

**Rai Singh and anr. Vs. the State and anr.**

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**Court :** Himachal Pradesh

**Decided On :** Nov-05-1964

**Reported in :** AIR1965HP49,1965CriLJ499

**Judge :** Om Parkash, J.C.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 96, 97, 99, 304, 323 and 326

**Appeal No. :** Criminal Appeal Nos. 29 and 30 of 1963

**Appellant :** Rai Singh and anr.

**Respondent :** The State and anr.

**Advocate for Def. :** K.C. Pandit, Govt. Adv.

**Advocate for Pet/Ap. :** Ishwar Chand, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

Om Parkash, J.C.

1. Two brothers, Rai Singh, appellant, in Criminal Appeal No. 29 of 1983 and Gunia, appellant, in Criminal Appeal No. SO of 1963, were convicted and sentenced, under section 304, Part II, I. P. C., read with section 34, I. P. C., by the learned Sessions Judge, Sirmur, for causing the death of Mohta. The prosecution

case against the appellants was as follows :

2. The fields of the appellants adjoined the fields of Mohta; the fields of the appellant, being on the upper side, and those of Mohta, being on the lower side. On the 30th August, 1962, Mohta was digging his field, known as That, just below the boundary line of the field of the appellants. Budhi Singh P. W. 2 and his sister, Smt. Bare, grandson and grand-daughter of Mohta, were hoeing the mash crop, growing in That field. At about 5-30 P. M., the appellants called out to Mohta, from a place known as Dangi-ki-Pand as to why he was digging their field. Mohta had replied that he was not digging the field of the appellant but was digging his own field. There was exchange of hot words, between the appellants and Mohta. The appellants, then, went to That field, They had Darants Exs. P-1 and P-2 with them. Hot words were, again, exchanged, between the appellants and Mohta, in That field. The appellants, then, had given blows with the blunt side of the Darants on the head, arm and leg of Mohta. Mohta had fallen down on the ground and had expired on the spot, as a result of the injuries. The appellants had run away from the place of occurrence.

3. Budhi Singh P. W. 2 had gone to call his father, Nanti Ram P. W. 1, who was grazing cattle in the jungle, nearby, Nanti Ram had come on the spot. He had seen the appellants running away and had called them out as to why they had killed his father. The appellants had asked Nanti Ram to keep quiet and had threatened him that otherwise he would meet the same fate as his father had met. Jania P. W. 3 and Shib Ram P. W. 4, who had seen the appellants, and Mohta exchanging hot words, had come on the spot and had seen the appellants inflicting injuries on Mohta. Jangli P. W. 7 and Uchhbu P. W. 8, who were working in their fields, had also seen the occurrence.

4. Nanti Ram P. W. 1, along with Jania P. W. 3 had left for lodging the F. I. R. at Shalai Police Post leaving Shib Ram P. W. 4 to guard the dead-body of Mohta. The F. I. R., Ex. P. W. I/A, was recorded by Head Constable, Bansi Lal P. W. 19, incharge Police Post Shalai. The case was investigated, by Sub-Inspector Nika Ram P. W. 20. He had arrested the appellants on 4-9-62. Gunia appellant, while in police custody, had made the disclosure statement Ex. PD and had, in pursuance

of that statement, recovered the Darant Ex. P-2 and the shirt Ex. P-4, from his house. Rai Singh appellant had made the disclosure statement Ex. P-F, and had, in pursuance of that statement, recovered the Darant Ex. P-I, from his house.

5. The dead body of Mohta was sent for postmortem examination. Doctor Durga Ram, P. W. 15, had conducted the post mortem examination on 2-9-62. He had found the following injuries on the dead body of Mohta :

(1) One contused wound 2 1/4' x 1/2' x scalp deep gaping behind the left ear 1/2' oblique upwards and Forwards. The mastoid bone underneath fractured for 2' x 3/8' in pieces and splinters depressed into the brain substance, after tearing the dura mater.

(2) One similar contused wound on occiput about 1' from No. 1. It was 1 3/4' x 5/8' x scalp deep slightly oblique upwards and behind. The occiput bone underneath was fractured for 1 1/4' x 1/3' and depressed into the brain substance.

