

(2017) 03 AHC CK 0195
In the Allahabad High Court
Case No : 254 of 1998

Babu son of Ram Sahai & Ors

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 323](#) - Power to examine the accused - Procedure when, after commencement of inquiry or trial. Magistrate finds case should be committed
[Indian Penal Code, 1860](#), [Section 304](#), [Section 324](#), [Section 323](#), [Section 506](#), [Section 504](#), [Section 308](#) - Punishment for culpable homicide not amounting to murder - Voluntarily causing hurt by dangerous weapons or means - Punishment for voluntarily causing hurt - Punishment for criminal intimidation - Intentional insult with intent to provoke breach of the peace - Attempt to commit culpable homicide
[Probation of Offenders Act, 1958](#), [Section 4](#) - Power of court to release certain offenders on probation of good conduct

Citation : (2017) 03 AHC CK 0195

Hon'ble Judges : Anil Kumar Srivastava

Bench : Single Bench

Advocate : Pankaj Gupta, R N Gupta

Final Decision : Allowed

Judgement

1. Heard Sri R. N. Gupta, learned counsel for the appellants and learned AGA for the State and perused the record.

2. Instant appeal has arisen against the judgment and order dated 16.4.1998 passed by learned First Additional Sessions Judge, Hardoi in Sessions Trial No.405 of 1993 arising out of Case Crime No.97 of 1993, P.S. Kachhaona, District-Hardoi; State vs. Ram Sahai. Learned trial court has convicted the accused-Babu under Section 304 IPC and sentenced him rigorous imprisonment for 10 years and fine of Rs.3000/- with default stipulation of six months" simple

imprisonment. Accused- Ram Sahai, Balak Ram and Jadu Nath were convicted under Section 323 IPC and were given benefit of Section 4 of Probation of First Offenders Act.

3. According to the prosecution version, a chick FIR was registered on 23.5.1993 at 11.15 AM at Police Station- Kachhaona, District-Hardoi, at case crime no.97 of 1993, under Sections 323, 324, 504 and 506 IPC on the basis of an oral information given by the injured Sri Ram. It is stated that Balak Ram Pasi was coming with his ox. Satish son of Sri Ram hit the ox by danda. Balak Ram slapped Satish and when the complainant asked Balak Ram and his family member about the incident, Ram Sahai his son Babu, Balak Ram and Jadu Nath assaulted him by "lathi", "danda" and "kata", and he ran away towards western side of the village. On 23.5.1993 at about 10.00 AM, all of them have beaten him in the field of Abbas. Complainant has suffered injuries of "Kata" in his head and "lathi" injuries on the body. On hearing the cries, Badlu father of the complainant mother of the complainant and Kamla wife of complainant and some villagers came there. Accused ran away from the place of occurrence.

4. First information report was registered at Crime No.97 of 1993 and investigation was handed over to the investigating officer. Injured -Sri Ram was medically examined on 23.5.1993 at 12.55 PM by Emergency Medical Officer, District Hospital, Hardoi, Dr. Rajendra Shukla who found following injuries on the body of the deceased:-

1. Incised wound 6x 2.5. cm into skin bone deep of on the back of the left side of head, 11 cm with oblique above the top of left ear. Margin clear cut and ragged with flap of scalp hanging with hematozoma and fresh bleeding present. Bright Pink unflammable.

2. Incised wound 2.5 cm x 0.5cm x skin deep on the lateral and upper part of the left arm 7 cm below the top of left shoulder. Fresh bleeding with bright pink inflammation.

3. Five contusion measuring from 6 cm x 2 cm to 4 cm x 1.5 cm in an area of 22 cm x 14 cm on the lateral part of left arm from middle to elbow bright pink coloured few are over tapping.

4. Contusion 5 cm x 2 cm on the radial side of left forearm just below the left elbow pink coloured.

5. Contusion 8 cm x 2 cm just behind the left scapula pink coloured.

6. Two incised wounds 1.5 cm x 0.5 cm x skin deep on the lateral malio rum left and 2.5 cm x 0.5 cm x skin deep on the foot left in the line of little toemargin clear cut with pink coloured inflammation about complaint of pain right knee.

7. Incised wound 0.5 cm x 0.75 cm on the front and upper part of right forearm margin clear cut.

5. According to doctor, injury no.1 was kept under observation and X-ray of skull

was advised. All the other injuries were simple in nature. According to opinion of doctor incised wound could have been caused by sharp edged object. While rest of injuries could have been caused by blunt object. All the injuries were fresh. Injured was hospitalized.

