

(2016) 01 RAJ CK 0044
In the Rajasthan High Court
Case No : Criminal Appeal No. 1235/2011

Bhagwan Sahai and Others	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 428
Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 300, Section 302, Section 304, Section 307, Section 308, Section 323, Section 324, Section 326, Section 34<

Citation : (2016) 01 RAJ CK 0044

Hon'ble Judges : Kanwaljit Singh Ahluwalia and Prakash Gupta, JJ.

Bench : Division Bench

Advocate : Ashvin Garg and V.S. Chauhan, for the Appellant; Aladeen Khan, Public Prosecutor, for the Respondent

Final Decision : Disposed off

Judgement

Kanwaljit Singh Ahluwalia, J.—1. Bhagwan Sahai alongwith his brother Satish @ Indraj, their mother Gulab Devi, Seema w/o. Sriman and Guddi Devi w/o. Manoj Kumar were sent for trial for offences under Sections 147, 148, 323, 324, 326, 307 r.w. 149 IPC. The case of the prosecution as set out in the charge is that on 4.5.2008 at 10.00 AM accused in Village Chandpur constituted unlawful assembly and armed with lethal weapons went near the Bada of Jagram and caused injuries to Sajana Devi with blunt weapon and caused simple injury to Jagram and his wife Malli Devi with blunt and incised weapon, whereas Kailash Chand was caused simple and grievous injuries with blunt and incised weapon.

2. The Court of Additional Sessions Judge, Rajgarh, District Alwar having tried the accused for above said offences, acquitted Guddi Devi, Seema and Gulab Devi after extending benefit of doubt for offences under Sections 307, 307/149, 326 and 326/149 IPC, but convicted them for offences under Sections 323 and 324 IPC and had released them on probation, whereas convicted accused-appellants Bhagwan Sahai and Satish for offences under Sections 307, 307/34,

326, 326/34, 324 and 323 IPC. Having convicted the appellants for the above said offences, the trial court vide a separate order of even date sentenced them as under:-

U/s. 307, 307/34 IPC: Five years rigorous imprisonment, to pay a fine of Rs. 1000/- and in default thereof to undergo three months rigorous imprisonment each.

U/s. 326, 326/34 IPC: Three years rigorous imprisonment, to pay a fine of Rs. 500/- and in default thereof to undergo one month rigorous imprisonment each.

U/s. 324 IPC: One year rigorous imprisonment, to pay a fine of Rs. 200/- and in default thereof to undergo fifteen days rigorous imprisonment each.

U/s. 323 IPC: Two months simple imprisonment each.

3. Prosecution in order to prove its case had examined eighteen witnesses and produced and proved on record documents Exhibits-P. 1 to P. 28. The accused denied prosecution case in their statements under Section 313 Cr.P.C. and examined Dr. Suresh Chand Meena as D.W. 1 and Bhagwan Sahai Meena as D.W. 2.

4. Appellants were tried in case arising out of cross version. It is to be noted that in the occurrence, Kanchan father of both the appellants had died. Appellant Bhagwan Sahai, his mother Gulab Devi acquitted accused, Seema acquitted accused and appellant Satish had suffered injuries alongwith Jalli Devi. In respect of cross case, a separate appeal has been filed bearing D.B. Criminal Appeal No. 1255/2011. The trial court had given a finding that there was a free fight between both the parties and therefore, had convicted the accused for their individual liability.

5. In the occurrence, Kanchan Lal father of the appellants had received following injuries:-

"1. Lacerated wound with bleeding 6 c.m. x 1 c.m. bone deep on left parietal region of scalp.

2. Lacerated wound with bleeding 2 c.m. x 1/2 c.m. on occipital region of scalp."

6. Bhagwan Sahai appellant also received two injuries and the same were noted in the injury report as under:-

"1. Lacerated wound 3 c.m. x 1/2 c.m. x 1/2 c.m. on palmar aspect of base of left thumb.

2. Lacerated wound 1 1/2 c.m. x 1/2 c.m. x 1/2 c.m. on right parietal region of scalp."

7. Gulab Devi mother of both the appellants had also received two injuries and same are noted as under:-

"1. Lacerated wound with bleeding 1 c.m. x 1/2 c.m. x 1/2 c.m. on forehead.