(3) One similar contused wound 1 1/4' x 1/3' x scalp deep on right side on the occiput upwards and forwards extending to the occiput.

(4) One contusion 2' x 3/8' slightly oblique on back of left fore-arm about 2 1/2' above the wrist, oblique downwards and radial wards at the ulnar end 1/2'; contused wound was communicating with ulna bone which was fractured, by direct violence.

(5) One contusion 1 1/4' x 3/8' on right knee in front, dark reddish brown.

In the opinion of Doctor Durga Ram, Mohta had died due to compound comminuted fracture of the skull and shock. Ex. P. W. 15/A is the report of the postmortem examination, conducted, by Doctor Durga Ram.

6. The Darants Exs. P-I and P-2, the shirt Ex. P-4 and other articles, recovered, were sent to the Chemical Examiner. No blood was detected on the Darants Exs. P-I and P-2 but blood was found on other articles.

7. On the above facts and circumstances, the appellants were hauled up, charge-sheeted and committed, under Section 302, 1. P. C., for the murder of Mohta. The

charge was amended by the learned Sessions Judge and each of the appellants was charge-sheeted, under Section 302, I. P. C., read with Section 34, I. P. C., for causing the death of Mohta, in furtherance of their common intention.

8. The appellants denied the charge, levelled against them. They denied that they had inflicted injuries on Mohta. The plea of the appellants was to the following effect:

9. Rai Singh, appellant, was conning from the jungle, and had a load of grass on his back. Mohta was digging the field of the appellants. On seeing Mohta digging the field, Rai Singh had shouted to him why he was digging their field. Mohta had replied that he was digging his own field. Thereupon, Rai Singh had gone to That field and had requested Mohta, with folded hands, not to dig their field. Mohta had attacked Rai Singh with the Kalsa and had inflicted injuries on him. Gunia, appellant, was returning from the Gharat. On seeing Rai Singh being attacked, Gunia had come to That field, and had given blows with the roots of Beol tree, to Mohta. Mohta had caught hold of the roots and had tried to snatch them from Gunia. Mohta had fallen down in the attempt to snatch the roots and had sustained injuries.

10. The appellants did not lead any defence evidence in support of their plea.

11. The learned Sessions Judge accepted the evidence of Budhi Singh P. W. 2, Jania P. W. 3, Shib Ram P. W. 4, Jangli P. W. 7 and Uchhbu P. W. 8, to the effect that there was dispute, between the appellants and Mohta, about the digging of the field and that the appellants had inflicted injuries on him with Darants and Mohta had fallen down and died. But the learned Sessions Judge did not accept the evidence of Shibu P. W. 10 that Rai Singh appellant had made a confession of his guilt to him. The evidence of the prosecution, about a previous dispute, about a ghasni, between the appellants and Mohta, was also not accepted. Relying on the evidence of Budhi Singh P. W. 2, Jania P. W. 3, Shib Ram P. W. 4, Jangli P. W. 7 and Uchhbu P. W. 8 and the evidence of Doctor Durga Ram P. W. 15, the learned Sessions Judge held that the appellants had caused the death of Mohta by inflicting injuries on him with Darants. He, further, held that the appellants had no intention to murder Mohta but had the common intention to belabour him and in

furtherance of that common intention had caused injuries, which they knew could cause death. The learned Sessions Judge, therefore, held the appellants guilty under Section 304', Part II, I. P. C. read with section 34, I. P. C., and sentenced each of them to five years' rigorous imprisonment.

12. Rai Singh and Gunia have lodged Criminal Appeals Nos. 29 and 30 of 1963, respectively, against their conviction and sentence. This judgment will dispose of both the appeals.

13. It was contended, by the learned counsel for the appellants, that the prosecution had not produced some material witnesses, namely Smt. Baro, Sukhia, Prita'm and Sobha and as such, an adverse inference arose against the prosecution, and a serious doubt was cast on the veracity of the prosecution case. The learned counsel referred to *Habeeb Mohammad v. State of Hyderabad*, AIR 1954 S C 51, wherein it was said :

'It is the bounden duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the truth. Not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to Section 114 of the Evidence Act, but the circumstance of his being withheld from the Court casts a serious reflection on the fairness of the trial.'

