
(2007) 10 AHC CK 0039
In the Allahabad High Court

Kanhai, Parasu Ram and Raghubir

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 11-10-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 324, 34

Citation : (2007) 10 AHC CK 0039

Hon'ble Judges : S.K. Jain, J; Amar Saran, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.K. Jain, J.—The three appellants, namely, Kanhai, Parasu and Raghuvir in this appeal have been found guilty by the I Addl. Sessions Judge, Moradabad vide his judgement and order dated 17.2.1082, passed in G.T. No. 503 of 1979 for the charges against them under suction 302 read with Section 34 I.P.C. Section 307 read with Section 34 I.P.C. and Section 324 read with Section 34 I.P.C. On the first count each of the appellants has been sentenced to imprisonment for life and on he second count each of the appellants has been sentenced to five years R.I. and on the third count each of the appellants was sentenced to one year"s R.I. However, the different sentences awarded to the appellants were ordered to run concurrently.

2. During pendency of appeal appellant Raghuvir and Kanhai died and their appeal stood abated vide order of this Court dated 14.7.2005.

3. The facts essential for the purpose of this appeal are as follows:

Shiv Lal the father of appellant Kanhai had transferred some plot in favour of Smt. Phoolwati wife of deceased Nanhoo. Appellant Kanhai and his sons appellants Parasu Ram and Raghuvir did not relish the transfer of land by the father of appellant Kanhai. Because of this the three appellants on the one hand and Shiv Lal and his other son Nanhoo on the other hand had strained relations. Appellant Kanhai was born from the first wife of Shiv Lal whereas Nanhoo

(deceased) was born from the second wife. Shiv Lal started living with Nanhoo (deceased). Appellant Kanhai had filed a civil suit against his father Shiv Lal which was pending in the court. This suit was filed for partition of ancestral property and was decreed on 13.2.1081. Appellant Kanhai was given 5/16 share.

4. The present occurrence took place on 18.1.1979 at about 9.00 a.m. when deceased Nanhoo along with the family members was ploughing the land, which was transferred by his father Shiv Lal in favou of his wife Phoolwati. His wife Phoolwati was also present along with Mohan Sharan, Smt. Nathia and Chiranji for picking up potatoes from the field. Appellant Kanhai (deceased) armed with taval and his sons appellant Parasu Ram and deceased appellant Raghuvir armed with Chhuri and knife respectively along with others Laxman and Tika Ram who were armed with Lal this came on the field of Nanhoo.

5. Tika Ram was the nephew of Kanhai and died during the trial and Laxman was the friend of Kanhai.

6. Appellants with the help of other two co-accused attacked Nanhoo with their weapons, who fell down in the field and when Phoolwati, Mohan Sharan, Smt. Nathia and Chiranji rushed to save Nanhoo, they were also assaulted by the three appellants and their companions. Hearing the alarm Pooran Singh, Babu, Kishori and many others arrived, who saved Nanhoo. The accused persons left the place of occurrence saying that they would see in future. In this occurrence Nanhoo, Chiranji, Mohan Sharan and Phooiwati suffered the injuries.

7. The written report of the occurrence Ext. Ka-1 was lodged by PW 1, Pooran Singh at the police station Suabhal on the same day at 1.50 p.m. The place of occurrence is about two kilo meters from the police station. Ail the injured were taken to the Civil Hospital Mordabad by Constable babu Ram Gangwar PW 8, where PW 6 Dr. Manju Rastogi medically examined them and recorded the dying declaration of Deceased Nanhoo. Injured Phoolwati and Mohan Sharan and injured Nanhoo were admitted in the Hospital. Nanhu succumbed to his injuries. On 19.1.1979 at 9.00 a.m. autopsy of the dead body of Nanhoo was conducted by Dr. A.H. Ambwani P.W. 9.

