
(2004) 09 AHC CK 0063

In the Allahabad High Court

Case No : Criminal Appeal No's. 528 and 529 of 1982

Adya Prasad Mishra and Another (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 23-09-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 308, 323

Citation : (2005) 1 ACR 129

Hon'ble Judges : M.C. Jain, J;K.K. Misra, J

Bench : Division Bench

Advocate : G.S. Chaturvedi, P.N. Tripathi and O.P. Misra, for the Appellant; S.S. Yadav, Apul Misra, P.N. Misra, P.N. Pandey, Ramanand Pandey, G.D. Misra and P.P. Pandey, A.G.A., for the Respondent

Judgement

M.C. Jain, J.—These two appeals challenge the judgment and order dated 24.2.1982 passed by Sri R. P. Mishra, the then I Ind Addl. Sessions Judge, Basti in Sessions Trial No. 197 of 1980. They being connected with each other, are being decided by a common judgment. The Appellants in Criminal Appeal No. 528 of 1982 are Adya Prasad Mishra and Harish Chandra Mishra. The Appellant in Criminal Appeal No. 529 of 1982 is Thakur Prasad Mishra son of Sheo Murat. All of them have been convicted u/s 302 read with Section 34, I.P.C. and Section 323 read with Section 34, I.P.C. The sentence of life imprisonment has been passed against them for the former offence and six months rigorous imprisonment for the latter. Both the sentences have been ordered to run concurrently. The deceased of the incident was Kamta Prasad whereas Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3 were the injured of the incident which occurred on 27.12.1978 at about 9 a.m. in village Tilakpur, P.S. Kaptanganj, District Basti situate at a distance of four miles from the concerned police station. The report was lodged at 11.30 p.m. on 27.12.1978 by the injured Indu Shekhar P.W. 2. Both the injured are the sons of the deceased Kamta Prasad.

2. The prosecution case as unfolded at the trial was that Sheo Murat and Algoo were real brothers. Sheo Murat had three sons-Thakur Prasad, Adya Prasad and Ram Lakhan. Bhagwan Dei was the widow of Algoo who died issueless. Harish Chandra accused is the son of Adya Prasad accused. The accused are collaterals of the deceased Kamta Prasad. Adya Prasad Mishra had got the property of Algoo transferred in his name by Bhagwan Dei, widow of Algoo in which Ram Lakhan was given no share. For this reason, Ram Lakhan was ill-disposed to Adya Prasad. There was some agricultural land in village Raja Jot in the name of Ram Lakhan. It was inter-se divided amongst the accused and Ram Lakhan. When Adya Prasad got the property of Algoo transferred in his exclusive name Ram Lakhan also took forcible possession of the entire property recorded in his name in village Raja Jot. The deceased Kamta Prasad had helped Ram Lakhan in taking forceful possession of the same. Therefore, the accused were nursing grudge against the deceased and his sons. In May/June, 1978, Ram Lakhan performed the marriage of his daughter. He convened a panchayat and the deceased also attended it. In the said panchayat the deceased advocated the cause of Ram Lakhan and demanded some place from Adya Prasad for celebrating the marriage of the daughter of Ram Lakhan, but Adya Prasad did not relent at all. Ram Lakhan, therefore, celebrated the marriage of his daughter from the house of the deceased Kamta Prasad. It was disliked by the accused Thakur Prasad and Adya Prasad.

3. The house of the accused was adjacent in the western side to that of the deceased Kamta Prasad. The two houses were connected by a common wall. A few years before the incident. Thakur Prasad, Adya Prasad and Ram Lakhan had divided their houses. The southern portion of the house was given to Ram Lakhan. It consisted of one kothari and some open land. The northern portion of the house belonged to Thakur Prasad and Adya Prasad. The back side of the house of the deceased was to the southern side. A neem tree and guava trees existed in the said back side land of the house of the deceased. The neem tree was planted by the deceased which exclusively belonged to him. To the east of the said neem tree, thatch and trough of the deceased existed.