14. In the aforesaid authority, their Lordships had referred to *Adel Muhammed El Dabbah v. Attorney General of Palestine*, A I R 1945 P C 42, wherein it was said that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, it can be shown that the prosecutor has been influenced by some oblique motive. Their Lordships of the Supreme Court had, also, referred to *Stephen Seneviratne v. The King*, A I R 1936 P C 289, wherein it was observed :

'But at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is

it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.' Page 300.

15. The principle, deducible, from the aforesaid authorities, regarding the production of witnesses, by the prosecution, appears to be that the prosecution must produce witnesses, essential to the unfolding of the narrative, on which the prosecution case is based, and that the non-production of any such witness must be satisfactorily explained. Subject to this, it is not obligatory on the prosecution to produce all the witnesses irrespective of the considerations of number and reliability and the prosecutor has a discretion as to what witnesses should be called for the prosecution.

16. Applying the above principle, to the facts of the instant case, it appears that the prosecution had produced a sufficient number of witnesses, essential for the unfolding of the prosecution story, and the non-production of others had been satisfactorily explained. The prosecution had produced five eyewitnesses to the occurrence. Smt. Baro, who was also an eye-witness, was only a child witness : She had been tendered for cross-examination in the Court of Sessions. Sukhia and Pritam, two brothers, were given up, by the prosecution. The reason, for not producing them, was, that they were prejudiced against Mohta and were not expected to tell the true story as Mohta had lodged a criminal prosecution against them. Sobha was a tailor who had sewn a shirt of one of the appellants. He was not a material witness but was an unimportant witness. In the circumstances, the non-production of the above witnesses did not raise any adverse inference against the prosecution.

17. It was, next, contended by the learned counsel for the appellants that circumstances, on the record, established that Budhi Singh P. W. 2, Jania P. W. 3 and Shib Ram P. W. 4 could not have seen the occurrence and that their evidence that they had seen the appellants inflicting blows with Darants on Mohta was false. The learned counsel pointed out that these witnesses were closely related to

Mohta and had deposed falsely, because of their interest in him. It is not disputed that the aforesaid witnesses were closely connected with Mohta. Budhi Singh P. W. 2, Jania. P. W. 3, and Shib Ram P. W. 4 are, respectively, the grandson, nephew and brother, of Mohta. They were interested witnesses. Their evidence that they had seen the appellants inflicting blows on Mohta stands contradicted by the evidence of other independent witnesses. Budhi Singh P. W. 2 stated that he had seen the appellants inflicting injuries on Mohta and that he had left to call his father Nanti Ram, P. W. 1, after the infliction of the injuries. Jangli P. W. 7 and Uchhbu P. W. 8 stated that Budhi Singh had left for calling his father when hot words were being exchanged between the appellants and Mohta. There does not appear to be any reason to doubt this statement of Jangli and Uchhbu. Budhi Singh P. W. 2 had left the place of occurrence before the infliction of injuries on Mohta. His evidence that he had seen the appellants giving blows with dharants to Mohta is not worthy of credence.

18. Jania P. W. 3 and Shib Ram P. W. 4 stated that they were sitting in the courtyard of their houses and had seen the appellants at Dangi-ki-Pand, exchanging hot words with Mohta, and that on seeing, that the appellants had come to That field, they had also come there, and had seen the appellants inflicting injuries on Mohta. Jangli P. W. 7 and Uchhbu P. W. 8 stated that Jania and Shib Ram had arrived at the place of occurrence after the appellants had left that place. Jangli P. W. 7, further, stated that a man standing at Dangi-ki-Pand was not visible from the house of Jania and Shib Ram. Dharam Singh P. W. 17 stated that fields intervened between the houses of Jania and Shib Ram and That field and that maize crop was growing in those fields. Dharam Singh, further, stated that That field could not be visible from the court yards of Jania and Shib Ram because of the growth of maize crop in the fields. From the evidence of Jangli P. W. 7, Uchhbu P. W. 8 and Dharam Singh P. W. 17, discussed above, it is clear that Jania and Shib Ram could not have seen the appellants, inflicting injuries on Mohta. Their evidence that they had seen the occurrence cannot be relied upon.

