

**Gopal and ors. Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Apr-05-1989

**Reported in :** 1989WLN(UC)137

**Judge :** D.L. Mehta and; S.S. Byas, JJ.

**Appeal No. :** D.B. Criminal Appeal 376 of 1987

**Appellant :** Gopal and ors.

**Respondent :** State of Rajasthan

**Judgement :**

**S.S. Byas, J.**

1. The appeal is directed against the judgment dated September 14, 1987, by which the Sessions Judge, Bundi convicted two of the seven appellants (Gopal and Bala) under Section 302, IPC and the remaining five (Hira, Bajranga, Ram Chander, Bheru and Badrilal) under Section 302/149 IPC and sentenced each of them to imprisonment for life with a fine of Rs. 100/-, in default of payment of fine to further undergo two month's imprisonment. By the same judgment, he further convicted all of them under Sections 148, 323 or 323/149 IPC and sentence each of them to one year's rigorous imprisonment with a fine of Rs. 50/- and three month's imprisonment with a fine of Rs. 25/- under the respective counts. The substantive sentences were directed to run concurrently.

2. The prosecution case is short and simple and may briefly be summarised as under. Appellants. Hira, Bala and Badri are the real brothers of the deceased victim Laxman. Appellants Gopal, Bajranga and Ram Chandra are sons of Hira. Appellant Bheru is the son of appellant Bala. They are all residents of village Mohipura. District Bundi. They and the deceased were thus in close relationship. PW 1 Bhanwar Lal and PW 4 Parashram are the sons of deceased Laxman.

3. At about 6.00 p.m. on 16-12-1985, PW 1 Bhanwarlal was coming from his field to go to his house. When he reached near the house of accused Bala, Bala abused him and told him that his brother Parashram was stealing sugar-canes from his field. PW 1 Bhanwarlal raised protest and told that the accusation of stealing sugar-canes was false. At that very moment the other accused persons came out of the house of appellant Bala armed with lathis. Accused Gopal had a 'Saliya'. All the seven accused persons started beating Bhanwarlal. Bhanwarlal raised cries. His father Laxman and his brother Parashram, PW 4 come to his rescue. The accused persons did not spare them too. Accused Gopal struck a blow of his 'Saliya' on the head of Laxman. Accused Bala also struck a blow of his lathi on the head of Laxman. Laxman fell down. There was profuse bleeding from his wounds. PW 4 Parashram was also assaulted and belaboured. PW 5 Keshra & PW 9 Bhanwar Lal also arrived there. The accused then retired and went away. Laxman was taken in a bullock cart to Police Station Taleda where PW 1 Bhanwarlal verbally lodged a report Ex. P/1 of the incident at about 8.20 p.m. The Police registered a case under Sections 307, 147, 323, IPC. Since the condition of Laxman was rapidly deteriorating, he was taken to the Government Hospital, Bundi and was admitted there for treatment. PW 12 Jagdish Prasad, Investigating Officer went to the General Hospital, Bundi and recorded the statement (Ex. P/19) of Laxman at about 4 a.m. on 17-12-1985. He however did not survive and passed away at about 7.15 a.m. on 17-12-1985. The Police added Section 302 IPC during investigation. The Investigating Officer prepared the inquest report, visited the site and prepared the site-plan, P/2. The post-mortem examination of the victim's dead body was conducted by the Medical Jurist Dr. Chobisha, PW 14. He noticed the following antemortem injuries on the victim's dead body:

External injuries-

[1] Lacerated wound 1-1/2' x 1/2' x 1/2' on scalp mid line in frontal region;

[2] Abrasion 1' x 1/2' on outer side of left knee ankle;

[3] Abrasion 1/2' x 1/4' on medial side of left below melliain;

[4] Abrasion 1/4' x 1/4' below Rt. knee;

[5] Abrasion 1/2' x 1/2' on medial side of Rt. knee;

[6] Swelling on Rt. side of scalp in fronto temporal region. Size 2' x 2':

[7] Swelling on scalp in occipital region on right side.

Internal Injuries:

Comminuted fracture of frontal, temporal and parietal bones.

In the opinion of Dr. Chobisa, the cause of death of Laxman was head injury. The post-mortem examination report prepared by him is Ex. P/27. The injuries of Parashram and Bhanwarlal were also examined by Dr. Chobisa. Simple injuries were found on their persons as mentioned in their injury reports Ex. P/28 and Ex. P./29. The Wood stained cloths of the deceased victim were also seized and sealed. The appellants were arrested and consequence of the information furnished by them, some lathis and Saliya were recovered. On the completion of the investigation, the Police presented a crime report against the seven appellants in the court of the Additional Chief Judicial Magistrate, Bundi, who committed the case for trial to the court of Sessions. Learned Sessions Judge framed charges under Section 302 148 and 323 IPC against Gopal and Bala under Sections 302/149, 148 and 323/149 IPC against the rest, to which they pleaded not guilty and faced trial.

