

Bhorya and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-04-2005

Reported in : RLW2005(3)Raj2147; 2005(3)WLC262

Judge : V.K. Bali and; Harbans Lal, JJ.

Acts : Indian Penal Code (IPC) - Sections 147, 148, 149, 302, 323, 324, 325 and 452; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : D.B. Criminal Appeal No. 485 of 1998

Appellant : Bhorya and ors.

Respondent : State of Rajasthan

Advocate for Def. : Nirmala Sharma, Public Prosecutor

Advocate for Pet/Ap. : A.K. Gupta,; Pooja Gupta and; Ashutosh Bhatia, Advs.

Disposition : Appeal dismissed

Judgement :

V.K. Bali, J.

1. This appeal has been filed by Bhorya and his four sons namely Harkesh, Ghisya, Ramji Lal and Moti recorded against them, by the Additional Sessions Judge, Dausa. Whereas Ghisya has been found guilty under Section x IPC

substantively and sentenced to undergo rigorous imprisonment for life, others named above have been held guilty for the offence Under Section 302 with the aid of Section 149 IPC and convicted likewise. They have been also ordered to pay a fine of Rs. 2,000/-, on in default of the same, to further undergo rigorous imprisonment for a period of there months. They have also been convicted under various other sections of the IPC, as detailed below.

Bhorya

Under Section 148 IPC - 3 months' rigorous imprisonment.

Under Section 452 IPC - 6 months rigorous imprisonment with a fine of Rs. 200/- and default in payment of fine to undergo 15 days simple imprisonment.

Under Section 325/149 IPC - One year RI and a fine of Rs. 200/- and in default of payment of fine to further undergo 15 days S.I.

Under Section 324 IPC - 6 months' simple imprisonment with a fine of Rs. 200/- and in default of payment of fine SI for 15 days.

Under Section 323 IPC - Three months' R.I.

Harkesh and Ramjilal

Under Section 147 IPC - 3 months' R.I.

Under Section 452 IPC - 6 months' RI and a fine of Rs. 200/-, in default of payment of fine, SI for 15 days.

Under Section 325/149 IPC - One year R.I. and a fine of Rs. 200/-, in default of payment of fine, 15 days' SI.

Under Section 324/149 IPC - 6 months SI with a fine of Rs. 200/-, in default of payment of fine, further SI for 15 days.

Under Section 323 IPC - 3 months' R.I.

Ghisa

Under Section 147 IPC - 3 month' RI

Under Section 452 IPC - 6 months' RI and a fine of Rs. 200/-, in default of payment of fine, further SI for 15 days.

Under Section 325/149 IPC - 1 year RI and a fine of Rs. 200/-, in default of payment of fine, further SI for 15 days.

Under Section 324/149 IPC - 6 months' SI and a fine of Rs. 200/-, in default of payment of fine, further RI for 15 days.

Under Section 323 IPC - 3 months RI.

Moti Lal

Under Section 147 IPC -3 months' RI

Under Section 452 IPC - 6 months' RI and a fine of Rs. 200/-, in default of payment of fine, 15 days' SI.

Under Section 325 IPC - 1 year RI and a fine of Rs. 200/- in default of payment of fine, 15 days SI.

Under Section 324/149 IPC - 6 months' SI and a fine of Rs. 200/-., in default of payment of fine, further SI for 15 days.

Under Section 323 IPC - 3 months' RI.

2. In the occurrence that is stated to have taken place on 16.9.1993 at 7-8 a.m. In Village Ramsar, whereas Kishnya lost his life, Smt. Rumali (PW-3), Ghanshyam (PW-4), Kalu (PW-6) and Chotya received various injuries. FIR with regard to the incident came to be lodged on the same day at 1.40 p.m. at Police Station Lalsot on the basis of the written report (Ex.P.1) which was lodged by PW-1 Bacchu son of Kanhaiya. Special report with regard to the incident reached the concerned Magistrate on 21.9.1993.