8. P.W. 4 Inspector Raghuvir Singh took up the investigation of the case and after recording the statement or the first informant Pooran Singh sent the injured for medical examination to the District Hospital. Thereafter he came to the place of occurrence, prepared site plan, Ext. Ka-4. He took into possession the blood stained and ordinary earth from the place of occurrence, prepared its memo. He had also arrested accused Laxman. Since Nanhoo had died, the case which was originally registered for the offence u/s 307 IPC. was converted u/s 302 I.P.C. and aiter recording the statement of the witnesses remitted the charge sheet against accused Kanhai, Parasu Ram and Raghuvir. Thereafter the investigation was taken up by PW 5 Mahendra Saxena, who after further investigation remitted the charge sheet against accused Tika Ram, who died during the trial.

9. The prosecution in order to prove its case examined the first informant Pooran

Singh as PW 1, alleged injured, Chiranji as PW 2 Head Constable Jaggo Singh as PW 3, Inspector Raghuvir Singh as PW 4, Second Investigating Officer Mahendra Saxena as PW 5, Dr. Manju Rastogi as PW 6, S.I., Suresh Chandra who prepared the inquest report and necessary papers for post mortem of deceased Nanhoo as PW 7 and constable Babu Ram Gangwar who had taken the injured to the Hospital as PW 8 and Dr. M.S. Ambwani PW 9 and Court Reader Shri Rafiq Ahmad of the Addl. City Magistrate who had recorded the dying declaration of Nanhoo as P.W. 10.

10. P.W. 1 and P.W. 2 are the witnesses of fact and the remaining are the formal witnesses.

11. P.W. 6 Dr. Manju Rastogi or, 18.1.1979 had examined the injuries of Nanhoo, Phoolwati, Mohan Sharan and Nathia. As per her statement she found the following injuries on the person of Nanhoo.

1. Incised wound 6 cm x 1 cm x bone deep with fresh bleeding on middle of forehead.
2. Incised wound 1.5 cm x 1 cm over right eye brow.
3. Incised wound 3.5 cm x 1.5 cm on the chin, just below the lower lip
4. Incised wound 3 cm x 1/2 cm on the left cheek.
5. Incised wound 10 cm x 6 cm on the right side of abdomen and 4 cm above the umbilicus at 11 o'clock position. Omentum and intestines were projecting out from this wound.
6. Incised wound 1 cm x 1/2 cm on the part of right fore arm about 5 cm below right elbow joint.

12. In her opinion all injuries were caused by sharp and cutting object and were fresh in nature. According to her, injury No. 5 was grievous in nature and the patient was admitted in the Hospital as his general condition was poor. She proved the injury report and it was marked Ext. Ka-10. She admitted the suggestion that the injuries found by her could come the same day at about 9 a.m. As regards the weapons were concerned, she conceded that injuries could have come by knife, tabal or chhura. She also conceded that the injuries noted by her were sufficient to cause death of the injured in the ordinary course or nature. Apart from that, she also conceded that the injured after getting the injuries may have become unconscious.

13. Following injuries were found by her on the person of Smt. Phoolwati and she was identified by the same constable.

1. Incised wound 7 cm x 3 cm on the right shoulder region muscle deep with profused bleeding.
2. Incised wound 5 cm x 3 cm on the right scapular region and 3 cm below injury No. 1. It was muscle deep with profused bleeding.

3. Lacerated wound 4 cm x 1 cm on the right parietal eminence, 9.5 cm above the right ear.

4. Incised wound 4 cm x 1 cm on the top of head, 11 cm above left ear.

5. Incised wound 3 cm x 1/2 cm on the palm of left hand x muscle deep.

6. Incised wound 2.5 cm x 1 cm on the left shoulder region x muscle deep. She opined that all injuries, except injury No. 3, were caused by some sharp and cutting object. Regarding injury No. 3 she stated that it was caused by some blunt and heavy object.

14. As regards the age of the injuries was concerned, she stated that they were fresh and the patient was admitted for detailed examination and X-ray of chest and skull was advised.

