

(1965) 10 GUJ CK 0006
In the Gujarat High Court
Case No : Criminal Appeal No. 9 of 1964

Koli Gator Sura

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 27-10-1965

Acts Referred:

Cattle Trespass Act, 1871 — Section 10
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 10, 100, 102, 103, 24

Citation : AIR 1966 Guj 221 : (1966) CriLJ 994 : (1966) 7 GLR 357

Hon'ble Judges : N.G. Shelat, J; A.S. Sarela, J

Bench : Division Bench

Advocate : H.P. Shukla and N.C. Trivedi, for the Appellant; G.T. Nanavati, Asst. Govt. Pleader, for the Respondent

Judgement

1. Koli Gator Sura, accused No. 1 and his two brothers Koli Jaga Sura and Koli Khima Sura were tried by the Sessions Judge of Surendranagar on a charge of murder of one Karamshi of village Kora in Taluka Limbli at about 12 noon on 27-7-1963 for an offence u/s 302 read with Section 34 of the Indian Penal Code. All the accused came to be acquitted in respect of the charge u/s 302 read with Section 34 of the Indian Penal Code. Accused No. 1 was, however, convicted and sentenced to suffer imprisonment for life for an offence punishable u/s 302 of the Indian Penal Code. It is against that order of conviction and sentence passed against him that the accused No. 1 alone preferred an appeal. No appeal was filed against the order of acquittal of accused Nos. 2 & 3 in the case.

At about 12 noon on 27-7-1963 deceased Rabari Karamshi Gokol was grazing his buffaloes in the padter land of field hearing survey No. 34 of one Bahadur Khoda Bihima Nathu as also Sajan Thaver were similarly grazing their cattle in that field. At about 12 noon accused No. 1 and his two brothers Jaga Sura and Khima Sura, who were accused Nos. 2 and 3 in the trial Court, came up running and they were armed with having iron-shod sticks (Kadiali sticks). They started giving abuses to Karamshi and as Bhima Nathu asked them not to give such

abuses, accused No. 1 Gator gave a stick blow which caused injury on the head of Karamshi Gokal. Jaga Sura is then said to have given a stick blow on the head of Karamshi, and as a result of these injuries Karamshi fell down bleeding. Khima Sura is then said to have given a blow with a stick that he had which hurl Karamshi on his back. All three of them had then run away from that place towards the village. The deceased was taken home. Bhima had thereafter gone to the Police Patel Dadbhai and there his first information report regarding the incident came to be recorded. After recording the same at about 4-30 p.m. the Police Patel gave that report to Bhima Nathu for taking it to the police station at Chuda. The injured person Karamshi was then sent with Head Constable Jambha to Limbdi hospital and Shri Mana proceeded to the village Korda where he arrested all the three accused in the presence of panchas, and the sticks, articles Nos. 1 and 2, were attached from them.

At that time, accused No. 1 Gator Sura had filed a complaint against Karamshi Gokal, Sajan Thaver and Bhima Nathu. In that complaint he had stated that he had sown Juwar crop only 20 or 26 days before that day and that when he had gone for a watch at about 12 noon that day, he saw cows and buffaloes of Rabari Karamahi Gokal, Rabari Bhima Nathu and Rabari Sajan Thaver grazing in Juwar crop in his field and those three persons were standing away from one another. On seeing that he went to Rabari Karamshi and told him as to why he was grazing his cattle in his field and at the same time told him to drive his cattle to the cattle-pound. According to him, an exchange of words took place between them and at that time Rabari Karamshi aimed a stick blow on him, but as he raised his stick with a view to protect himself from that blow he received a slight injury on his lip. Karamshi is further said to have inflicted another blow with a stick that he had which hurt him on his right leg. He has then stated that his clothes were stained with blood on account of the injuries received on his lip and leg by him. Going further, he has stated that in that scuffle Rabari Karamshi had received a stick blow from him. By about that time Sajan Thaver and Bhima who were standing at a distance rushed towards him and consequently he ran away out of fear of being beaten by them. On seeing this scuffle, according to him, his brothers Jaga Sura and Khima Sura and two other persons Jaga Noti and Jaga Mansang came up and met him on the way. All of them, however, returned to the village.