3. Chain of events leading to one death and injuries to four as given out by Bacchu (PW-1) who lodged the FIR, when translated into English, reads thus -

'There is dispute with regard to the partition of land between us and Bhorya son of Moolchand Mali regarding which a case is going on in the court. Because of this enmity, today on 16.9.1993 at about 7-8 a.m. I and my family members Kishnya, Ghanshyam, Kalu and Chhotya were sitting at the house. Wife of my nephew (brother's son) Smt. Rumali was cooking food. In the meanwhile, Bhorya son of Mool Chand and his sons Ghisya, Ramjilal, Harkesh, Motilal Mali came armed with lathis and spades with common object the beat us. They came at our house, entered the same and Bhorya told that you are troubling us for a long time and your work shall be done. Mr. brother Kishnya told him that the case was between you and Champalal whereupon Bhorya said that boys what are you looking for, kills him. The moment he said so, Ghisya, Harkesh and Ramjilal started giving lathi blows on the head of my brother and other parts of the body. I, Kalu Ram, Rumali, Ghanshyam and Chotiya tried to save our brother. All these persons started beating us with lathis and spades. Moti gave a lathi blow to me on the head, Bhorya gave a blow with spade from the reverse said on my left shoulder. Ramjilal gave a lathi blow on my right shoulder. When we cried, on hearing the same Bacchi son of Ramphool Mali, Kali son of Ramphool Mali came and rescued us. Due to beating given to us, I, Ghanshyam, Chhotya, Kalu, Rumali and his brother Kishnya received number of injuries. My brother Kishnya became unconscious on the spot due to injuries received by him. We took him to the hospital. Legal proceedings be carried against the accused.'

4. Kishnya as per the evidence brought on record died on 17.9.1993.

5. In its endeavour to bring home the offences against the appellants, the prosecution examined Bacchu son of Kanhaiya, the first information, who also happened to be injured, as PW-1. He supported the prosecution version. In the cross examination, he stated that he had seen the site plan (Ex.P.4) and the fight had taken place at point 'X' in the said site plan. The fight had taken place in front of the house. He also stated that if the accused were to go from their fields to their house, then passage shown 'E' in the site plan would fall on their way. He also stated that they had not given any beating to Bhonriya, Ghisya, Ramjilal, Harkesh and Moti nor these persons received any injuries. Bacchu son of Ramphool who along with his father Ramphool and Kalu and tried to rescued the complaint party

was examined as PW-2. He too supported the prosecution case. He, however, stated that the accused had also received injuries by lathi and spade. He further stated that the fight had taken place 2-4 steps ahead in front of the house. He also stated that the house of Bacchu is in the fields itself. Unlike PW-1, he however denied that the passage marked 'E' will fall on the way if the appellants were to go from the fields to their house. He, however, in the later part of his cross examination stated that from the side of point 'E' the appellants could go to their fields. He also stated that the occurrence had taken place at point 'X' in the site plan (Ex.P.4) and that lathi and Spades were wielded from both the sides. But immediately thereafter, he stated that it was not correct. Actually, the appellants alone were beating the complaint party and that the complaint party was not causing injuries to the appellants. He denied for want of knowledge as to how the appellants received injuries. He stated that he had not seen any injuries on the person of the appellants. He stated that he had not made any statement to the police that the accused has also received injuries and that the complaint party was defending itself. He was however, confronted with such statement made by him before the police. He denied if the appellant were going to their fields with spades in the hand. He denied for want of knowledge if the appellants were going to their fields with spades in their hand to make 'Doli' (boundary) in their fields and that the complaint party attacked them and caused them injuries. Smt. Rumali the other injured eye witness examined as PW-3, supported the prosecution version. She further stated that when she was cooking food, then Ghisya and Moti and dragged her father in law Kishnya who too was cooking food in the kitchen. In the cross-examination, she was confronted with the statement made before the police where dragging of the father-in-law from the kitchen was not mentioned. She stated that no accused were given any injury from our side nor she had seen any injury on the person of the accused. Ghanshyam, the other injured eye witness who was examined as PW-4, also supported the prosecution version. In cross-examination, he however stated that when he came running, he found Kishnya lying unconscious. After him, Kalu and Bacchu had also come. There was no dispute between them and the accused with regard to the partition of land, further stated this witness. He categorically stated that the occurrence had taken place where they were residing. Kalu, another injured eye witness who was examined as PW-6

also supported the prosecution case. In his cross-examination, he admitted that Bhonriya's son Ghisya and Champalal and lodged a report against his father Kishnya with regard to the theft of a nozzle. He also stated that the appellants had come to their house from the passage and further that if one is to go to the fields of the accused the passage would not be from the side of their house. He denied the suggestion that they had given beatings to the appellants.

