accused party, both, did go armed over the land to have a trial of strength.

(vii) Cause of death of deceased according to postmortem report was incised wound on the head attributed to accused Kadar (now dead) and bruise over back

of neck with fractures of seventh servical vertebra attributed to appellant Samsuddin.

13. The principles which is well settled by precedents is that, if neither party can be held to be in actual possession of the property in dispute and if both parties go armed to have a trial of strength, then neither party can be held to have acted in exercise of the right of private defence irrespective of whether the one or the other party was the aggressor or the first to attack. In *Vishvas Aba Kurane v. State of Maharashtra* : 1978 CriLJ484 their Lordships of the Supreme Court indicated that in a free fight no right of private defence is available to either party and each individual is responsible for his own acts.

14. Having carefully analysed the evidence of, informant Bhagchand (PW. 10), Prahlad (PW. 11) and Bhagwan Singh (PW. 18) we find that failure on their part to account for the injuries sustained by the appellants Abdul Kareem and Samsudin does not undermine their evidence to the core. On examining their evidence from the point of trustworthiness, we find it consistent qua the allegations against appellant Samsuddin. In regard to injuries attributed to other appellants, we find material contradictions in the testimony of Bhagchand, Prahlad and Bhagwan Singh and it does not inspire confidence so far as the allegations against appellants Jhamman, Gafoor, Rustam, Sahab, Deenu, Saddi, Sattar, Muddin, Harobn and Abdul Kareem are concerned and they are entitled to benefit of doubt. The prosecution is thus able to establish the individual act of causing Injuries on the neck of the, deceased by appellant Samsuddin. Since it is a case of free fight between two parties question of formation of unlawful assembly and common object aoes not wise and each appellant is responsible for his Individual act committed by him. Charges under Sections 148 and 149 IPC are therefore not established against the appellants.

15. In view of the fact that appellant had caused one injury with lathi on the neck of the deceased that resulted in fracture of seventh servical vertebra, we find that requirements of Exception 4 to Section 300 IPC are established and the act of appellant Samsuddin comes within the parameters of Section 304 Part IPC.

16. For these reasons, we dispose of the instant appeal in the following terms:

(i) We partly allow the appeal of appellant Samsuddin and instead of Section 302, we convict him under Section 304 Part I IPC and sentence him to undergo rigorous imprisonment of ten years and fine of Rs. 5000/-, in default to further suffer one year rigorous imprisonment. We however acquit him of the charges under Sections 148, 323 and 325/149 IPC.

(ii) We allow the appeal of appellants Jhamman, Gafoor, Rustam, Sahab, Deenu, Saddi, Sattar, Muddin, Haroon and Abdul Kareem and acquit them of the charges under Sections 302/v, 148, 323 and 325/149 IPC. They are on bail, they need not surrender and their bail bonds stand discharged.

(iii) Impugned judgment of learned trial judge stands modified as indicated above.

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