4. On the fateful day, at about 9 a.m., the accused Harish Chandra plucked a twig (datun) from the neem tree referred to above. In the meantime, the deceased Kamta Prasad also came over there and objected to the taking of twig by Harish Chandra from the said neem tree. He snatched away the twig from Harish Chandra. Harish Chandra abused the deceased Kamta Prasad and went to his house. The deceased then came to his door. His sons Indu Shekhar and Chandra Shekhar were present just inside the threshold and were taking tea. In the meantime, the accused Thakur Prasad armed with his licensed gun and Adya Prasad and Harish Chandra armed with lathis came to the door of the deceased. Accused Thakur Prasad challenged the deceased and asked his brother Adya Prasad and nephew Harish Chandra to do away with him as he was the root cause of all troubles, disrupting his family. Then Adya Prasad and Harish Chandra started assaulting Kamta Prasad deceased with lathis. Hearing the commotion

and challenge, Indu Shekhar and Chandra Shekhar came out of their house. Deceased Kamta Prasad fell down sustaining lathi injuries on his head. The accused also started assaulting Indu Shekhar and Chandra Shekhar who also wielded lathis and plied the same in their self-defence. The occurrence was seen by witnesses Ram Achhaibar, Roop Narain and others. On the intervention of the witnesses, the accused went away to northern side. Indu Shekhar and Chandra Shekhar brought their father Kamta Prasad to the National Highway which was about two furlongs from their house. Kamta Prasad was in a state of unconsciousness. They hired a jeep and brought Kamta Prasad to District Hospital, Basti. At District Hospital, Basti, Kamta Prasad was medically examined on 27.12.1978 at 10 a.m. by Dr. R. C. Verma P.W. 5, who found the following injuries on his person:

(1) Lacerated wound 7 cm. x .2 cm. x bone deep present on left side of front of scalp, 10 cm. above left eyebrow. Bleeding was present.

(2) Contusion 7 cm. x 5 cm. on right side scalp, 6 cm. above right ear, Colour was red.

5. Both the injuries were kept under observation. X-ray was advised. They had been caused by blunt object and were fresh. The general condition of the injured was low. He was admitted.

6. On 27.12.1978 at 10.15 a.m., the same doctor examined the injuries of Chandra Shekhar Mishra. The following injuries were found on his person:

(1) Abraded contusion 4 cm. x 1.5 cm. on top of left shoulder. Colour was red. Bleeding was present.

(2) Lacerated wound 1 cm. x .2 cm. x .5 cm. present on outer aspect of right elbow joint. Bleeding was present.

(3) Contusion 6 cm. x 2 cm. on outer aspect of right toe, 10 cm. above wrist joint. Colour was red.

(4) Lacerated wound on front of little finger of right hand in an area of 1.5 cm. x .2 cm. x .2 cm. Blood clotting was present.

(5) 3 abrasions .2 cm. x .2 cm., .3 cm. x .2 cm. and .3 cm. x .3 cm. on dorsum of proximal interphalangeal joint of little ring and middle finger respectively of left hand.

7. All the injuries were simple and caused by some blunt object and friction against hard object. They were fresh.

8. The injury of Indu Shekhar was examined on 27.12.1978 at 10.30 a.m. by the same doctor. The following injury was found on his person:

(1) Lacerated wound 8 cm. x .5 cm. x bone deep present on front of middle of scalp 6.5 cm. above roof of nose. Bleeding was present.

9. It was simple and caused by blunt object. It was fresh.

10. On being admitted in the hospital, the skull of the deceased Kamta Prasad was X-rayed which disclosed fracture of right parietal bone. He did not gain consciousness and died on 28.12.1978 at 9.55 a.m. in District Hospital, Basti. An information to this effect was sent to P.S. Kotwali, S.I. Rajendra Prasad was deputed to hold inquest of the dead body of the deceased Kamta Prasad who accordingly held the same on 28.12.1978 at 11.10 a.m. in District Hospital, Basti. The other relevant papers were also prepared by him. Thereafter the dead body, on being sealed, was sent for post-mortem through Constable Upendra Mishra and Constable Wazid Ali.