6. Prosecution also examined Dr. Dharmendra Kumar (PW-7) who stated that he had examined Kishnya son of Ram Swaroop on 16.9.1993 at 7.10 p.m. and found three injuries on his person. With regard to all the injuries, he had advised X-ray. All the injuries were given by blunt weapon within duration of 12 hours. He proved medico legal report Ex.P.6. The injured was unconscious at that time. Dr. Hari Prasad, who was examined as PW-8, deposed that on 29.9.1993 at about 11.30 a.m. he had medico legally examined Kaluram son of Kishnya and found the following injuries on his person:

'1. Bruise 3 cm x 2 cm on right thumb.

2. Soft swelling 6 cm x 3 cm on the right parieto temporal region of skull.

3. Abrasion (scabbed) 2 cm x 1 cm on the outer aspect of left forearm.

7. He opined that all the injuries found on the person of kalu were simple in nature and were caused within duration of 12-15 days.

8. On 16.9.93 at 4.40 p.m. he had medico legally examined Chotya and found following one injury on his person:

'Bruise 18 cm x 3 cm on the right back.'

9. The injury in the opinion of the doctor was simple in nature and was caused by blunt weapon within a person of 24 hours. He proved medico legal report Ex.P.8.

10. On the same very day, at about 4.50 p.m. he also medico legally examined Smt. Rumali and found following two injuries on her person:-

'1. Lacerated wound 4 cm x 1 cm x skin deep on the right parietal region.

2. She was complaining of pain of right scapular region of back.'

11. The injuries in the opinion of the doctor were simple and caused by blunt weapon within duration of 24 hours. He proved medico legal report Ex.P.9.

12. This very doctor, on the same very day at 4.20 p.m. also medico legally examined Ghanshyam and found following three injuries on his person:

'1. Incised wound 5 cm x 0.5 cm x scalp deep on the right parietal region of scalp.

2. Bruise with swelling 10 cm x 3 cm on the dorsum of left hand and wrist.

3. Bruise 24 cm x 3 cm on the both scapular region of back.'

Injury No. 1 in the opinion of the doctor was simple but was caused by sharp edged weapon. Injuries No. 2 and 3 were caused by blunt object. He advised X-ray for injury No. 2 and declared injury No. 3 as simple. The injuries were caused within duration of 24 hours. He proved medico legal report Ex.P.10.

13. Prosecution also proved post mortem report of Kishnya. The doctor recorded following injuries on the dead body of Kishnya in the post mortem report (Ex.P.38):-

'1. Stitched wound (37 stitches) 30 cms long, curved as shown in diagram.

2. Stitched wound (5 stitches), 04 cms long.

3. Abrasion 3 x 2 and 1/2 and 1/2 cms.

4. Incised wound (surgical drainage)

1 and 1/4 x 3/4 cms, muscle deep.

Note:- All injuries ante mortem of about 01-2 days before death (duration and opinion about weapon of stitched wound not ascertainable).

Injuries on scalp (Rt. Side); abrasion caused by blunt object.

14. The fracture, doctor further mentioned, extended to the base of skull. The cause of death in opinion of the doctor was due to extradural haemorrhage as a result of head injury which was sufficient to cause death.

15. There is no need to give further details of the prosecution evidence but for to mention that Prabhu Dayal Sharma, S.I. Police station Lalsot who was examined as PW-14 had deposed with regard to the steps that he had taken while investigating the case.

16. When examined Under Section 313 Cr.P.C. appellants who also happened to be injured, admitted the occurrence but pleaded right of private defence of person. Bhorya while denying the incriminating material put to him, further stated that a dispute with regard to the partition of land between him and Champalal was going on. The complainant party was siding with Champalal. They were going to the fields to make 'Dole' (boundary) what the complainant party had given them beating on they way. He, Ramjilal, Harkesh, Moti and Chhotya all received injuries. They were beaten by saying that the complainant party will not permit them to make the 'Dole' (boundary). The site plan that has been made showing that they had given beating to the complainant party in their house is incorrect. The complainant party had started fighting in the passage. In the case that they lodged they have shown that the fight had taken place in the passage.

17. The defence also examined three witnesses but as nothing based on their depositions has been urged before this court, there is no need to give details of the depositions made by them. Suffice is it however to mention that all the defence witnesses endeavored to strengthen the plea of the appellants that the fight had taken place in the passage which was used by the appellants for going from their house to the fields and from the fields to their house.