19. Out of the eye-witnesses, we are left with the evidence of Jangli P. W. 7 and Uchhbu P. W. 8. These witnesses were working in their respective fields. They had stated that Mohta was digging his field and that the appellants had called out

to him why he was digging their field, and that Mohta had replied that he was digging his own field. The witnesses, further, stated that hot words were exchanged between Mohta and the appellants, and that the appellants had, then, gone to: That field, and after exchanging some words with Mohta, had given him blows with Darants. Jangli P. W. 7 and Uchhbu P. W. 8 are independent witnesses and there is no reason to reject their evidence.

20. The learned Sessions Judge did not accept the evidence of Shibu P. W. 10 that Rai Singh appellant had made a confession of his guilt to him. He also did not accept the prosecution evidence that there was any dispute, previously, between the appellants and Mohta, about a ghasni. These findings, have not been challenged before me, by the Government Advocate.

21. The evidence of Jangli P. W. 7 and Uchhbu P. W. 8, which is independent and reliable, establishes, that the appellants had inflicted injuries with Darants on Mohta. The evidence of Doctor Durga Ram P. W. 15 proves that death of Mohta was due to the injuries inflicted on his head and fore-arm and the resultant shock. The aforesaid evidence wholly discredits the plea of the appellants that the injuries were sustained by Mohta on account of a fall while snatching roots of Beol tree from Gunia appellant As already stated, the appellants did not lead any evidence in support of their plea.

22. The next point is what offence was committed by the appellants. The contention of the learned counsel for the appellants was that the appellants had not committed any offence as they had caused death of Mohta in exercise of the right of private defence of property and person. The argument of the learned counsel was that Mohta was committing mischief, by digging the field of the appellants, and that he had also attacked Rai Singh with Kalsa which had given an apprehension to the appellants that death or grievous hurt would be the consequence and that the appellants had the right to protect their persons and property and even to cause death in the exercise of that right. Before examining the plea of the right of private defence, put forth on behalf of the appellants, it appears desirable to note the basic assumptions underlying the law of self-defence. These were laid down, by the Hon'ble Mr. Justice, P. B. Gajendragadkar,

in *Jai Dev v. State of Punjab*, AIR 1963 S C 612, as follows :

'In a well-ordered civilised society it is generally assumed that the State would take care of the persons land properties of individual citizens and that normally it is the function of the State to afford protection to such persons and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.... But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force which he uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared.' Page 617.

23. The plea of the right of private defence, put forth, on behalf of the appellants, is to be scrutinized in the light of the principles, enunciated in the above authority. The appellants did not adduce any evidence to substantiate their plea. Of course, they can establish their plea, by relying on the circumstances,transpiring, from the prosecution evidence itself. It is an admitted fact that Mohta was digging the field, just below the boundary line of the field of the appellants. Dharam Singh P. W. 17

admitted that the edges of the field of the appellants had fallen down. Though there is no reliable evidence that Mohta had actually caused injuries to Rai Singh, as pleaded by the appellants, yet, this much was admitted by Uchhbu P. W. 8 that Mohta had raised his Kalsa to strike Rai Singh appellant and that the latter had warded off the attack by sitting down. The appellants were justified in apprehending from the attack with the Kalsa, that grievous hurt might be caused to them. Mohta had, also, damaged their field. The appellants had, therefore, the right of private defence, both of person and property, against Mohta. But, by inflicting injuries, with Darants on the head of Mohta, and thereby causing his death, they had used more force than was, reasonably, necessary, in the circumstances of the case. Mohta was an old man of about sixty years. Gunia appellant was thirty five years old and Rai Singh appellant was about fifty years old. The appellants could have easily disarmed Mohta by snatching the Kalsa from him and could have brought the danger to their person and property to an end. Mohta could not have caused any serious injury to the property or person of the appellants after being disarmed. The inference from the above facts is that the appellants, by inflicting injuries, on the head of Mohta, with Darants, which had resulted in his death, had used excessive force, and that their case is not covered by Section 96, I. P. C. The appellants are liable for the excessive harm, caused.

