
(2002) 12 AHC CK 0143
In the Allahabad High Court
Case No : Criminal Appeal No. 732 of 1981

Ajai Pal and Others (in Jail)	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 11-12-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2003) 1 ACR 413

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

Bench : Division Bench

Advocate : V.B. Singh, G.S. Chaturvedi, V.S. Singh and Samit Gopal, for the Appellant; A.G.A., for the Respondent

Judgement

M.C. Jain, J.—This appeal came to be filed by 7 Appellants, namely, (1) Ajai Pal, (2) Ram Dutt, (3) Balram, (4) Raj Bahadur, (5) Jagdev, (6) Laxmi and (7) Rajwa. Out of them, Ajai Pal and Ram Dutt are real brothers. The impugned judgment is dated 23.2.1981 rendered by Sri Bhagwan Din, the then I Vth Additional Sessions Judge, Hamirpur in Sessions Trial No. 113 of 1980. All of them have been convicted u/s 147, I.P.C. and sentenced to one year's rigorous imprisonment. Ajai Pal and Balram have also been convicted u/s 148, I.P.C. and each sentenced to two years' rigorous imprisonment. All the Appellants have further been convicted u/s 307, I.P.C. read with Section 149, I.P.C. and 302, I.P.C. read with Section 149, I.P.C. Sentence passed against each of them u/s 307 read with Section 149, I.P.C. is four years' rigorous imprisonment and life imprisonment u/s 302 read with Section 149, I.P.C. The sentences have been ordered to run concurrently.

2. Appellants Jagdev, Balram and Laxmi died during the pendency of the appeal and by order dated 20.8.2002, the appeal has abated so far as they are concerned.

3. The incident took place on 5.3.1979 at about 10 p.m. at the khalihan of P.W. 1 Rameshwar (injured) in village Chandpurwa, police station Sumerpur, district

Hamirpur. The F.I.R. was lodged by him in the night itself, viz., at 2.30 a.m. on 6.3.1979. The distance of police station from the place of occurrence was three miles. The Appellant Ajai Pal was armed with countrymade pistol, Balram had a barchhi (sharp edged weapon) and the rest had lathis. The deceased was one Dibiya. Rameshwar P.W. 1 and Gaya Prasad are the injured of the felony on the prosecution side. One Shyam Lal D.W. 1 (now dead) is said to have sustained injuries on the side of accused also.

4. The case coming to fore from the F.I.R. and the evidence adduced in the Court may shortly be stated. Both the parties reside in village Chandpurwa, police station Sumerpur, district Hamirpur. A day before the incident at about the time of sundown, the accused Ajai Pal, Ram Dutt, Rajwa, Balram and Laxmi were digging earth from the field of Rameshwar P.W. 1, joining the same with the chak-road. They wanted to fill in the nala with earth so as to facilitate the passing of their bullock cart. Rameshwar P.W. 1 and his brother Gaya Prasad happened to reach the spot and asked Ajai Pal and others not to do so. Heat was generated and exchange of hot words took place between the two sides. Ajai Pal and others on his side left the scene after hurling abuses and offering threats that the score would be settled.

5. At the fateful time of the present incident, Rameshwar P.W. 1 and his brother Gaya Prasad were lying in their khalihan. It was a moonlit night. The Appellants with their weapons as detailed above, came over there and giving reference of earlier day's incident, challenged Rameshwar P.W. 1 and his brother that they would not be allowed to get away. Rameshwar and Gaya Prasad raised shouts. The accused-Appellants surrounded them and started assaulting them. Dibiya and his brother Ram Kishan came over there with lathis on hearing the shouts of Rameshwar and his brother and they attempted to shield Rameshwar and Gaya Prasad with their lathis. One Vishal Yadav is also said to have appeared there with lathi. Ajai Pal opened fire which hit Dibiya who fell down and died a little while later. The F.I.R. also stated that some on the accused side had sustained injuries.

6. Consequent upon lodging of the F.I.R., a case was registered and investigation followed. Rameshwar P.W. 1 was examined in District Hospital, Hamirpur, on 6.3.1979 at 10.30 a.m. by Dr. K. S. Srivastava P.W. 2. The following injuries were found on his person:

- (1) A lacerated wound 8 cm. - 2 cm. - bone deep on the scalp 8 cm. above the right ear and oblique in direction.
- (2) Contusion 6 cm. - 3 cm. on the right shoulder, just above the spine of right scapula, surrounded by traumatic swelling in an area of 10 cm. - 8 cm.
- (3) Traumatic swelling 7 cm. - 5 cm. on the Lat. Side of right hand (dorsal aspect).
- (4) Contusion 10 cm. - 4 cm. on the middle of lateral aspect of left leg

surrounded by traumatic swelling 10 cm. - 6 cm.