11. The post-mortem over the dead body of the deceased Kamta Prasad was conducted on 28.12.1978 at 2 p.m. by Dr Kuber Nath Pandey P.W. 1. The deceased was aged about 62 years. The following ante-mortem injuries were found on his person:

(1) Lacerated wound 6 cm. x 1 cm. x upto bone deep on the head left side. 10 cm. above left ear.

(2) Contusion 10 cm. x 9 cm. on the back of right shoulder joint.

(3) Contusion 4 cm. x 3 cm. on the forehead left side, 2 cm. above left eye.

12. On opening the doctor found a linear fracture on left side frontal bone 4 cm. long under injury No. 1. He further found linear fracture 5 cm. long on the right parietal bone. The doctor also found both the chambers of heart empty.

13. In the opinion of the doctor, the death of the deceased was caused due to shock and haemorrhage as a result of the aforesaid ante-mortem injuries.

14. Consequent upon the lodging of the F.I.R. by Indu Shekhar on 27.12.1978 at 11.30 p.m., a case u/s 308, I.P.C. was initially registered which was altered to Section 304, I.P.C. on the death of Kamta Prasad. The investigation followed as usual at the hands of S.I. Bhagirathi Singh P.W. 6 leading to the submission of the charge-sheet against the accused persons whose defence was of false implication.

15. The accused Thakur Prasad stated that being issueless he had given his entire property to Adya Prasad and was residing with him. Adya Prasad stated the neem tree and the land underneath to be joint ; Harish Chandra had plucked datun from the said joint neem tree when he was returning from the frontage of the house of Kamta Prasad ; he (Kamta Prasad), Indu Shekhar, Chandra Shekhar and Roop Narain accosted him and threatened him that in case he plucked any datun from the said neem tree, it could lead to a murder, Harish Chandra replied that neem tree belonged to him and he would continue to pluck datun from the said tree ; then Roop Narain exhorted and Kamta Prasad, Indu Shekhar and Chandra Shekhar started assaulting Harish Chandra with kicks, fists and dandas ; hearing alarm he went there but he was also beaten up by Kamta and

his two sons named above. Adya Prasad also stated that he plied danda in his defence. Almost to the same effect was the statement of third accused Harish Chandra.

16. The prosecution in all examined seven witnesses including doctors and Investigating Officer. Out of them, Indu Shekhar P.W. 2, Chandra Shekhar P.W. 3 and Roop Narain P.W. 4 were examined as witnesses of fact. As mentioned earlier. Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3 are injured also.

17. The accused also examined three witnesses in defence. Sri Ram D.W. 1 was examined to speak about the defence version of the incident as related above. Ram Naresh Singh, pharmacist D.W. 2 proved the injury reports of Adya Prasad and Harish Chandra who were medically examined on 27.12.1978 at 10.30 a.m. at 10.45 a.m. at P.H.C., Kaptanganj by M.O., Dr Jain. A swelling 3 cm. x 4 cm. on the left side of forehead, 2 cm. above left ear was found on the person of Adya Prasad. A lacerated wound 1.5 cm. x 3 cm. x skin deep on the outer part of right thigh 3 cm. above right knee was found on the person of Harish Chandra. The injuries of both of them were simple caused by some blunt object and were fresh.

18. Believing the prosecution version of the incident, the trial Judge recorded the impugned judgment.

19. We have heard Sri G. S. Chaturvedi, learned senior advocate for the Appellants assisted by Sri P. N. Tripathi. From the side of the State Sri S. S. Yadav, learned A.G.A. has been heard. Sri P. N. Misra, learned Counsel for the complainant assisted by Sri Ramanand Pandey also advanced arguments in opposition of the appeal.