15. Following injuries were found on the person of Mohan Saran, who was also identified by the same constable.

1. Incised wound 3 cm x 1 cm on the left flank region of abdomen 4 cm above the left iliac bone.

16. She deposed that it was fresh and bleeding was present and wound was not probed. According to her, injury was caused by some sharp and cutting weapon and x-ray of abdomen was advised. Patient was also admitted by her for observation and treatment. She opined that the injury found by her could have come either by tabal or by knife on 18.1.79 at about 9 a.m. or 9.30 a.m. He proved the injury report and it was marked Ext. Ka-12.

17. Following injury was found on the person of Smt. Nathia and she was identified by the same constable.

1. Incised wound 3 cm x 1.5 cm on the palm of right hand near the right thumb and it was muscle deep with fresh bleeding present.

She stated that the injury was simple and it could have come the same day between 9 or 9.30 a.m. by some sharp and cutting weapon like knife or tabal.

She proved the thumb impressions and mark of identification which she had noted on the injury report (Ext. Ka 13).

18. She also proved the injuries of Chiranjilal, who was present in Court. They were as follows:

1. Incised wound 1 cm x 1/2 cm on the left inguinal region x muscle deep with fresh bleeding present.

2. Two linear abrasions 1 cm x 1 1/2 cm long and 1 cm apart on the top of head.

19. In her opinion, the two injuries were simple in nature and the first was caused by some sharp and cutting weapon like knife or tabal and the second injury could have been caused by some sharp pointed object like knife, AS in the

case of others, she opined that the injuries could have come the same day between 9 or 9.30 A.M. She proved the thumb impression and the mark of identification which She had noted in the injury report (Ext. Ka 14).

20. Apart from proving the injuries, she stated that she had reported for the dying declaration of the three injured by a Magistrate and she proved the letter, which she had written and which was marked Ext. Ka 15.

21. In her presence, Nandu had gave his dying declaration at about 5.45 P.M. and Sri Rustagi Magistrate had recorded the said statement. She proved the certificate which she had given that the mental condition of the patient was satisfactory and he was able to give his statement to the Magistrate. She proved the said certificate and it was marked Ext. Ka 16. She explained that before the start of the dying declaration, every one was asked to leave the place and the Magistrate had recorded the dying declaration in her presence. She also proved the Certificate (Ext. Ka 1&) which she had given after the Magistrate had completed the dying declaration of Nanhu. She also proved the thumb impression of Nanhu on the said dying declaration and she had attested the same. She proved her endorsement regarding it and it was marked Ext. Ka 18.

22. As the Magistrate had noted the dying declaration of Mohan Saran and Smt. Phoolwati, also so she had given certificates regarding their mental condition also and the same were proved as Ext. Ka 19 and Ka 20.

23. Dr. H.S. Ambawani (P.W. 9) had done the post mortem of dead body of Nanhu and proved the same. According to him, he was Medical Superintendent, Central Police Hospital, Moradabad and the dead body was produced before him by Constable Dinesh Chand and Jia Lal and the dead body was in sealed condition.

24. According to him, the age of deceased Nanhu s/o Shiv Lal was about 45 years and he had died in District Hospital, Moradabad on 19.1.1979 at about p.m. Rigor mortis was present on both extremities and post mortem staining was present. Bandages were removed and following ante mortem injuries were found:

1. Punctured wound with clean cut margins 1 1/2 cm x 1/2 cm x 3 cm on the back of right fore arm 7 cm from the back of the elbow.
2. Three abrasions 1/2 cm x linear; 1/2 cm x 1/4 cm; 1 cm x linear on the back of the loft hand, below the ring, middle and index fingers.
3. Stitched wound 4 cm x 2 cm deep up to the bone on the front of the chin, obliquely with cut marks on the bone.
4. Stitched wound 5 cm x 2 1/2 cm x bone deep, margins cut and the frontal bone cut and fractured underneath over the forehead, above the root of the nose.
5. Stitched wound 2 cm x 1 cm x bone deep above the right eye brow, cut mark seen on the bone.