(5) Complaint of pain in the middle of anterior aspect of left thigh.

All the injuries were simple and had been caused by hard blunt object. The duration was about 1/2 day.

7. Injuries of Gaya Prasad were examined on 6.3.1979 at 9.50 a.m. by the same Doctor. The following injuries were found on his person:

(1) Stab wound 1 cm. - 0.2 cm. - 10 cm. depth on the left side chest. 5 cm. medial to the left axillary fold.

(2) Stab wound 0.3 cm. - 0.2 cm. - 1 cm. depth on the left side back, 1 cm. below the left axillary fold.

(3) Traumatic swelling 7 cm. - 4 cm. on the left forearm, lateral aspect, below the left elbow joint.

(4) Abrasion 4 cm. - 2 cm. on the left leg at the upper 1/4 part of skin of left side tibia surrounded by traumatic swelling in an area of 6 cm. - 3 cm.

All the injuries were simple. Injury Nos. 1 and 2 had been caused by sharp edged weapon, whereas the remaining two by friction or blunt object. They were about half day old.

8. Post-mortem over the dead body was conducted on 7.3.1979 at 11.30 a.m. by Dr. S. N. Dixit, P.W. 5. He was about 40 years of age and about 1-1/2 days had passed since he died. The following ante-mortem injuries were found on his person:

(1) Gunshot wound of entry 0.8 cm. - .8 cm. - 8 cm. - whole of thickening of arm on the right arm, inner aspect 10 cms. below right axillary direction left to right slightly downwards, no blackening and charring present. Margins were inverted.

(2) Wound of exit (Gunshot) .9 cm. - .9 cm. - communicating to injury No. (1) on the right arm outer side, 21 cm. below right shoulder. Margins everted.

(3) Gunshot wound of entry .8 cm. - .8 cm. - chest cavity deep on the left side chest, 5 cm. from left nipple at 9 O'clock position. Direction from left to right, slightly downwards and backwards, margins inverted. No blackening present.

(4) Multiple abrasions in an area of 12 cm. - 4 cm. on left side back, lower part just above the waistline.

The cause of death was shock and haemorrhage on account of firearm injuries.

9. On the conclusion of investigation, charge-sheet was laid and trial held which culminated into the passing of the impugned judgment and order.

10. The defence of Raj Bahadur and Jagdev was of denial and of the rest was of self-defence. In short, the theory of self-defence was to the effect that on

5.3.1979 in moonlit night, they were digging earth from left out land to fill in the nala so as to facilitate the passing of their bullock carts through the chak-road for the carriage of their agricultural produce direct from their fields in Marwaha to their khalihaan as there was no other way. At that very time, Kalloo, Rajwa, Rishal, Rameshwar, Gaya Prasad and Dibiya appeared there and commanded them not to dig earth from the left out land. When they protested that no loss or damage was being caused to them, they (persons on the prosecution side) hurled abuses and started assaulting. At that time, they had spades and gainti with which they defended them. Laxmi's father Shyam Lal came over there and intervened. Dibiya, who had a barchhi, attacked Shyam Lal therewith and he was hit thereby. Dibiya again attempted to strike barchhi on him. Then Ajai Pal picked up the gun of his father and opened fire on Dibiya which hit him. According to them, the incident did not take place at the khalihaan of Rameshwar. Instead, it took place at dried Nala. This is the gist of defence version.

11. It may also be stated before proceeding further that Shyam Lal D.W. 1 was also examined in District Hospital, Hamirpur, on 6.3.1979 by Dr. K. S. Srivastava P.W. 2 and the following injuries are shown to have been found on his person:

(1) Stab wound 1.2 cm. - 0.4 cm. - 1.5 cm. depth on the left side chest, 2 cm. medial to the left auxiliary fold.

(2) Abrasion 0.6 cm. - 0.6 cm. on the middle of skin of right tibia.

Both the injuries were simple. Injury No. 1 was of sharp edged weapon and injury No. 2 by friction. The injuries were 3/4 day old.