18. We have heard learned counsel appearing for the parties and with their assistance carefully examined the records of the case.

19. Mr. A.K. Gupta, learned counsel defending the appellants vehemently contends that the prosecution has suppressed the material facts like injuries received by all the appellants, the venue of occurrence has been shifted from the

place one originally stated in the FIR to a place somewhere near the house of the complainant for which too there are different versions given by the witnesses, prosecution miserably failed to prove motive that is said to have actuated the appellants to commit the crime and that on account of theft of nozzle regarding which the appellants had lodged report against the complaint party, the grudge, if any, was on the side of complainant party. They alone thus waylaid the appellants when they were going from the house to make 'Dole' and attacked them and it was in exercise of right of private defence of person that the appellants also caused some injuries to the complainant party on account of which, unfortunately, one person died.

20. We have given our anxious thoughts to the contentions raised by the learned counsel, but in the context of the facts of the present case, we do not find any merit in the same. In the occurrence that admittedly took place on 16.9.1993 whereas Kishnya lost his life, four others from the side of complainant party namely Smt. Rumali, Ghanshyam, Kalu and Chhotya were also injured. The injuries sustained by Kishnya were so serious that he died on 17.9.93. Ghanshyam besides others also received a grievous injury. All the accused were also injured and it does appear that they received injuries in the same occurrence that took place on 16.9.1993. Dr. Hari Prasad examined as PW-4 had medically examined Bhonrya and found five injuries on his person all of which were simple. Moti too was examined by the same very doctor. He too had received five injuries but all were simple in nature. Ghisia received two injuries whereas Harkesh had received one injury which too was simple in nature.

21. The crucial question that needs determination is as to whether the appellants had gone to the house of the complainant party and caused injuries to them or that the complainant party had waylaid the appellants when they were going to their fields and attacked them. From the evidence available on the record, it is the prosecution version which appears to be correct. Before we may proceed further and give reasons as to why the prosecution version is plausible, we would like to mention the FIR lodged by the appellants was filed as untraced which means the police had not found any truth in the counter version given by the appellants. That in itself, however, is not sufficient to come to the conclusion that the version given

by the appellants is false and it has only been stated as a fact that the police had not found any truth in the version given by the appellants.

22. Coming now to the crucial issue as mentioned above, it appears to us that if the complainant party would have waylaid the appellants, surely they must have equipped themselves sufficiently enough to ward off the counter attack. In that even, more harm would have been caused to the accused party than the complainant party. In the present case as fully detailed above, whereas one person died because of serious injuries inflicted upon him from the side of the complainant, four others received injuries; one injury received by Ghanshyam is grievous; and compared to that, the appellants suffered only simple injuries and that too, on non-vital parts of their bodies but for 3 or 4 which appear to be very insignificant kind of injuries. The complainant party opening attack in the passage which was common to all, does not appear to be in tune with the natural human conduct. Normally, planned attacks are carried out at a place where availability of natural witness is very scanty and not at the place like passage which is open to all and sundry. The sworn testimony of as many as four injured eye witnesses, whose presence at the spot cannot be doubted, lends credence to the prosecution case. But for some improvements which we will discuss hereinafter, their version has been rather consistent. In so far as inconsistency in the statements with regard to the exact place of occurrence as is sought to be highlighted by the counsel appearing for the appellants is concerned, we may mention that the discrepancy in the FIR and the depositions made by the witnesses is only with regard to injuries being caused inside the house or only 2-3 steps outside the house. We fail to understand the effect of this improvement in proving the offence against the appellants. Whether the injuries were caused in the house or just outside the house, would not make any dent in the prosecution version. Concededly, the house of the complainant is located in their fields and therefore, even if the occurrence had taken place in the fields of the complainant party, the appellants would still be guilty for offences for which they faced trial. The prosecution was not to gain anything in changing the venue of occurrence from inside the house to outside the house. We reiterate that the appellants would be guilty of the offences committed by them whether they caused injuries to the complainant party in the house or 2-3 steps outside the house. It is too well settled