6. Site plan was prepared by the investigating officer. Subsequently, the injured succumbed to the injuries and the case was converted under Sections 323/324, 304, 308, 504 and 506 IPC, vide G.D. No.30 dated 4.6.1993. Thereafter, postmortem was conducted. After investigation, charge-sheet was submitted against the accused.

7. In order to prove its case prosecution has produced P.W.1 Badlu eye witness, P.W.2 Smt. Kamla wife of the deceased, P.W.3 Dr. Rajendra Shukla and P.W. 4 S.I. Shiv Shwaroop Tiwari investigating officer.

8. In the statement under Section 313 Cr.P.C., accused- Babu has stated that they were also injured and had lodged the report. Accused-Ram Sahai, Jadu Nath have also stated that a false case has been registered to save themselves from the cross case. In defence, chick FIR in Case Crime No.97A of 1993 under Section 323, 504, 506 IPC registered at Police Station- Kachhaona, District-Hardoi by Sri Ram against Badlu and copy of G.D. of registration of case were proved.

9. Learned trial court after appreciating the evidence on record, recorded the finding of guilt against the accused and convicted and sentenced them accordingly.

10. Feeling aggrieved, appellants have preferred the appeal.

11. Learned counsel for the appellants submits that prosecution has miserably failed to prove the charges against the accused beyond reasonable doubt. It is submitted that prosecution has produced two witnesses of facts namely, P.W.1 Badlu and P.W. 2 Smt. Kamla who are father and widow of the deceased. Both are highly interested witnesses. It is further submitted that none of these witnesses were present at the spot. It is further submitted that the place of occurrence has been changed as the field of Abbas while according to the prosecution witness, deceased went to the house of Ram Gulam where the incident occurred.

12. It is further submitted that the accused have also received injuries in the same incident. A cross- case was also registered but the injuries on body of the accused could not be explained by prosecution. Hence, the benefit should be given to the accused.

13. Law is settled on the point of that even if a witness is a related witness, his evidence cannot be discarded solely on the ground that he was a related witness. In Nagappan v. State (by Inspector of Police, Tamil Nadu) reported in (2014) 3 SCC (Cri) 660 Hon"ble the Apex Court in paragraph no. 10 has observed as under :- "10. As regards the first contention about the admissibility of the

evidence of PW 1 and PW 3 being closely related to each other and the deceased, first of all, there is no bar in considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and have not supported the case of the prosecution. The prosecution heavily relied on the evidence of PW 1, PW 3 and PW 10. The trial court and the High Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without considerable contradiction as claimed by their counsel. This Court, in a series of decisions, has held that where the evidence of "interested witnesses" is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness. " (emphasis added)

14. In *Vikram Singh and others V. State of Punjab* reported in (2010) 3 SCC 56 Hon"ble the Supreme Court has cited paragraph 3 of its earlier pronouncement in the case of *Rana Pratap and Others V. State of Haryana* reported in 1983 (3) SCC 327 which reads as under:- "There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses" even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."(emphasis added)

15. First information report was lodged by Sri Ram who was an injured who succumbed to the injuries. P.W.1 Badlu, father of the deceased, has stated that the report was lodged by Sri Ram. It is admitted that he was not present at the place of occurrence. It is also admitted that when Satish made a complaint to Sri Ram that he has been slapped by the accused, Sri Ram went to the house of Ram Sahai. Thereafter, accused came out from house where Sri Ram made a complaint to them. Then accused had beaten him. Sri Ram fell down there only. When P.W.1 Badlu reached at the spot he found that Sri Ram lying on floor. It means that this witness reached at the spot when he heard the shriek. When he

reached at the spot he found that his son was lying on the ground. He has not seen assaulting Sri Ram. P.W 2 Smt. Kamla has also stated that she and Baldu did not go to the house of accused. Her husband, Sri Ram went to the house to make a complaint as to why the accused have slapped Satish. P.W.2 Kamla has also stated that when she reached at the spot i.e. at the door of accused Ram Sahai, she found that her husband was lying in injured condition. She did not see the accused present there. Evidence of both these witnesses clearly makes out that both of them were not present at the place of occurrence. They have not seen the incident. Incident took place at the house of Ram Sahai where the deceased went to make a complaint as to why the accused have slapped his son Satish. There is no mention that the incident occurred at the field of Abbas while in the first information report as well as in the site plan, place of occurrence is shown as the field of Abbas. Hence, presence of P.W.1 Badlu and P.W.2 Kamla is not established by the evidence on record. Further, the place of occurrence is also changed from the field of Abbas to the door of the house of Ram Sahai.