12. Besides the evidence of Doctors and formal witnesses including that of investigation, the prosecution case rested on the eye-witnesses account of Rameshwar P.W. 1, Ram Kishan P.W. 3 and Kalloo P.W. 4.

13. We have heard Sri G. S. Chaturvedi on behalf of Appellants and learned A.G.A. from the side of State in opposition. While assailing the impugned judgment of conviction, the thrust of the argument raised by Sri Chaturvedi is that the prosecution side was the aggressor and the Appellants only acted in self-defence to repel the attack. Therefore, they did not commit any offence within the ambit of law. It has also been urged that the prosecution presented a fabricated version of the incident and even the injuries of Shyam Lal D.W. 1 (on the side of the Appellants) have not been explained.

14. On going through the evidence, we find that Rameshwar P.W. 1 is himself the injured of the incident, who is also the maker of the F.I.R. He categorically stated that incident took place at his khalihaan when he and his brother Gaya Prasad were at their khalihaan at about 10 p.m., the earlier incident having taken place a day before when altercation had taken place between the two sides at about the time of sunset when Ajai Pal, Ram Dutt, Rajwa, Balram and Laxmi were filling the nala, cutting the earth from their field. He and his brother Gaya Prasad, whose were returning after grazing the cattle, had objected to their act and abuses had

been traded by both the sides. His cousin Kalloo P.W. 4 had also arrived at that time who too was returning after grazing cattle. Kalloo P.W. 4 has also spoken about this earlier incident and has supported the testimony of Rameshwar P.W. 1 injured. At that time, Ajai Pal and others had gone away, offering threats to see them later. The version of Ram Kishan P.W. 3 corroborates Rameshwar P.W. 1 that the actual incident relating to this crime took place at the khalihan of Rameshwar P.W. 1. It was the earliest version also presented by the prosecution in the F.I.R. made by Rameshwar P.W. 1 without loss of time which seems to be a spontaneous document. The defence has tried in vain to blur the reality by contending that the incident took place at the time when some of the Appellants were filling the nala to make link road for passing of bullock carts a little after the time of sunset. In fact, the verbal duel with the generation of heat and trading of abuses between the two sides had taken place a day earlier when Rameshwar P.W. 1 and Gaya Prasad had objected to the filling of nala by earthing by the Appellants and the latter had left the scene offering threats. It is also pertinent to find out that the blood-stained earth had been found by the Investigating Officer Satya Narain Chaudhari P.W. 7 from the khalihan of Rameshwar as depicted by him in the site plan too.

15. Thus, the physical evidence of the blood having been found in the khalihan of Rameshwar P.W. 1 belies the testimony of Shyam Lal D.W. 1 who tried hard it to be believed that the incident took place at the time of the filling of nala by earthing by the Appellants a little after the time of sunset. In his overzealousness to make a dent in the prosecution case, he even denied the existence of the khalihan of Rameshwar P.W. 1. However, the truth fell down from his lips in the very next breath that the khalihan of Rameshwar was in the south of nala, only at a distance of 300-400 paces away. It is further to be noted that two of the injuries sustained by Gaya Prasad were stab wounds, one on the left side of chest and the other on left side of back. The categorical case of the prosecution right from the lodging of the F.I.R. till the furnishing of proof in the Court has been that the Appellant Balram was armed with a barchhi. These injuries could be caused by such a weapon. It may also be stated as passing reference that there could hardly be any occasion or necessity of any of the Appellants to have a sharp edged weapon at the time of filling the nala for preparing the link road. Our firm impression on the judicial scrutiny of the evidence is that the Appellants have come up with a false defence of the incident, claiming it to have taken place at the time of their filling the nala or preparing the link road. The question of their having acted in self-defence, therefore, does not arise at all. The evidence and the attending circumstances go to prove convincingly that it were the Appellants who launched the attack at about 10 p.m. in the khalihan of Rameshwar P.W. 1 when he and his brother Gaya Prasad were there. The reason was that they (Appellants) were feeling hurt and chagrined in extremity because of having been prevented from filling the nala for preparing the link road, by Rameshwar and Gaya Prasad the previous day by digging earth from their field. Resultantly, we reject the theory of self-defence put forth by the Appellants and

argued by the learned Counsel for the Appellants.