Karamshi was taken to the hospital at Limbdi for treatment of his injuries where he expired at about 11-55 on 28-7-1963. The Post Mortem Examination was then made and the external injuries as well as the internal injuries including an oblique irregular and triangular fracture of the parietal and temporal bones left side 4" x 2" in size were duly recorded. After finishing the investigation of the case, the charge-sheet against the accused was sent up to the Judicial Magistrate, First Class, at Surendranagar, who after making necessary inquiry, committed the accused to stand their trial for an offence u/s 302 read with Section 34 of the Indian Penal Code before the Sessions Court at Surendranagar.

The Sessions Judge, on a consideration of the evidence adduced in the case, found that the prosecution failed to establish the charge of all of them having common intention to commit murder of Kabari Karamshi Gokal and that all of them were consequently acquitted in respect of the charge u/s 302 read with Section 34 of the Indian Penal Code. He, however, held that the appellant accused No. 1 had given a blow with the stick which he had, on the head of deceased Karamshi and that since that blow was fatal, he was liable for the offence of murder punishable u/s 302 of the Indian Penal Code. With regard to the various points raised by the defence, the learned Sessions Judge found that the act of accused No. 1 was not covered by any of the exceptions to Section 300 of the Indian Penal Code and that, at any rate, he has failed to prove the exercise of his right of private defence so as to be entirely exonerated of the offence in question by reason of Section 96 read with Section 100 Clause (2) of the Indian Penal Code. In the result, while accused Nos. 2 and 3 came to be acquitted, the Appellant-accused No. 1 was convicted and sentenced, for the offence of murder u/s 302 of the Indian Penal Code, to imprisonment for life. It is against that order of conviction and sentence passed against him that he has preferred this appeal.

The fact about Karamshi having met his death in the morning of 28-7-63 as a result of some injuries caused on his head at about 12 noon of 27-7-63 has not been in dispute. The evidence of Dr. Vaidya Ex. 12 read with the Post Mortem Notes prepared by him at Ex. 13 amply establishes the fact about his death having resulted on account of shock and haemorrhage due to the fracture of the skull and injury to the brain. Mr. Shukla, the learned advocate appearing for the appellant-accused No. 1, with regard to the evidence of the two eye-witnesses Bhima and Sajan, had stated in the High Court that their evidence might be accepted inasmuch as one injury was said to have been caused by the appellant which hurt him on his head. That had been admitted by the appellant-accused No. 1, though not clearly in his statement recorded u/s 342 of the Criminal Procedure Code before the learned Sessions Judge, but in his complaint which came to be given at about midnight time on 27-7-1963 to the PSI Shri Rana.

N.G. Shelat, J.—After slating the facts as mentioned above, his Lordship proceeded): Thus Mr. Shukla has proceeded to argue before us on the assumption that one stick blow was given by the appellant-accused No. 1 which hurt Karamshi on his head at about 12 noon on 27-7-63. He has, however, advanced two contentions before us. The first is that in the Held bearing survey No. 25 belonging to the appellant, there was standing Juwar crop and the deceased Karamshi had taken his cattle for grazing, and in fact had caused damage to his crop. It was on hearing or coming to know about it that he went there and as he found Karamshi as also his cattle grazing in his field, and thereby committing trespass and causing mischief, he had even right to take or ask Karamshi to have his cattle taken to the cattle-pound & when he asked him to do so, not only he refused but on the contrary began to beat him and it was that way that as he apprehended that he would cause grievous hurt or the like by

reason of his having an iron-shod stick with him, that he had, in exercise of his right of private self defence, given a blow with the stick that he had which hurt him on his head. He is, therefore, according to him, completely exonerated of any liability for the injury caused to Karamshi on his head. Another contention made out by him is that now with the finding of the learned Sessions Judge that there was no common intention on the part of all the three accused to bring about the death of Karamshi, and when the charge against him remains in respect of his having brought about his death by reason of an injury caused to him with a stick, the liability or otherwise of the appellant would arise out of his own act alone. Since that act was in respect of only one injury by him with stick, though no doubt, on his head, but when the evidence led by the prosecution shows that there were two injuries caused on the head of deceased Karamshi and when it is not clear from evidence as to which of the two blows brought about his death, he can be attributed with the minimum intention or knowledge regarding his act, and his liability cannot therefore be more than that of an offence of voluntarily causing hurt with a stick so as to be punishable u/s 323 of the Indian Penal Code and not for an offence of murder u/s 302 of the Indian Penal Code. Before we go to the first point raised by Mr. Shukla with regard to the exercise of the right of private defence, we have first to find out as to for which offence, in case we come to the conclusion that the plea of self-defence is not available or is not established, he would be guilty of.