6. Abrasion 1 /4 1 cm over the union of collar bone.
7. Stitched wound 2 1/2 x 1 cm x bone deep on the left cheek, but marks seen on the bone.
8. Two linear abrasions going parallel to each other, at a distance of 3 cm on the right side of chest.
9. Punctured wound 6 cm x 4 cm and deep up to the abdomen on the right side below the coastal margins as shown in the diagram.
25. Intestines were coming out of the wound. Membranes of the skull were found ruptured, under the injury of the skull. Peritoneum was cut under the abdominal injury. Stomach was empty. Liver on the right side in the lower part was found cut under the abdominal injury. Cut mark was 4 cm x 3 cm x 2 1/2 cm.
26. In the opinion of the doctor, the deceased died of syncope, as a result of shock and haemorrhage due to injury of liver.
27. He proved the post mortem report and it was marked Ext. Ka- 26.
28. As regards the punctured wounds were concerned, he explained that they could have come by knife or "chhura". In the same way, he explained that the injuries in which bones were cut, could have come only by a heavy cutting weapon like tabal. He also opined that the . injuries found by him could have caused the death of the victim in the ordinary course of nature.
29. Dr. Manju Rastogi PW 6 has also proved the dying declaration recorded by her of deceased Nanhu at the time of medical examination by her. As per dying declaration of Nanhu this occurrence had taken place at 12.00 noon when accused Kanhai with his two sons Parasu Ram and Raghuvir came to the field of Nanhu and assaulted him. It has been specifically stated by him that he was alone when the assault was made on him and he was assaulted by tabal and lathi. He also stated that when Chiranjii and Mohan Saran came to his rescue they were also assaulted by the accused persons. He further stated that his father has transferred five bighas of land in the name of his wife and himself and Kanhai, Parasu Ram and Raghuvir wanted to take forcible possession of this land. Giving the details of the occurrence he stated that when he reached this agricultural field none was present there and the accused started assaulting him and left the field thinking that he was dead.
30. As stated above, the two witnesses of fact namely, Pooran PW 1 and Chiranjii PW 2 received injuries in this occurrence. PW 1 Pooran deposed that appellant Kanhai was Sala of his brother in law's cousin. Therefore, he knew him and his son. On the day of occurrence he had come to the village Nai Basti at the house of his father in law Jai Ram to meet him and he went to the field where his father in law Jai Ram was working. He further stated that four accused Kanhai, Parasu Ram, Raghuvir along with Laxman reached the field of deceased Nanhu., where Nanhu was ploughing the field with tractor, thereafter he repeated the

prosecution version and proved the written report Ext. Ka-1 made by him.

31. PW 2 Chiranji has corroborated the version given by PW 1 Pooran in his examination in chief.

32. The accused persons in their statement u/s 313 Cr.P.C. denied the prosecution version.

33. Accused Kanhai stated that deceased Nanhu was destroying their agricultural field of Dhaniala and Turai. He objected to the same. He along with his mother and father were assaulted. Tika Ram saved their lives. Similar statement was made by Parasu Ram. Laxman denied his presence at the place of occurrence.

34. There was a defence version and in support of their defence a copy of the FIR Ext. Kha-2 of case crime No. 21A u/s 324, 323 I.P.C. P.S. Sambhal was filed. This report was made by accused Kanhai at the police station and as per this report on 18.1.1979 at 12.00 p.m. his brother Nanhu was destroying Dhaniala and Turai crop in his field by the tractor, when he objected to the same Nanhu, Chiranji, Mohan Saran and wife of Nanhu armed with lathis and Gandas started beating him. They also did Marpet to save their life in this occurrence he along with his son and his wife suffered injuries and investigation was going on between him and Nanhu.