24. Are the appellants jointly liable, under Section 34, I. P. C., for the excessive harm, namely, injuries inflicted on Mohta, resulting in his death, or is each appellant liable for his individual act, is the next question which calls for decision. From the circumstances, that the appellants, who were coming from jungle, had seen Mohta digging the boundary line of their field and had, thereupon, shouted to him not to do so, it appears that, to begin with, the intention of the appellants was to dissuade Mohta from damaging their field. But when Mohta had persisted in digging the field, despite the protests of the appellants, they had formed the common intention to belabour him. It is true that common intention presupposes prior concert and a pre-arranged plan. But such a plan can arise and be formed suddenly at the spot, vide *Pandurang v. State of Hyderabad*, AIR 1955 S C 216 and *Krishna Govind v. State of Maharashtra*, AIR 1963 S C 1413. It is to be noted that both the appellants, who are real brothers, had, simultaneously, attacked Mohta, with Darants, when he had not stopped from digging the field. The

necessary inference is that they had, at the spot, developed the common intention to attack Mohta. The injuries, which had resulted in the death of Mohta, were inflicted in furtherance of the aforesaid common intention. The appellants are, therefore, jointly liable for causing the death of Mohta.

25. The learned Sessions Judge was right in holding that the appellants did not intend to cause the death of Mohta. On seeing Mohta, digging their field, the appellants had shouted to him not to do so. Even after reaching That field, the appellants had not straightaway attacked Mohta, but had again asked him not to dig the field. The appellants had attacked Mohta only when their verbal protests had failed to dissuade Mohta from damaging their field. The injuries were inflicted with the olunt side of Darants which were handy, as the appellants were returning from jungle after lopping and collecting leaves.

26. Though the appellants had no intention to| cause death of Mohta, yet they must have known that' the injuries, inflicted on the head, which were caused with considerable force, so as to fracture the skull were likely to cause death. The offence, committed by the appellants, therefore, fell under Section 304, Part II, I. P. C. read with section 34, I. P. C.

27. The learned counsel for the appellants contended that the appellants could not be legally convicted, under Section 304, Part II, I. P. C., read with Section 34, 1.P.C., as the element of intention necessary, under Section 34 I. P. C., is missing in the case of an offence, under Section 304, Part II, I. P. C. There was conflict of judicial opinion as to the applicability of Section 34 to an offence, under ection 304, Part II, I. P. C. It is unnecessary to refer to the conflicting views, as the point has, now, been authoritatively decided by the Hon'ble Supreme Court, in *Abrahim Sheikh v. State of West Bengal*, A I R 1964 S C 1263, wherein it has been laid down that Section 34 I. P. C. is applicable, to an offence, under Section 304, Part II, I. P. C. and that the conviction for that offence, read with Section 34, is legal and valid. Their Lordships observed (page 1263 of the Report) :

'It appears to us that in other cases doubt was felt because Section 304 is in two parts ; and first part is concerned with culpable homicide committed with two types of intention and the second part with culpable homicide committed with a particular

knowledge. It appears that it was felt that Section 34, which deals with common intention, could not be read with the second part of Section 304. In our opinion, the learned Judges who held that view--and we say it respectfully--fell into the error of viewing the second part of Section 304 divorced from common intention whatever. A person does not do an act except with a certain intention; and the common intention which is requisite for the application of Section 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of a criminal act.'

28. Their Lordships, also, observed that 'knowledge', referred to in Part II, Section 304 I. P. G. is the knowledge of the likelihood of death and that if, it could be said that knowledge of this type was possible in the case of each one of the accused, there is no reason why Section 34 I. P. C. cannot apply to an offence under Section 304, Part II, I. P. C.

29. In the instant case, the common intention of the appellants was to belabour Mohta who had defied their protests against the digging of the field. In furtherance of that common intention, they had inflicted injuries on Mohta with Darants. Each of the appellants possessed the knowledge that injuries, inflicted with Darants on the head of Mohta, were likely to cause death. Section 34 I. P. C. applied to the facts of the present case and the appellants were rightly convicted under Section 304, Part II, I. P. C. read with that section.

30. The result is that both the Appeals Nos. 29 and 30 of 1963, are dismissed.

31. This judgment will be read in both the appeals. The original judgment will be placed on the record of Appeal No. 29 of 1963 and a copy will be placed on the record of Appeal No. 30 of 1963.