2. Now in respect of the main charge u/s 302 read with Section 34 of the I.P.C. against all the three accused with regard to the death of Karamshi it has been found by the learned Sessions Judge as not established, and all of them are acquitted in respect of that charge. Thus there exists no case of common intention contemplated in Section 34 of the I.P.C. shared by this appellant with any other persons, and consequently the question of liability would obviously turn on the act individually committed by the appellant. It is amply established, and even in respect of which there is no dispute, that the appellant had an iron-shod stick, and it was with that stick that he had given a blow which hurt Karamshi on his head in the noon of 27-7-63. That injury is taken as fatal by the learned Sessions Judge and it is that way that he is found guilty of an offence of murder of Karamshi. It was urged by the learned Assistant Govt. Pleader that the learned Sessions Judge has found that only one blow was on his head, as in respect of the other blow on him, in view of the medical evidence, he has acquitted accused No. 2. While it is one thing to acquit a person in respect of any such act, it is another to say that therefore there remained one injury and since it was caused by the appellant, it being fatal, he would be guilty u/s 302 of the I.P.C. We have first to examine as to how many injuries were found on his head, and if they were two, and the medical evidence is consistent in that respect, it is obvious that the liability of the appellant cannot be as is sought to be made out by the learned Assistant Govt. Pleader and found by the learned Sessions Judge. The story in the first information report Ex. 5 was given by eye-witness Bhima at about 4-30 p. m. on that very day before the Police Patel and it clearly sets out

that while this appellant had given one blow with a stick on the head of Karamshi, one other blow with a stick was also given by his brother Jaga Sura accused No 2 which hurt him on his head. Bhima has also stated the same thing, and that again finds support from another eye-witness Sajan examined in the case. According to Sajan's evidence while Gator Sura inflicted one stick blow on the head of Karamshi, Jaga Sura inflicted a blow which hurt him above the eye of Karamshi and then Karamshi fell down on the ground. The third eye-witness is Pamu Versi of about 10 years of age. She is the daughter of the sister of Bhima, and she has also given similar evidence in the case. Both these witnesses are, however, not so very clear as to on what side, whether the right side or the left side, the blows had fallen on Karamshi. The fact, however, remains that the case of prosecution as disclosed from the evidence of Bhima and others was about two blows given on the head of Karamshi --one by the appellant and the other by accused No. 2. If we then turn to the evidence of Dr. Vaidya, he does not say that the injury found on the head of Karamshi was as a result of only one blow as thought by the learned Sessions Judge. According to him, the injury noticed by him was possibly by one or two blows. Since it created doubt in his mind about the number of blows Karamshi had received on his head and as accused No. 2 was said to have given a blow on his Forehead, he came to be given the benefit of doubt in that respect. Now both blows were given by instrument like stick. Dr. Vaidya's evidence further shows that the swelling was 5" x 3" and it may be the result of two injuries, as according to him the swelling of the two injuries might have connected each other. If the two injuries were just near each other they would result in only one swelling. In other words, all along the case of the prosecution was, and which also was borne out by the medical evidence, that the injuries on the head of Karamshi were as a result of the two blows given on his head. The witnesses may not be able to say clearly as to on what side and what part of head these blows had fallen. At any rate, it can be easily said that the injuries on head were as a result of two blows with sticks, and at any rate the evidence does not rule out the same by establishing that only one blow was given on the head of Karamshi. In those circumstances, after accused No. 2 has been acquitted of the charge, it would hardly lie in the mouth of the prosecution now to say that the medical evidence tends to suggest about only one injury being caused on the head and that since that injury was caused by the appellant, he must be held liable for the death resulting therefrom. Going further, which of the two blows was fatal is in no way clear and obviously cannot be so clear for the reason that Dr. Vaidya has all along remained in a doubt as to whether the injury found on the head of Karamshi was as a result of one blow or two blows Nor is it possible to make out as to on what particular part of the head the injury was caused by the appellant and the other by another person. When such is the position, it cannot be said that it was by reason of the blow given by the appellant that the entire injury was caused and that alone brought about the death of Karamshi. The benefit arising out of such a doubtful position would obviously go to the accused in the circumstances of the case. The offence in that respect for which the appellant can be held responsible would be on the basis of