35. Ext. Kha-3 is the statement of Dr. Bhagwat Swarup recorded in ST. No. 325 of 1980, State v. Chiranji was filed. As per this statement on 18.1.1979 this doctor had medically examined Parasu Ram son of Kanhai Lal at 5.45 p.m. He was brought for medical examination by constable Lakhan Singh. He had found the following injuries on the body of Parasu Ram:

(1) Abraded contusion 1 cm x 1 cm with swelling of 3 cm x 3 cm on the left side of scalp 9 cm above the ear.

(2) Contusion 3 cm x 2 cm on back of left side of chest on scapula along with swelling in area of 4 cm x 3 cm around this injury and in the opinion of the doctor these injuries were 1/4 day old and were caused by blunt weapon.

On the same day at 5.55 p.m. he had examined Chandrawati wife of Kanhai and found the following injuries on her person:

(1) Lacerated wound 2.5 cm x 1/2 cm x bone deep on right side of occipital region just right to mid line obliquely horizontal, oozing was present on cleaning the wound.

(2) Traumatic swelling 5 cm x 4 cm on the back right side of chest on scapula redish in colour.

(3) Multiple abrasion in area of 9 cm x 9 cm on the posterior and medial surface of fore arm 3 cm above the wrist joint. In the opinion of the doctor those injuries were also caused by some blunt weapon, like lathi and 1/4 day old.

36. On the same day at 6.10 p.m. he had medically examined Kanhai Lal son of

Shiv Lal and he found the following injuries on his body.

(1) Incised wound 1/2 cm x; 1/4 cm x 3/4 cm on front of right fore arm 2 cm above the wrist joint. Oozing was present along with the swelling in an area of 6 cm x 6 cm, x-ray was advised.

(2) Contusion 4 cm x 2 cm on top of right shoulder joint, redish in colour.

(3) Abraded contusion 1 cm x 1 cm on the dorsal surface of left hand. These injuries were also in his opinion caused by some sharp edged weapon like Gandasa and blunt weapons like lathis.

37. Copies of the injury reports of the injured were also filed which are Ext. Kha-4, Kha-5 and Kha-6 on record.

38. The learned Trial Judge relying upon the testimony of the two injured witnesses discarded the defence version and recorded the finding of conviction against the accused/appellants as stated above.

39. We have heard the learned Counsel for the appellants and the learned AGA.

40. Learned Counsel for the appellant has submitted that the prosecution has not furnished any explanation for the defence injuries. There is no mention of any injury suffered by the accused persons in the first information report. PW 1 Pooran in his examination in chief before the court improving from his earlier version given to the Investigating Officer has stated that Chiranji was having a small lathi in his hand and he had wielded it against the assailants. P.W. 2 though admitted that a cross case was pending, but in his statement he denied that any injuries were suffered by Chandrawati, Kanhai and Parasu Ram in this occurrence. It has also been argued that Nanhu in his dying declaration has given the time of occurrence as 12.00 hours and as per the defence case also this occurrence had taken place at 12.00 hours and as per prosecution, case this occurrence took place at 1.50 p.m. Thus, the learned Counsel for the appellants has contended that the prosecution has presented a distorted version of incident. It is fully established on record that the three persons from the side of the accused had suffered; injuries as is clear from the F.I.R. made by Kanhai and statement of Dr. Bhagwat Swarup. The injuries suffered on the side of the accused are not superficial and some of them are on the vital parts of the body Thus the learned Counsel submitted that in all probability the occurrence took place in the manner alleged by the defence and since the prosecution has suppressed the true facts and did not explain the injuries of accused/appellants, therefore, they are entitled for acquittal.

41. Per contra the learned AGA submitted that it is clear form the statement of Dr. Rastogi as stated above that deceased Nanhu suffered six injuries, all were incised wounds. Phoolvati had also suffered six incised wounds and Mohan Saran had sukered one incised wound, Nathia had also suffered one incised wound and Chiranji Lal had also suffered one incised wound and two linear abrasions, while as per defence version Parasu Ram had suffered only two contusions,

Chandrawati wife of Kanhai had suffered only three injuries and Kanhai himself suffered three injuries. Thus it is clear that the appellants were the aggressors and the learned Trial Court committed no error in recording the finding of conviction against the accused/appellants.