that the improvements brought about in the prosecution version are looked with suspicion only if some weakness in the case is sought to be covered. That is not the kind of case in hand. No doubt, it is true that the complainant party has tried to suppress the injuries that they have caused to the accused party but the same in the facts and circumstances of the case, cannot be fatal to the prosecution case. It may be recalled that the defence itself suggested to one of the witnesses that she had made statement before the police that the complainant had caused injuries to the appellants in self defence. When therefore statements of the witnesses were recorded Under Section 161 Cr.P.C. It was indeed the case of the complainant party that they too had caused injuries to the appellants in their self defence. This was the first and the natural version. Why it was sought to be changed is difficult to fathom. But the fact remains that the prosecution brought sufficient evidence to show that the occurrence had taken place 2-3 paces outside the house of the complainant party and house of the complainant party is in their fields where the appellants had no occasion to go. Further, once the theory propounded by the appellants that the occurrence had taken place in the passage leading to their fields from their house is rejected, the only conclusion to be drawn would be that they alone come to the house/fields of the complainant party and opened attack on them. In this scenario, if the complainant party too had given some injuries to the appellants, which as mentioned above, were simple in nature, it can not be fatal to the prosecution case. It has been now held in number of judgments rendered by the Supreme Court that non-mentioning of injuries on the person of the accused is not always fatal to the prosecution case.

23. In so far as motive is concerned, it is no doubt true that in the FIR lodged by Bacchu (PW-1) it has been mentioned that the dispute with regard to the partition of land was between them and the accused party but it was explained during the course of trial that such a litigation was between Champalal and the accused party and that the complainant party was helping Champalal. This indeed is the statement made by the appellant Bhorya who admitted that the complainant party was helping Champalal in the pending dispute between them and Champalal regarding partition of land. In so far as theft of the nozzle regarding which the accused party and lodged FIR against the complainant party, is concerned, suffice is to mention that the FIR with regard to the theft was filed as untraced. That apart,

enmity between the complainant and the accused party as per the statement made by the accused appellants under Section 313 Cr.P.c. was with regard to the land dispute between the accused party and Champalal in which the complainant party was helping Champalal. That is the prosecution case as well. Further the grouse could be with the appellants only as the complaint party was helping Champalal, a third person, in a dispute between the appellants and Champalal.

24. The alternative contention of the learned counsel that it was a case of free fight and therefore, if at all, the appellants should be convicted for their individual acts played by them and in as much as it is not proved as to who caused the fatal injury to Kishnya, none of the appellants could be convicted Under Section 302 IPC with the aid of Section 149 IPC, also cannot be accepted in the facts and circumstances of this case. The occurrence as mentioned above had not taken place in the passage but it took place in front of the house of the complainant party which is located in their fields. The appellants had no occasion to go to the house or the fields of the complainant party and open an attack on them. They had trespassed in the land of the complainant party, challenged them when in all probability they were in house and caused injuries to them outside the house. If the appellants in the course of occurrence sustained some injuries, it could only be because of the natural conduct on the part of the complainant party to defend themselves. When therefore, the complainant party might defend itself and in the process cause some injuries to the other side, it cannot be adjudged as a case of free fight. No doubt true, if perhaps a finding was to be returned that it is a case of free fight the appellants would have been held liable for their individual acts only.

25. The judicial precedents relied by Mr. A.K. Gupta, in State of UP v. Madan Mohan and Ors. : 1989 CriLJ1485 and a division bench judgment of this Court in Kishore v. State (1987(12) R.Cr.C. 59), are distinguishable and cannot be applied to the facts of the present case. In State of UP v. Madan Mohan (supra) non explanation of injuries on the part of the prosecution was taken as an additional circumstance in rejecting the prosecution case. The Supreme Court had discussed circumstance earlier in the judgment which were primarily taken into consideration while rejecting the prosecution case. As mentioned above, the additional circumstance was non explanation of injuries. In these circumstances, the

Supreme Court had held that inability of PW-1 and PW-2 to explain the injuries to Chander Mohan adds to doubt regarding their claim to have seen the incident. It was then mentioned that to top it all the prosecution has suppressed the genesis of the crime. In *Kishore v. State* (supra) the court recorded finding that the story given by the defence was corroborated by the statement given by the prosecution witnesses Under Section 161 Cr.P.C. and further that the prosecution had not come out with true facts and suppressed the genesis of the crime. There were number of circumstances that were taken into consideration for recording a finding to the effect aforesaid. Change of place of occurrence from inside to outside the house was not the only ground for which reliance was not placed upon the prosecution case.

26. Finding no merit in this appeal, we dismiss the same, thus confirming the order of conviction and sentence recorded against the appellants by the learned Trial Judge dated 27.6.1998.

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