20. The first submission is that no overt act has been assigned to the accused Appellant Thakur Prasad who was allegedly armed with a gun and no case is substantiated against him at all. Advancing the argument further, it is urged that on the strength of the evidence adduced by the prosecution, it could not be determined with certainty that the accused were aggressors and, therefore, the impugned judgment of conviction is not sustainable. The second argument is that in a sudden lathi fight, both sides received injuries including the two accused Appellants, namely, Adya Prasad and his son Harish Chandra. It has been urged that the injuries of Chandra Shekhar and Indu Shekhar (sons of the deceased) on the side of the prosecution were simple as those of Adya Prasad and Harish Chandra accused. It was not discernible from the evidence of the prosecution as to who had given fatal lathi blow on the head of the deceased Kamta Prasad which resulted in his death. Therefore, the submission of learned Counsel for the accused Appellants, in alternative, is that they could not be convicted for murder. Instead, argued the learned Counsel, the offence could at the best be one covered by Section 325, I.P.C., so far as the assault on Kamta Prasad deceased was concerned.

21. Per contra, the learned A.G.A. and learned Counsel for the complainant vehemently argued that Kamta Prasad had been murdered by the accused

Appellants in furtherance of their common intention and the injuries caused by them to Chandra Shekhar and Indu Shekhar rendered them liable u/s 323 read with Section 34, I.P.C. They, thus, supported the findings of the trial court.

22. Let us deal with the arguments one by one so as to come to the right conclusion.

23. We have carefully scrutinised the testimony of the eye-witnesses including Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3 (sons of the deceased Kamta Prasad). Roop Narain P.W. 4 has corroborated the testimony of Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3. His presence is admitted to the defence itself and it was suggested to him that it was on his exhortation that Kamta Prasad, Indu Shekhar and Chandra Shekhar started beating Harish Chandra. No doubt, Indu Shekhar and Chandra Shekhar are themselves injured of the incident and their presence at the spot is beyond doubt. However, the factum of their being injured only guarantees their presence at the spot, but not that whatever is deposed by them is gospel truth. Their credibility on all the aspects of the case is to be tested on the anvil of probabilities. Both of them stated that a little after Harish Chandra had gone to his house following the altercation over the plucking of datun by him, he (Harish Chandra), Thakur Prasad and Adya Prasad appeared at the spot. Thakur Prasad was armed with a gun and the other two had lathis. They further stated that Thakur Prasad exhorted the other two accused Appellants who started assaulting Kamta Prasad with lathis and when they rushed up and came to his rescue, they were also assaulted by lathis wielded by Adya Prasad and Harish Chandra. It is, however, a fact that neither these two injured witnesses nor the deceased Kamta Prasad sustained any injury of firearm. The witnesses also do not say that Thakur Prasad had opened any shot from his gun, though they insisted that he had exhorted the other two accused Appellants to launch assault on Kamta Prasad (with whom Harish Chandra had had an altercation a short while ago). Thakur Prasad is the brother of accused Adya Prasad and uncle of Harish Chandra who is the son of Adya Prasad. It is somewhat illogical that Thakur Prasad appeared at the spot armed with a gun, though he did not mean to open any shot therewith. It is equally incongruous that the other two accused Appellants who were already armed with lathis and had themselves come prepared to launch assault therewith on Kamta Prasad needed any exhortation to swing in action. The experience shows that there is tendency on the part of witnesses to exaggerate the guilt of the opponent. The Court has to sift the evidence with care in each case and on full consideration of all the relevant material circumstances to come to a decision as to which part of the testimony of the witnesses is to be accepted and which is to be rejected. The witnesses cannot be branded as liars in toto even if parts of their statements are demonstrably doubtful. The principle "falsus in uno falsus in omnibus" is not applicable in India. It is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth, exaggerations, embroideries or embellishments. The inimical relations between the prosecution and the accused side, at times, serve as an inducement to the