4. In support of its case, the prosecution examined 18 witnesses and filed some documents. In defence, the accused examined 5 witnesses. All of them except Bala pleaded alibi and denied their presence on the spot. The defence taken by accused Bala is that when he was standing on the Chabutari of his house, the deceased accompanied with his sons Parashram and Bhanwarlal came there and

started beating him. A report of his beating was lodged by him at Police Station Taleda.

5. On the conclusion of trial, the learned Sessions Judge found the prosecution case substantially true and the charges duly proved against all the seven accused persons. They were consequently convicted and sentenced as mentioned at the very outset. Aggrieved against their conviction, the accused have taken this appeal.

6. We have heard Mr. Jagdeep Dhankar for the appellants and Mr. Rizwan Alvi, learned Public Prosecutor. We have also gone through the case file carefully.

7. Mr. Dhankar did not challenge the testimony of PW 14 Dr. Chobisa relating to the number and nature of injuries found on the victim's dead body and the cause of his death. He also did not challenge the opinion of Dr. Chobisa as regards the injuries found on the persons of PW 1 Bhanwar Lal and PW 4 Parashram. We therefore, need not touch the evidence of Dr. Chobisa in details. Suffice it to say that the death of Laxman was homicidal and not natural. We may also state here that 3 injuries were found on the head of the deceased victim. They are injuries No. 1, 6 and 7 as mentioned in the post-mortem report Ex. P/27. Dr. Chobisa stated that injuries No. 1 & 6 were individually as well as collectively sufficient in the ordinary course of nature to cause death.

8. Keeping in view the direct testimony of PW 1 Bhanwarlal, PW 4 Parashram, PW 5 Keshra & PW 9 Bhanwarlal, Mr. Dhankar did not challenge the finding of the court below that accused Bala and Gopal struck blows on the head of deceased Laxman by 'Saliya' and lathi and thus caused his death. He also did not challenge the finding of the court below that PW 1 Bhanwar Lal and PW 4 Parashram were assaulted and belaboured by the appellants Bala and Gopal. He confined and concentrated his contentions only to the nature of offence made out from the proved facts. It was contended by him that the appellants are the real brothers and nephews of the deceased victim Laxman. There was no bad blood between them and the deceased before this incident. The incident took place the house of appellant Bala. The houses of the other appellants are also situate nearby. Thus the presence of the appellants at the site when the incident took place was natural

The mere presence of the appellants or their collection at the spot is not sufficient to convert their gathering into an unlawful assembly. The incident sprung up suddenly. Accused Bala and Gopal had no intention to commit the murder of Laxman. Laxman was landed blows when he came to intervene. Taking all the circumstances into consideration, the offence which resulted from the death of Laxman does not amount to culpable homicide amounting to murder. The offence made out travel beyond Section 304, Part-II, IPC as against Bala and Gopal, even if they, are taken to be the authors of the head injuries of the deceased victim Laxman. The other 5 appellants struck blows to none and as such their conviction under Section 148 or 323/149 IPC and Section 302/149 IPC is unsustainable.

9. It was on the other hand contended by the learned Public Prosecutor that the appellants suddenly came in a group from the house of accused Bala. Each of them had a lathi. The injuries found on the victim's head were sufficient in the ordinary course of nature to cause his death. As such the offence made out is that of murder. The appellants were thus rightly convicted and sentenced.

10. We have taken the respective submissions into consideration. Since the direct testimony of the ocular witnesses named above has not been challenged before us, we need not discuss their evidence in details. Suffice it to say, that accused Bala and Gopal struck blows on the head of deceased Laxman and there by caused his death. Accused Gopal had a Saliya and accused Bala had a lathi, which they used in inflicting blows to the deceased victim. They are thus authors of the fatal injuries caused to deceased Laxman. As per evidence of the ocular witnesses the remaining five appellants Hira, Bajranga, Ram Chander, Bhenru and Badrilal caused injuries to none did not participate in the beating and did not overact.

11. A look into the site plan, Ex. P/2 reveals that the incident took place at the spot shown by mark-A in it. This spot is situate in the public way running adjacent to the house of accused Bala. The houses of the other appellants are also situate near by. As such presence of the appellants at the spot when the incident took place could be innocent unless and until it is shown that they did something to make themselves members of an unlawful assembly. It is strangled that though these

five appellants are stated to have lathis with them, they did not participate in the beating and inflicted blows to none. There must be some-thing in addition to the presence to show that these 5 appellants had formed an unlawful assembly along with Bala and Gopal with the common object of committing the murder of causing injuries to PWs Bhanwarlal and Parashram. Even if no overt act on the part of a person is necessary to make him member of unlawful assembly, there must be material on record to show his participation in one or the other way to render him a member of the unlawful assembly. The mere fact that these five appellants had lathis with them, is not conclusive to show that they had formed an unlawful assembly. Mere assemblage or collection of five or more persons is not sufficient to make them the members of an unlawful assembly. Such an assemblage must have one or more common objects enumerated in Section 141 IPC. Whether there was such a common object or not is a question of fact required to be proved by the prosecution. There is no presumption that an assembly how ever, big it may be is an unlawful assembly. It is true that the direct evidence relating to the existence of common object is seldom available. The existence of common object is, therefore, generally gathered from the acts committed and the surrounding circumstances.