16. P.W.1 Badlu has admitted that accused- Balak Ram, Ram Sahai and Jadu Nath have received head injuries. It is also admitted that they have lodged report against Badlu and Sri Ram although, it is specifically denied by P.W.1 that neither he nor any witness has caused any injury to the accused.

17. In *Kashiram and others vs. State of Madhya Pradesh* (2002) 1 Supreme Court Cases 71 three Judges Bench of the Hon'ble Apex Court has referred the case of *Thakhaji Hiraji v. Thakore Kubersing Chamansing and Ors.*, (2001) 6 SCC 145 para 20 which is as under: "20. At the hearing, the learned counsel for the accused-appellants submitted that the factum of accused Prabhu having sustained serious injuries including those on vital part of the body was well established and the trial court as also the High Court have not doubted such injuries having been received by the accused Prabhu in the same incident in which those on the side of the prosecution suffered the injuries and such injuries of Prabhu having not been explained by the prosecution witnesses, the prosecution story should have been discarded and all the accused persons should have been acquitted. In my opinion such a submission is too tall a submission and hence cannot be accepted. In *State of U.P. v. Mukunde Singh and Ors.*, (1994) 2 SCC 191, it has been held that merely on the ground that the prosecution witnesses have not explained the injuries on the accused, the evidence of the prosecution witnesses ought not to be rejected outrightly if the Court finds it probable that the accused might have acted in exercise of right of self-defence, the Court ought to proceed to consider whether they have exceeded the same. In *Thakhaji Hiraji v. Thakore Kubersing Chamansing and Ors.*, (2001) 6 SCC 145, this Court has held that the court ought to make an effort at searching out the truth on the material available on record with a view to find out how much of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful and the approach of rejecting the prosecution case in its entirety for non-explanation of the injuries sustained by the accused persons is erroneous. This Court further held:

"It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injuries on the person of the accused were of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution."

18. In *Dev Raj v. State of Himachal Pradesh*, AIR (1994) SC 523 this Court has held that where the accused received injuries during the same occurrence in which complainants were injured and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution.

19. In *Lakshmi Singh and Others vs. State of Bihar*, (1976) 4 SCC 394, this Court held that: "12...It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence."

It is clear that:

"12. where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue; and (2) that the injuries probabalize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

20. It is further clear that: *Lakshmi Singh v. State of Bihar*, (1976) 4 SCC 394; "12. the omission on the part of the prosecution to explain the injuries on the

person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. . [However,] there may be cases where the non- explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, .. that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

21. In *Krishnan v. State of Tamil Nadu*, (2006) 11 SCC 304, the following principles have been relied on: "15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read with Section 96 to 106 of the Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability."

22. It was held in *Mohd Khali Chisti vs. State of Rajasthan and others* (2013) 2 Supreme Court Cases 541 that it is the duty of the prosecution to explain the injuries sustained by the accused and established the genesis of the incident by placing acceptable materials.

23. Admittedly, accused have sustained head injuries. It is also admitted by P.W.4 S.I. Shiv Swaroop Tiwari investigating officer that accused have sustained injuries in the same incident. A cross version was also registered at police station but prosecution has failed to explain the injuries on body of the accused. Hence, the genesis of the incident could not be established by the prosecution.

24. On the basis of the discussions made above, I am of the view that learned trial court has utterly failed to properly appreciate the evidence on record. Learned trial court has written a very cryptic judgment.

25. The appeal of accused-Jadu Nath stands abated vide order dated 5.1.2017.

26. Prosecution has failed to prove the case against the accused beyond reasonable doubt. Accordingly, accused are entitled for acquittal. Appeal deserves to be allowed.

27. Appeal is allowed. Judgment and order dated 16.4.1998 passed by learned First Additional Sessions Judge is set aside. Accused- Babu, Ram Sahai and Balak Ram and Jadu Nath are acquitted of the charges leveled against them. Accused are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender before the court below.

28. Office is hereby directed to certify the judgment to the learned trial court for compliance. Record of the trial court also be sent forthwith.