the minimum intention actuating his act and thereby giving rise to his liability for the same. It was in this connection urged by Mr. Nanavati, the learned Assistant Govt. Pleader appearing for the State, that the appellant was armed with an iron-shod stick and that when he chose to give a blow with it on his head a very vital part of the body, he should be taken to have intended to kill him and that in that event even if he had given one blow, his act should be taken to have brought about his death as a result thereof so as to be liable for an offence u/s 302 of the I.P.C. It was also said that it is immaterial whether the other injury caused on the forehead contributed to his death. A blow with such an instrument on such a vital part of the body is in all probability likely to bring about his death, and that, in any view of the case, according to him, the offence for which he is liable would be one u/s 302 of the I.P.C. This argument lacks the appreciation of a very obvious fact that once the Court came to the conclusion that all the accused did not share any common intention to cause death of Karamshi, the individual liability with regard to his Individual act would arise. Besides, it cannot be said on the evidence as it stands, with any certainty that the blow given by the appellant was by Itself so fatal as to bring about his death. It is possible that both the blows together may have a cumulative effect to result in his death. It may well be that second blow which was alleged to have been given by another accused and which hurt deceased Karamshi on his forehead may have been fatal, or had even accelerated or led to his death which one single blow may not have brought about his death. The question of intention to cause his death, besides, can be easily ruled out in the circumstances of this case as the quarrel was of a sudden nature arising out of the suspicion about the cattle of Karamshi having caused damage to the crop of the appellant in his field. Besides, they bore no enmity and no grudge whatever against each other. In no case, therefore, the argument of the learned Assistant Govt. Pleader can be accepted to say that the appellant intended to cause his death or intended to cause such bodily injury which was sufficient in the ordinary course of nature to cause his death. On the contrary, in such circumstances when a person is said to have given one blow with a lathi on the head of the deceased, it has been held in several cases that one can only impute knowledge that such an injury was likely to cause death and the offence would that may fall u/s 304 part II of the I.P.C. In *Chamru Budhwa Vs. State of Madhya Pradesh*, , the accused was found to have given one blow with a lathi on the head of the deceased, and the Supreme Court held that when the fatal injury was inflicted by the accused on the head of the deceased by only one blow it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as was likely to cause death. That act appears to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death, within the meaning of Part II of Section 304 of the Penal Code. In other case where a blow was given with a hockey stick on the head of the deceased, the accused was found to be guilty by the Supreme Court in *Willie (William) Slaney Vs. The State of Madhya Pradesh*, , for the offence under second part of Section 304 of the I.P.C. More often, it would