42. As far as the factum of death Nanhu is concerned the learned Counsel for the appellant has neither disputed nor assailed the same. This fact is also otherwise wholly established from the post mortem report and statement of Dr. Manju Rastogi, who conducted the medical examination before his death and statement of Dr. H.S. Ambwani PW 9 who conducted the post mortem on the dead body of deceased Nanhu.

43. It is also not disputed that the incident had occurred in the agricultural field which was claimed by the appellants and Nanhu.

44. The question as to how far the prosecution story is not proved on account of non explanation of injuries of the accused has to be considered in this appeal.

45. In the case of Mohar Rai and Bharath Rai Vs. The State of Bihar, it was field by the Apex Court that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witnesses is not proved or at any rate not vvholly proved and the injuries on the side of the accused probabalise the plea taken by the accused.

46. The same question again came up for consideration before the Apex Court in the case of Ram Sunder Yadav and Others Vs. The State of Bihar, The Hon''ble Supreme Court has observed that if the evidence is clear, cogent and creditworthy, then non explanation of the injuries of the accused car; not be made basis to discredit the prosecution case.

47. In the case of Narain Singh and Others Vs. State of U.P., relying upon the above) law laid by Hon''ble Supreme Court it was held that where the deceased died due to stab injuries and previous enmity between the deceased and the accused persons was admitted and from the facts it was revealed that the deceased and his companions had assaulted the accused persons, the non explanation of the serious injuries sustained by one of the accused suggests that the witnesses suppressed the true facts and the accused are entitled to acquittal.

48. Keeping in view the above principles, we have carefully scrutinised the evidence on record of this case and from the perusal of the F.I.R. as well as from the statement of the, witnesses (PW 1 and PW 2), it is clear that deceased Nanhu and deceased appellant Kanhai were the real brothers. The father of Kanhai and Nanhu had transferred some land in favour of the wife of Nanhu Smt. Phoolwati, because of which there was enmity between the deceased and the accused persons. As per the prosecution version this occurrence took place on 18.1.1979 at 9.00 a.m., but from the dying declaration of Nanhu it appears that he stated in his dying declaration that this occurrence had taken place at 12.00 noon. As the per the F.I.R. made by the accused Kanhai also the occurrence took

place at 12.00 noon. Perusal of the F.I.R. and the statement of the witnesses of fact suggests that there is no explanation of the injuries suffered by the accused persons. The injuries as noted above suffered by the accused persons are not superficial, on the other hand in the F.I.R. lodged by accused Kanhai it appears that there is explanation of the injuries suffered on the side of the prosecution. It has been stated in the FIR Ext. Kha-2 that the accused persons did Marpeet with Nandu, Chiranji, Mohan Saran and wife of Nanhu in their self defence, when they were assaulted.

49. Thus from the circumstances appearing in this case, the cleanse plea appears to be more probable and the accused persons had a right of self defence, in our opinion PW 1 and PW 2 deliberately with oblique motive suppressed the true facts and have not given a correct account of genesis of the origin of the occurrence. We are therefore, of the opinion that the accused/appellants are entitled to the benefit of doubt.

50. For the reasons assigned above, the appeal is allowed and the judgement and order of the Trial Court convicting and sentencing the appellant Parasu Ram along with two other deceased appellants is set aside. Appellant Parasu Ram is acquitted of the offences charged for. He is in jail. He shall be released forthwith, if not wanted in any other case or crime.

51. We also appreciate the valuable assistance rendered to this Court by the learned Counsel, Sri Amit Singh, who was appointed as Amicus Curiea for the appellants. He shall be paid Rs. 2500/- as remuneration.

52. Let a copy of this judgement be sent to the court concerned for information and compliance within a week. Compliance report shall be submitted by the court concerned within a month from today.