members of the family of the prosecution side to falsely implicate more members of the family of their enemies even when only few of them were actually involved in the commission of crime. Even when only some members of the rival group are involved in the offence, quite often one finds a tendency also to falsely rope in some other members. In doing so, the story is improved and modified to achieve this purpose. In the case at hand, it is against inherent probabilities of the situation that the accused Thakur Prasad was there at the scene of incident with a gun, but participated only in the form of issuing exhortation to the other two accused Appellants. On cumulative consideration of the facts, circumstances and evidence of the case, he deserves to be afforded the benefit of doubt. We shall, therefore, acquit him, setting aside his conviction and sentence recorded by the lower court.

24. It takes us to the second argument of the accused Appellants. In this case, many facts are admitted to both the sides. Two of the eye-witnesses, namely, Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3 are themselves the injured who sustained lathi injuries. One of them Indu Shekhar is the informant also. It is also admitted that the lathis were wielded by these witnesses also from the side of prosecution. Their claim, however, is that they used the same in self-defence. The two accused Adya Prasad and Harish Chandra also sustained blunt weapon injuries which is borne out from their injury reports. Even Indu Shekhar P.W. 2 stated in his examination-in-chief that these two accused sustained injuries owing to the lathis wielded by him and his brother, though, according to him, in defence. Wielding of lathis from the prosecution side is mentioned in the F.I.R. also. It is also an admitted fact that the incident occurred because of plucking of a datun by Harish Chandra accused to which Kamta Prasad objected on the ground that the neem tree belonged to him. The defence was that neem tree and the land underneath was joint. The two sides differ on the manner of incident. According to the defence, Harish Chandra was coming from the front side of the house of the deceased with datun plucked from the neem tree. Deceased Kamta Prasad intercepted and questioned him over plucking of datun from his tree whereupon Harish Chandra held out that he would continue to pluck the datun from the said tree. Then Roop Narain exhorted and Kamta Prasad, Indu Shekhar and Chandra Shekhar started assaulting him with kicks, fists and dandas. Hearing alarm, Adya Prasad came over there who was also beaten up. He also used danda in his defence.

25. There was background of bad blood between the two sides owing to factions and leanings of the deceased Kamta Prasad towards Ram Lakhan (brother of Thakur Prasad and Adya Prasad accused). Acrimony between the two sides was apparent from this fact also that Kamta Prasad picked up a non-issue of plucking of datun by Harish Chandra accused from neem tree. To say the least, he made mountain of a mole. It is there in the testimony of Indu Shekhar P.W. 2 that while objecting to the plucking of datun by Harish Chandra, he snatched it from his hand and commanded him not to do it in future, threatening of dire consequences otherwise. That is, he rebuked Harish Chandra over a trivial

matter. Not only this, it has also come down from the statement of Chandra Shekhar P.W. 3 that his father also chided Harish Chandra, reminding that his father had got transferred the land of Algoo fictitiously and had rendered Ram Lakhan to be shelterless. Harish Chandra allegedly then went away, abusing Kamta Prasad. Immediately thereafter the accused appeared at the scene of incident. Plucking of datun is such a trifling matter that one would not ordinarily object to a stranger. At the start of the incident was the unusual and childish conduct of Kamta Prasad.