depend on the force used as a single blow may or may not be sufficient to bring about his death. In the present case, however, we are not required to go so far for the obvious reason that it cannot be said to have been established beyond any reasonable doubt that it was the appellant's blow which alone brought about the death of Karamshi so as to hold him liable for an offence u/s 304 Part II, much less, for holding him liable u/s 302 of the I.P.C. as urged by the learned Assistant Govt. Pleader before us. When it is not possible to find out as to which of the two blows was fatal, in absence of any common intention shared by him with any other person, he can only be saddled with the liability on the principle of attributing to him the minimum intention or knowledge for the act committed by him. In fact, we have taken a similar view very recently in case of Nazir v. State of Gujarat, Criminal Appeal No. 1091 of 1964 (Guj.), judgment whereof was delivered by us on 13-9-1965. In that case we found that there were two blows on the head of the deceased and the prosecution evidence established only one blow having been given with an axe by the accused-appellant. There were, however, two injuries on his head one of which an incised wound caused by an axe, and the other also on head with a lathi stick, and it was further found that it was not possible to say with certainty as to which of the two injuries found on his head was fatal. On an application of the principle of minimum liability arising out of attributing to him minimum intention or knowledge in respect of an injury caused on the head of the deceased, the appellant was held liable for an offence of voluntarily causing hurt with an axe u/s 324 of the I.P.C. The same principle can well govern the present case and the liability that way arising of the appellant for his act would be one for an offence of voluntarily causing hurt, with any hard blunt substance like a stick. Ordinarily no doubt if the blow was given with an ordinary stick on the head, the liability would be one u/s 328 of the I.P.C. But we find that the stick used by the appellant in causing that injury on his head was a bamboo stick having an iron-shod. That iron-shod adds to the gravity of the weapon which otherwise would be a simple one, and it is that way that we are inclined to hold it to be a dangerous one if used as a weapon for committing an offence. Section 324 of the I.P.C. refers to "voluntarily causing hurt by means of any instrument of shooting, stabbing or cutting, or any instrument which if used as a weapon of offence, is likely to cause death," A stick becomes a dangerous weapon, by reason of its iron-shod at its top, and when that part of a stick is used as weapon of offence, it is likely to cause death, and that the offence committed with such an instrument would fall u/s 324 of the I.P.C. It can stand in line with other type of instruments referred to in Section 324 or 326 of the I.P.C. This aspect of the case is lost sight of by the learned Sessions Judge, as he has proceeded on the basis that it was one blow and that it was that one blow given by the appellant which had proved fatal so that he can be liable u/s 302 of the I.P.C. We, therefore, alter that part of his finding and hold that the appellant would only be liable for an offence of voluntarily causing hurt with a dangerous weapon as to fall u/s 324 of the I.P.C.

3. The further question that arises to be considered is as to whether the

appellant is exonerated from his liability of having caused injury on the head of deceased Karamshi, on the plea of an exercise of the right of private self-defence u/s 96 of the I.P.C. In that respect, it is hardly essential to show that the burden of proving the exercise of such a right falling within any of the general exceptions such as one u/s 100 of the I.P.C., would obviously be on the appellant, in view of Section 105 of the Indian Evidence Act, though no doubt the initial burden of establishing the causing of an injury to the deceased has got to be discharged by the prosecution. Section 106 of the Indian Evidence Act provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general Exceptions in the I.P.C., or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances. Such burden of proof on the accused would be no-more-than that on a party in a civil proceeding as observed by the Supreme Court in Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, . The initial burden that lay on the prosecution is already established and inasmuch as the appellant is, as already found hereabove, liable for on offence u/s 324 of the I.P.C. That liability would however depend upon the proof or otherwise of the right claimed by the appellant. That right can be established either by leading any evidence in that respect, or by reference to the circumstances disclosed from the evidence led by the prosecution in the case. The Court shall however presume the absence of such circumstances and it would, therefore, be entitled to find out whether the appellant has been able to show to the satisfaction of the Court that not only a right existed and that it has been so exercised so that the justification for the act can be held as established, having regard to the provisions contained in Section 100 Clause (2) and Section 102 of the I.P.C. It is then that by reason of Section 96 of the I.P.C. that he would be exonerated from his liability for the act committed by him. The plea is said to be covered under Clause (2) of Section 100 of the I.P.C. Section 100 of the I.P.C. says that "the right of private defence of body extends... to the voluntary causing of death or of any other harms to the assailant--if the offence which occasions the exercise of the right be of any descriptions enumerated there below". The second clause relates to an assault as may reasonably cause apprehension that grievous hurt will otherwise be the consequence of such assault.... Thus there must arise reasonable apprehension in his mind that he would be so assaulted as grievous hurt may be caused to him. That right commences as soon as reasonable apprehension of danger arises from an attempt or threat though offence may not have been committed and it continues as long as such apprehension of danger to his body continues as contemplated in Section 102 of the I.P.C. When such a right is justifiably exercised, the law says that the act committed by him, which is an offence in law, would not be an offence, it being done in the exercise of the right of private defence, u/s 96 of the I.P.C. At the outset an attempt was made to suggest that the plea of right of defence of property was available u/s 103 of the I.P.C. as well, but it was not pressed and abandoned. It is in light of these provisions of law and having

regard to the burden of proof being on the appellant, that we have to consider the submissions made by Mr. Shukla, the learned advocate for the appellant before us.