2. Bruise (reddish) 10 c.m. x 2 c.m. over right shoulder."

8. Both the sides had taken a plea that the land in question where the occurrence had taken place is in their possession. It is to be noted that Jagram (P.W. 14) in written report (Ex. P. 24) had stated that the accused Bhagwan Sahai, Kanchan, Sriman, Anil, Sunil, Satish, Yadram, Ratanlal, Guddi Devi, Jalli Bai, Gulab, Santo Devi, Seema residents of Chandpur were having grudge with his family and they were extending threat to liquidate the family of the complainant. On 4.5.2008 at about 10.00 AM all accused came alongwith Lathi, Farsa, Kulhari, Danda etc. They arrived at the Bada of Jagram and caused injuries to the persons already sitting there, namely Jagram (P.W. 14), Kailash Chand (P.W. 13), Malli Devi (P.W. 6), Sajana Devi (P.W. 12). The above said injured had received serious injuries. The accused considering them dead had left the spot.

9. Dr. G.P. Meena (P.W. 1) had medico legally examined Kailash Chand (P.W. 13), Malli Devi (P.W. 6), Jagram (P.W. 14) and Sajana Devi (P.W. 12).

10. Dr. G.P. Meena (P.W. 1) on 4.5.2008 at 3.45 P.M. had medico legally examined Jagram (P.W. 14) and as per injury report (Ex. P. 5) had found following injuries on his person:-

"1. Incised wound 2 c.m. x 0.8 c.m. x 0.6 c.m. on mid parietal region vertical.

2. Bruise 10 c.m. x 6 c.m. on left shoulder joint.

3. Bruise 6 c.m. x 4 c.m. on right shoulder joint.

4. Abrasion 3 c.m. x 2 c.m. on right leg lower 1/3rd."

11. Sajana Devi (P.W. 12) had also suffered injuries and same are noted in injury report (Ex. P. 6) as under:-

"1. Bruise 6 c.m. x 4 c.m. on right shoulder joint.

2. Swelling with tenderness 6.8 c.m. x 5 c.m. on LS Spine region.

3. Complaint of pain in abdomen."

12. Malli Devi (P.W. 6) had also suffered injuries and following injuries were noted in injury report Ex. P. 3:-5

"1. Incised wound 2.5 c.m. x 0.9 c.m. bone deep on left side mid parietal region oblique.

2. Incised wound 4.5 c.m. x 1.5 c.m. bone deep on left side waist joint horizontal.

3. Swelling with tenderness 10 c.m. x 8 c.m. on left forearm upper 1/3rd.

4. Lacerated wound 3.2 c.m. x 0.8 c.m. x 0.6 c.m. on right wrist joint.

5. Swelling with tenderness 10 c.m. x 6 c.m. on right shoulder joint.

6. Swelling with tenderness 6 c.m. x 4 c.m. on left hand.

7. Complaint of pain in abdomen."

13. Kailash Chand (P.W. 13) also suffered eleven injuries and they were noted in Ex. P. 1 as under:-

"1. Incised wound 4.5 c.m. x 1.5 c.m. bone deep on mid occipital region.

2. Incised wound 4.6 c.m. x 1.6 c.m. bone deep on right side occipital region.

3. Incised wound 3.2 c.m. x 1 c.m. bone deep on left side occipital region.

4. Abrasion 1.5 c.m. x 1 c.m. on left shoulder joint.

5. Swelling with tenderness 8.6 c.m. x 6 c.m. on left shoulder joint.

6. Bruise 10 c.m. x 4 c.m. on left scapular region.

7. Abrasion 3 c.m. x 1.5 c.m. on right lower eye.

8. Bruise 3 c.m. x 1.5 c.m. on right temporal region.

9. Lacerated wound 1 c.m. x 0.8 c.m. x 0.6 c.m. on right forearm upper 1/3rd.

10. Swelling with tenderness 10 c.m. x 6 c.m. on left thigh lower 1/3rd.

11. Swelling with tenderness 8 c.m. x 7 c.m. on right thigh."

14. Dr. Ravi Mathur (P.W. 2) stated that he came to the conclusion that Kailash Chand (P.W. 13) had suffered fracture on his head.

15. Malli Devi (P.W. 6) in court stated that they were having dispute over the land with the accused. Accused party came armed. Kanchan exhorted a threat. Thereafter Bhagwan Sahai had caused injury on the head of Kailash Chand (P.W. 13), Satish gave a Tanchiya blow on the person of Kailash Chand (P.W. 13). Seeing the fight, Malli Devi (P.W. 6) and Sajana Devi (P.W. 12) ran to the spot to rescue their relations. The witness further stated that when police arrived at the spot, both Kailash and Jagram had received injuries.