16. We also do not find any merit in the argument that a twisted version had been presented by the prosecution and the injuries of Shyam Lal (D.W. 1 on the side of the Appellants) went unexplained. Rather, the truth is the other way. We briefly state our reasons in this behalf. There is no question of the prosecution coming up with a twisted version. We note from the F.I.R. that it was recited in it that Dibiya (deceased) and Ram Kishan had come on the spot with lathis and had defended them by wielding lathis and that some of the accused received injuries. It was the earliest version of the prosecution. Rameshwar P.W. 1 stated in his statement before the Court also that he and his brother Gaya Prasad had also picked up their lathis to repel the attack launched by the Appellants. Obviously, therefore, there is no room for arguing that the prosecution made any attempt to conceal material facts or reality. Gaya Prasad was also an injured with Rameshwar and Dibiya lost his life. Ram Kishan and Dibiya were real brothers and had reached the spot from their khalihan with lathis on hearing the shouts emanating from the khalihan of Rameshwar, as stated by Ram Kishan P.W. 3. In the site plan also, the Investigating Officer showed the existence of their khalihan, the distance of which from the khalihan of Rameshwar has been shown as 312 paces. It has come to be about 300 paces in the statements of Rameshwar P.W. 1 and Ram Kishan P.W. 3. It sounds to be logical that Dibiya and Ram Kishan were together at their khalihan at that hour of night. The name of Ram Kishan is mentioned in the promptly lodged F.I.R. also.

17. So far as the injuries of Shyam Lal, D.W. 1 are concerned, we have not the slightest doubt that he was not at all present at the spot and that he succeeded in manufacturing of spurious medical examination report in respect of himself in an attempt to disturb the prosecution case. He has not been named as an assailant by the prosecution side. We have related earlier that the prosecution came forth with straightforwardness that lathis had been used from their side as well to repel the attack of the Appellants and that some of the Appellants received injuries. Judged in this backdrop, had Shyam Lal been one of the assailants, he would have definitely been named by the prosecution. There could be no point in screening his presence.

18. The report of the incident had been lodged at 2.30 a.m. itself in the night and it must have come to the notice of the Appellants. They started designing the false defence by pretending Shyam Lal as the injured on their side who had not been named by the prosecution as one of the assailants. Shyam Lal D.W. 1 who is father of the Appellant Laxmi and uncle of Appellants Ajai Pal and Ram Dutt, got himself medically examined at his own accord in District Hospital, Hamirpur, on 6.3.1979 at 1.40 p.m. He was taken there by one Keshwanand. Stab wound of insignificant dimension 1.2 cm. - 0.4 cm. - 1.5 cm. depth on the left side of chest was shown on his person with abrasion of the dimension of 0.6 cm. - 0.6 cm. on the middle of skin of right tibia. Dr. K. S. Srivastava P.W. 2 who professed to medically examine and prepare the injury report did not even

question him as to how he had received such injuries. If it was a legal medico case, he ought to have informed the police. He did nothing of the kind. Shyam Lal D.W. 1 admitted in his cross-examination that his nephew Gopi was a driver of a vehicle of District Hospital, Hamirpur. Seemingly, he used his services and influences in getting manufactured spurious medical examination report in respect of himself. No report was lodged about the defence version at the police station. Nor was any information sent to the higher police authorities by post. A complaint case was not filed either. There is a Government Hospital in Sumerpur itself and Mawadha too as admitted by him in his cross-examination. Instead of getting himself examined at any of these places, he preferred a far off place, viz., District Hospital, Hamirpur, where his nephew was a driver of Government vehicle. It can also very well be scented as to why Dr. K. S. Srivastava P.W. 2 did not inform the police about the medical examination of Shyam Lal D.W. 1. It being fictitious, the police could have located Shyam Lal and then it could come to light that actually he had not received any injury. Indeed, that would have caused trouble to the Doctor also. He, therefore, adopted the convenient and easy course of preparing a fictitious injury report for Shyam Lal without doing anything else in this behalf to discharge his professional duty. For all these reasons, we reject the testimony of Shyam Lal D.W. 1 and disbelieve his medical examination report also.