4. The version of the appellant can be divided in two parts. The first part thereof is that he saw Karamshi and his cattle having trespassed in his field S. No. 25 and his cattle then causing damage to his standing Juwar crop as he went up there on coming to know about the same. He therefore wanted to seize those cattle or wanted Karamshi to allow him or himself take them to the cattle-pound as he was so entitled to do u/s 10 of Cattle Trespass Act. Not only that, but according to Mr. Shukla. Karamshi had no right to give any resistance or, in other words, cause any obstruction to his taking away his cattle to the cattle pound. The second part of his version is that Karamshi did not allow him to take away his cattle to the cattle-pound and on the contrary started beating him with an iron-shod stick that he had, and it was only thereafter that when the appellant apprehended danger of being further beaten as to cause grievous hurt that the appellant had given one blow with a stick which he had in the exercise of his right of private self-defence

5. With regard to the first part of the version, Sections 10 and 24 of the Cattle Trespass Act were referred to by Mr. Shukla Section 10 of the Act provides that

"The cultivator or occupier of any land, may seize or cause to be seized any cattle trespassing on such land and doing damage thereto or to any crop or produce thereon, and send them or cause them to be sent within twenty-four hours to the pound established for the village in which the land is situate."

Then Section 24 of the Act provides that

"Whoever forcibly opposes the seizure of cattle liable to be seized under this Act, and whoever rescues the same after seizure, either from a pound, or from any person taking or about to take them to a pound, such person being near at hand and acting under the powers conferred by this Act, shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months"

The contention is that there was standing crop in the field bearing survey No. 25 belonging to the accused and that some crop was found damaged. That damage has been estimated at Rs. 5/- as per the panchnama Ex. 24 in the case. That panchnama further shows that footprints of some 5 or 6 cattle having moved in that part of the field were also found. From these two facts and having regard to the fact that Karamshi with his cattle was there in his field when the appellant went there, it was said that he had a right to seize those cattle and take them to the cattle-pound u/s 10 of the Cattle Trespass Act and it was when the deceased Karamshi chose to obstruct or not allow him to take them away that the quarrel had taken place. Now the fact about the appellant having found Karamshi and his cattle actually in the field of the appellant when he went does not appear to be so probable or true, in view of the other circumstances borne out from the

recitals of that very panchnama Ex. 24. Not only that, there were also foot-marks of cattle in the adjoining field S. No. 23 of one Bahadur-bhai, but that there were footprints suggestive of a scuffle having taken place between human beings. Besides, there were stains of blood found on stone and earth in that particular field. The earth from the scene of offence was attached and it was also found to have been stained with human blood. The place where the stains of blood were found was at a distance of about 42 feet from the end of the field survey No. 25 belonging to the appellant. If, therefore, Karamshi and cattle were in his field, the incident would have taken place in his field, but that does not seem to be so true. No such marks were found in his field. Thus, the story given out by the appellant both in his statement before the trial Court as also in his complaint Ex. 37 about his having seen the cattle and even Karamshi inside his field as also about the incident having taken place inside his field cannot be believed. One other fact that appears from his complaint is that it was not on hearing that Karamshi's cattle were damaging his crop that he had gone there as he wants the Court to believe, but he had gone to his field for keeping a watch over his crop in the field and it was on finding some damage done to his crop that he started the quarrel, finding Karamshi and his cattle in the nearby field. Thus his version cannot be believed. In that event, there would not ordinarily arise any right to seize his cattle for impounding u/s 10 of the Cattle Trespass Act.