12. It was contended by the learned Public Prosecutor that these five appellants emerged out from the house of accused Bala and each of them was having a lathi. It was thereafter that Laxman was assaulted and balaboured by accused Gopal and Bala. It was also thereafter that PW 1 Bhanwar and PW 4 Parashram were assaulted and belaboured by accused Bala and Gopal. It was argued that keeping these facts and circumstances in view, it can be safely inferred that these five appellants had formed ad unlawful assembly along with accused Gopal and Bala to commit the murder of Laxman and caused injuries to PWs Bhanwarlal and Parashram.

13. We are unable to subscribe the view of the learned Public Prosecutor. The formation of an unlawful assembly is not to be assumed merely because five or more persons collected at the spot and shortly thereafter, the offences are committed there at that place. These five appellants as stated earlier caused injuries to none, neither to the deceased victim or to the PWs Bhanwarlal and Parashram. Their houses are situate nearby the place of the incident. Their

presence on the spot could therefore, be natural. In these circumstances, if no overt act is attributed to them, it would not be free from risk in concluding that these five appellants had formed on lawful assembly along with accused Gopal and Bala. Merely because these five appellants happened to be the close relatives of accused Bala and Gopal, it cannot be inferred that they constituted any unlawful assembly along with these two with the common object of committing the murder act.

14. For the reasons aforesaid, we are unable to maintain the conviction of these five appellants Hira. Bajranga, Ram Chandra, Bheru and Badrilal under Sections 148, 323/149 and 302/149 IPC. They are entitled to acquittal.

15. The question, which now survives for consideration is as to what offence is made out against the appellants Gopal and Bala. We may reiterate that Bala is the real brother and Gopal is the real nephew of the deceased victim Laxman. There was no bad blood between them before this incident. The incident sprung up on a very trivial matter. In the absence of any previous enmity or bad blood or any motive, it cannot be said that accused Gopal and Bala intended to cause the death of Laxman. Deceased Laxman was assaulted and belaboured only when he came to intervene and rescue Bhanwarlal PW 1.

16. Taking all the circumstances into view, we are of the opinion that the prosecution has failed to prove that accused Bala and Gopal had the requisite intention required to be proved under Sections 299 and 300 IPC. The appellants neither had the intention of killing the deceased nor had the intention of causing him such bodily injuries as was likely to cause his death. The offence, therefore, does not fall within any of the clauses of Section 300 IPC. In as much as the death has been caused, the matter comes atleast within the meaning of culpable homicide not amounting to murder. There is no room for the doubt that the appellants Bala and Gopal must have had knowledge that they were doing the act, which was likely to cause the death of Laxman. They did the act with the knowledge that by their act they were likely to cause the death of the victim. They should, therefore, be convicted under Section 304, Part-II, IPC.

17. As regards the sentence, it was argued by Mr. Dhanker that accused Gopal was nearly 20 years of age when the incident took place. The age has been shown to be of 20 years in his arrest memo Ex P/15 prepared on 18-12-1985. He should, therefore, be released on probation of good conduct under Section 366 IPC. We are unable to accept this submission. Accused Gopal had a 'Saliya' and he inflicted a injury with it on the head of deceased Laxman. It was he who played a major role in the incident. The incident took place without any provocation from the side of the deceased. Taking these circumstances into consideration, we are not inclined to extend the benefits of probation to accused Gopal.

18. In the result:

(1) The appeal of accused Hira, Bajranga, Ram Chander, Bheru and Badrilal is allowed. Their conviction under Sections 148, 329/149 and 302 149 IPC and the sentences awarded to them thereunder are set-aside. They are acquitted of the said offences. They are already on bail and need not surrender to their bail bonds. Their bail bonds shall stand cancelled.

(2) The appeal of accused Gopal and Bala is partly allowed. Their conviction under Sections 148 and 302 IPC and the sentences awarded to them there under are set-aside. Instead, they are convicted Under Section 304, Part-II, IPC and each is sentenced to five year's rigorous imprisonment with a fine of Rs. 1000/-, in default of payment of fine to further undergo five months simple imprisonment.

19. The appeal shall stand accordingly disposed of.

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