26. It is, thus, apparent that the incident occurred without any premeditation on the part of the accused Appellants, but in a sudden quarrel in the heat of passion. Admittedly, the lathis were plied from both the sides with the result that Kamta Prasad deceased, Indu Shekhar P.W. 2 and Chandra Shekhar P.W. 3 on the prosecution side sustained lathi injuries and Adya Prasad and Harish Chandra accused Appellants also sustained lathi injuries owing to the same having been wielded by the witnesses Indu Shekhar and Chandra Shekhar. The injuries of Indu Shekhar and Chandra Shekhar on the prosecution side and of Adya Prasad and Harish Chandra accused on the other were all simple as detailed earlier. It is noted from the post-mortem report of Kamta Prasad that he sustained three ante-mortem injuries of blunt weapon (lathi). The ante-mortem injury Nos. 2 and 3 were contusions on the back of right shoulder and contusion on the left side forehead. The fatal injury was lacerated wound on the head, left side head, 10 cm. above the left ear. Dr. Kuber Nath Pandey P.W. 1 who conducted autopsy stated that there was no injury in the brain. It is there in the testimony of Chandra Shekhar P.W. 3 also that on receiving the first lathi blow, his father retreated but the second lathi blow was given which landed on his head and he fell down. It rendered him unconscious. It would appear that lathi blow on the head of the deceased (vital part) was not repeated by the accused Appellants Adya Prasad and Harish Chandra.

27. It has now to be determined as to what offence came to be committed by the accused Appellants Adya Prasad and his son Harish Chandra within the ambit of law. On careful scrutiny of the evidence on record, we are of the view that it is quite certain that the aggressors were the accused Adya Prasad and Harish Chandra who launched lathi assault on Kamta Prasad. Both of them also assaulted Indu Shekhar and Chandra Shekhar when they came to the rescue of their father with lathis. Doubtless it is that these two witnesses also wielded lathis causing injuries to Adya Prasad and Harish Chandra. The genesis was that Kamta Prasad had snatched datun from the hands of Harish Chandra and had also rebuked him for his father having got transferred the land of Algoo fictitiously, rendering Ram Lakhan to be shelterless. He (Harish Chandra) felt insulted in the extremity and went away hurling abuses on Kamta Prasad to reappear immediately with his father Adya Prasad armed with lathis to take revenge. But the intention to cause death was not there. The incident, as we said, was a result of a sudden fight. Though the assault was first made by the accused Appellants, but the lathis were plied from both the sides. A single fatal

blow of lathi wielded from the side of the accused Appellants landed on the head of Kamta Prasad. It turned out to be fatal. It is not known as to who out of the two accused gave the said lathi blow. For practical purposes, it is immaterial because both of them were acting in concert with the previous meeting of minds and they came together armed with lathis to avenge the insult caused to one of them Harish Chandra a little while before by Kamta Prasad. The case is covered by Exception 4 of Section 300, I.P.C. so far as the death of Kamta Prasad is concerned. For causing his death, the accused Adya Prasad and Harish Chandra are liable to be convicted under Part II of Section 304, I.P.C., because they have to be imputed the knowledge that by their act of assaulting Kamta Prasad with lathis, they were likely to cause his death, though the intention to kill was not there. The sentence of five years" rigorous imprisonment to each of them under Part II of Section 304 would meet the ends of justice.

28. So far as simple injuries caused by the accused Appellants to Indu Shekhar and Chandra Shekhar are concerned, their conviction u/s 323 read with Section 34, I.P.C. with six months" rigorous imprisonment is perfectly in order, not warranting any interference.

29. In view of the above discussion, our final order is as under.

30. Criminal Appeal No. 528 of 1982 is partly allowed. The conviction of accused Appellants Adya Prasad Misra and Harish Chandra Misra is converted from Section 302 read with Section 34, I.P.C. to Part II of Section 304 read with Section 34, I.P.C. with a sentence of five years" rigorous imprisonment to each of them (instead of life imprisonment). Their conviction u/s 323 read with Section 34, I.P.C. with a sentence of six months" rigorous imprisonment is affirmed. Both the sentences shall run concurrently. These two accused Appellants Adya Prasad Misra and Harish Chandra Misra are on bail. The Chief Judicial Magistrate, Basti, shall cause them to be arrested and lodged in jail to serve out their sentences as now ordered.

31. Connected Criminal Appeal No. 529 of 1982 is allowed. The conviction and sentence passed against the accused Appellant Thakur Prasad are set aside. He is already on bail.

32. Certify the judgment to the lower court immediately for reporting compliance within two months from the receipt of copy of this order.