6. But finding that difficulty, the ground was shifted to say that the right to seize begins as soon as he sees them damaging the crop, and continues till the cattle are taken to the cattle-pound. For that an attempt was made to suggest that cattle are bound to run away on seeing an owner or occupier of the land coming up and he has a right to pursue them for taking to the cattle-pound. According to him, on seeing appellant coming up, they must have gone away to the nearby field and he had, therefore, a right to go to seize them from that field where Karamshi had gone. There is no evidence whatever to suggest that they were running away and that he had pursued them for the purpose of seizing them and his complaint Ex. 37 as also his version in his statement do not suggest any such thing. The eyewitnesses are also not asked any such thing. The law on the point which we discuss hereafter would not be of any help to him in the circumstances of the case. Now the words "trespassing and doing damage" occurring in Section 10 of the Cattle Trespass Act, were interpreted in the case of *Bhagwant Rao v. Champat Rao* AIR 1926 Nag 50, as giving a right to seize the cattle till they are in that very field and that right ceases no sooner they left the land. That was, however, treated to be a very narrow interpretation of the words in a subsequent case of AIR 1934 258 (Nagpur). A liberal construction was put on those words, holding inter alia, that while the right of capture of the cattle does not extend to following them to their sheds and seizing them there; but if the owner of a field attempts to seize them while actually trespassing, he would be within his rights in capturing them before they have definitely made their escape from the spot, even though they were not actually inside the field when captured. The same view is expressed in a case of *Hansa and Others Vs. State*, where it is observed

that under the English Law the position appears to be that the cattle can be seized only while they were actually trespassing and not afterwards. But the codified law in India is slightly different and gives the right of seizure even though the cattle have in the meantime left the field of the complainant and reached the field or grove of the accused (the owner of the cattle), provided notice of trespass was taken immediately and the complainant was pursuing the cattle in order to take them to the pound. In such a case the accused would have no right to forcibly rescue the cattle and cause injuries to the complainants who were taking the cattle to the pound and who resisted the rescue. This is a broad approach to the words used in Section 10 of the Act, and much though words "trespassing and doing damage" being in the present tense, plainly mean actually doing damage, it would be reasonable to take the view taken in the last two cases referred to, as ordinarily the cattle would begin to run away from that field no sooner someone turns up to catch them, and if he cannot pursue them for the purpose of impounding them, within reasonable limits, i.e., before they reach their destinations, the purpose or right given u/s 10 would be meaningless. However in order to apply this view of the matter, it appears essential to establish that (a) the cattle must have trespassed into the field of the other person; (b) he must have noticed them having trespassed and causing damage to his crop; (c) he must have followed them with a view to seize them for taking them to the cattle-pound and (d) that was forcibly resisted by the owner or the person in charge of the cattle. It is only in those circumstances that he would have a right to seize them, before reaching their shed or grove, which cannot be challenged by that person whose cattle, he wants to seize. If, however, these conditions were not existing, his right does not remain, and if he believed that his cattle had trespassed and caused damage to the crop etc. in his field, he could take action against him under Sections 447 and 425 of the Indian Penal Code and cannot take law in his own hands and then claim protection as sought to be done here. Now we have already shown that though damage is caused to his crop, it is not shown that his cattle had trespassed and caused that damage, and that he had seen them trespassing and damaging his crop, and that while he pursued them, they ran away therefrom, and that Karamshi resisted him for rescuing his cattle from being taken to the cattle-pound. Besides, as pointed out by the learned Sessions Judge, Karamshi was not the only person who was grazing his cattle by about that time in Bahadurbhai's field. The cattle of the two eyewitnesses Bhima and Sajan and of Pamu, were also grazing in Bahadurbhai's field. It is not unlikely that the cattle of those persons may have caused damage to the Juwar crop in the field of the appellant. Whose cattle caused damage to the crop of the appellant is not clear and it was on suspicion that he took aggressive attitude on Karamshi, finding him there, as some damage by cattle was caused in his field. It is, therefore, clear that the appellant gets no right by reason of Section 10 of the Cattle Trespass Act to seize the cattle of Karamshi or even ask him to surrender them for being impounded. If he felt that Karamshi's cattle had caused damage to his crop, he could have filed a complaint for trespass in his field and causing of damage to his crop under Sections 447 and

426 of the Indian Penal Code. He was thus not within his right, as contemplated in the Allahabad case referred to above, to take law in his own hands and start abusing and causing injuries to deceased Karamshi on that ground.

7. (After further considering the evidence in the case his Lordship concluded): The appeal is partially allowed. The conviction of the appellant-accused No. 1 u/s 302 of the Indian Penal Code is altered to one u/s 324 of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 200 (two hundred), in default, to suffer further rigorous imprisonment for four months for the same.