16. Vishram (P.W. 7) stated that over some Bada dispute had arisen between Bhagwan Sahai and Jagram.

17. Supreme Court in Lakshmi Singh & Ors. v. State of Bihar [, (1976) 4 SCC 394] has held that if the injuries on the person of accused are not explained, it is to be assumed that prosecution has suppressed genesis and origin of the occurrence and thus, acquittal of the accused should be recorded. The relevant paras of the aforesaid judgment are as under:-

"This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue: and (2) that the injuries probabilise the plea

taken by the appellants. The High Court in the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In *Puran Singh v. The State of Punjab* Criminal Appeal No. 266 of 1971 decided on April 25, 1975 : which was also a murder case, this Court, while following an earlier case, observed as follows:

In *State of Gujarat v. Bai Fatima* Criminal Appeal No. 67 of 1971 decided on March 19, 1975: one of us Untwalia, J., speaking for the Court, observed as follows:

In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

- (1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.
- (2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.
- (3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case.

It seems to us that in a murder case, the 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."

18. Since both the parties, have withheld origin and genesis of the occurrence, it cannot be determined as to which party was aggressor. Thus, trial court has

rightly held that it is a case of free fight. However, trial court wrongly came to the conclusion that Jagram and Kailash accused appellants in connected D.B. Criminal Appeal No. 1255/2011 intended to cause death of Kanchan Lal, but Sajana Devi and Malli Devi have not shared the common intention with them. To us, this finding is not justified. Once the court come to the conclusion that it is a case of free fight, Section 34 IPC cannot be applied.

19. It was held by the Hon"ble Supreme Court in the case of Jumman & Ors. vs. State of Punjab [, AIR 1957 SC 469] as under:-

"(24). In such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, would it be correct to assume private defence for both sides? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict and has to be dealt with under S. 300, I.P.C., Exception 4.

(25). The matter has to be viewed in this way. It is clear that there was no pre-meditation and therefore when the contending factions met accidentally and attacked each other, the conflict resulted in a sudden fight, in the heat of passions, upon a sudden quarrel and without the accused having taken undue advantage or acted in a cruel or unusual manner. On the finding that both the parties had arms, there was no undue advantage taken by either. Hence Exception 4 to S. 300, I.P.C., applies with the result that the offence is under S. 304 (Part I), I.P.C."

20. A Division Bench of this Court in Buddhi & Ors. vs. State of Rajasthan [, 2007 (1) RCC 228], relying upon Dharman v. State of Punjab [, AIR 1957 SC 324] held as under:-

"13. Coming to the incident that occurred with deceased Saltu we find that he sustained injuries in the course of sudden fight ensued in the field of accused party. The complainant party was also armed with deadly weapons and as many as eight accused persons received lacerated and incised wounds on the vital parts. In Dharman vs. State of Punjab, , AIR 1957 SC 324 the Supreme Court held that when two such contending parties, each armed with sharp edged weapons, clashed and in the course of a free fight some injuries were inflicted on one party or the other, it cannot be said that either of them acted in a cruel or unusual manner and that the case against the accused falls within Exception 4 of Section 300 of the Indian Penal Code and the accused who caused the injury was guilty under Part I of Section 304 and not under Section 302 of the Indian Penal Code."

21. Having gone through the prosecution evidence, we are of the view that the trial court has rightly given a finding of free fight. In the facts and circumstances, due to non-impleadment of right of self defence, we cannot say with a definite opinion that from the case of prosecution itself right of self defence of property of accused or person is made out.

22. Taking into account the ratio of law laid down and totality of circumstances, we are of the view that conviction of the appellants Bhagwan Sahai and Satish @ Indraj cannot be sustained for offences under Sections 307 and 307/34 IPC. Since in a free fight without taking undue advantage accused had caused injuries, the case of the appellants will fall within the ambit of Section 308/34 IPC.

23. Hence, we alter conviction of the appellants from offences under Sections 307 and 307/34 IPC to offence under Section 308/34 IPC.

24. We are further of the view that in view of conviction of the appellants for offence under Section 308/34 IPC, their conviction for offences under Sections 326, 326/34 IPC cannot be sustained.

25. Consequently, we convert the offence qua the appellants under Sections 307, 307/34 IPC to Section 308/34 IPC. We set aside the conviction and sentence of the appellants for offences under Sections 307 and 307/34 IPC. We also record acquittal of the appellants for offence under Sections 326 and 326/34 IPC. However, the conviction of the appellants for offences under Sections 323 and 324 IPC is upheld.

26. Having done so, we are of the view that ends of justice will meet if the appellants are sentenced for offence under Section 308/34 IPC to two years rigorous imprisonment with a fine of Rs. 500/-, in default thereof to further undergo one month simple imprisonment. Sentence awarded by the trial court for offences under Sections 323 and 324 IPC is upheld. Sentence awarded to the appellants for all the counts shall run concurrently and they shall also be entitled to benefit of Section 428 Cr.P.C.

27. With the above modification in conviction and sentence, the present appeal stands disposed of.