19. Now comes the main question as to what offence has been committed by the Appellants within the ambit of law. The alternative argument of Sri Chaturvedi is that in any case, the shooting of Dibiya was the individual act of Ajai Pal and it could not be deemed to have been done in prosecution of the common object of the other members of the assembly, who can be deemed to have committed a much lesser offence. We find substantial force in this argument. It has to be kept in mind that the background of the incident was the altercation and exchange of hot words with trading of abuses between the two sides the previous day over the digging of earth by the Appellants from the field of Rameshwar P.W. 1 for filling the nala for preparing a link road and Rameshwar P.W. 1 with his brother Gaya Prasad having successfully objected to it. Being hurt, the Appellants, it appears, chose to chastise Rameshwar and his brother Gaya Prasad the next night when they were at their khalihan. Various armed, seven persons reached their khalihan and recalling the incident of the previous day, chided them for having the audacity to prevent them from digging earth for filling the nala on the previous day. Ajai Pal had country made pistol. One of them, namely, Balram had barchhi-a sharp edged weapon and the remaining five had lathis. It is pertinent to find that despite over numbering Rameshwar P.W. 1 and Gaya Prasad, they did not immediately act in extremity putting their weapons to the best use instantaneously, causing maximum damage to them (Rameshwar and Gaya Prasad). The own prosecution case is that Rameshwar and Gaya Prasad shouted, attracting Dibiya and Ram Kishan from their khalihan which was at a distance of 300 paces. These two reached the khalihan of Rameshwar with lathis. Dibiya who lost his life in the incident was only an intervener, unconnected with the incident

of the previous day. The facts, evidence and the circumstances clearly indicate that the purpose of the unlawful assembly formed by the Appellants was to chastise Rameshwar and Gaya Prasad to teach them a lesson with causing injuries. Regard being had to the weapons with which they were armed, i.e., firearm, barchhi (sharp edged weapon) as also lathis, the object has to be taken to be to cause grievous hurt to them by such weapons. They wanted to demonstrate that they would not brook any objection, interference or resistance from their side in filling the nala for making a link road which mission they had to leave unaccomplished the previous day. They wanted them to taste the impact of their brute force to silence any objection or resistance from their side in future. We are of the opinion that the murder was not the common object of the unlawful assembly formed by the Appellants.

20. The permissible contours of vicarious liability with the aid of Section 149, I.P.C. may be adverted to. The law is that all the members of unlawful assembly render themselves liable to punishment for any and every offence committed by any member or more members of that assembly for prosecution of the common object of the unlawful assembly. The commission of the offence must have been in contemplation of the unlawful assembly directly or impliedly. All the members of the unlawful assembly would be liable provided they knew, or ought to have known or might have known that the act was likely to be committed in prosecution of the common object. In such an eventuality, all the members of the unlawful assembly would be liable for the offence, as the law stands. But as common object of the unlawful assembly in the present case was not murder, but only to cause grievous injuries to the persons on the prosecution side, all the Appellants cannot be deemed to be liable for offence u/s 302 read with Section 149, I.P.C. The murder of Dibiya was the individual act of Appellant Ajai Pal, who exceeded and crossed the common object of the unlawful assembly that had been formed. An unexpected situation arose that Dibiya with his brother Ram Kishan reached the spot on hearing the shouts of Rameshwar and Gaya Prasad and intervened. He was shot at and murdered by the isolated act of one of the members of the unlawful assembly, namely, Ajai Pal and he alone would be liable for killing him. The aid of Section 149, I.P.C. cannot be invoked to fasten the liability of murder on other members of the unlawful assembly, who only committed the offence u/s 326 read with Section 149, I.P.C. besides, of course, of rioting as we intend to sum up hereinafter.

21. In view of the above discussion, we partly allow the appeal in this way:

- (1) The Appellants Jagdev, Balram and Laxmi having died, the appeal in respect of them stands abated.
- (2) The Appellant Ajai Pal is convicted u/s 302, I.P.C. and sentenced to life imprisonment.
- (3) The conviction and sentences of the Appellants Ram Dutt, Raj Bahadur and Rajwa u/s 302 read with Section 149, I.P.C. are set aside. Instead, they are

convicted u/s 326, I.P.C. read with Section 149, I.P.C. For the said offence, each of them is sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 5,000 each. In default of payment of fine, each of them shall undergo further rigorous imprisonment for one year.

(4) The Appellants Ram Dutt, Raj Bahadur and Rajwa are also convicted u/s 147, I.P.C. and each sentenced to undergo rigorous imprisonment for one year.

(5) The Appellant Ajai Pal is further convicted u/s 148, I.P.C. and sentenced to undergo rigorous imprisonment for two years.

22. Substantive sentences of imprisonment of the Appellants shall run concurrently but the sentence awarded in default of payment of fine shall be undergone separately.

23. The Appellants are already in jail. They shall serve out the respective sentences passed against them.

24. The office shall send the copy of this judgment along with the record to the lower court to ensure compliance of this judgment under intimation to this Court within two months.