
(2003) 11 AHC CK 0221

In the Allahabad High Court

Case No : Criminal Appeal No's. 1415 and 1472 of 1980 and Criminal Revision No. 1409 of 1980

Laxmi Singh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 07-11-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 106, 141, 147, 148, 149

Citation : (2004) 2 ACR 1447

Hon'ble Judges : U.S. Tripathi, J;M. Chaudhary, J

Bench : Division Bench

Advocate : S.L. Yadav, P.N. Misra, Vivek Prasad Mathur, Ashok Kumar Yadav, Suved Kumar Sharma, Govind Saran and Siddhartha, for the Appellant; A.G.A, for the Respondent

Judgement

U.S. Tripathi, J.—The above criminal appeals and criminal revision have been preferred against the judgment and order dated 30.6.1980 passed by Ist Additional Sessions Judge, Basti in Sessions Trial No. 231 of 1978, convicting Appellants Tribhuwan Singh and Jagdish Singh under Sections 302, 323, 148 and 342, I.P.C. and sentencing each of them to undergo imprisonment for life u/s 302, I.P.C., six months R.I. u/s 323, I.P.C., 9 months R.I. u/s 148, I.P.C. and six months R.I. u/s 342, I.P.C. and convicting Appellants Laxmi Singh, Mannu Singh alias Abhimanyu, Vijaee Singh, Kali Charan, Ranjit Singh, Ghotai Singh, Jai Ram Singh, Sureman Singh, Harihar Singh, Bhuwar Singh, Rang Lal Singh, Ram Dihal, Raj Kishore, Ambika Singh, Tane Singh, Faujdar Singh, Rudal Singh, Srikan Singh and Ram Awadh Singh under Sections 148 and 342, I.P.C. and sentencing each of them to pay a fine of Rs. 100 and of Rs. 50 on each count. In default of payment of fine, they were further sentenced to undergo R.I. for a period of one month and 15 days respectively. The Appellant Ranjit Singh was further convicted u/s 324, I.P.C. and sentenced to pay a fine of Rs. 100, while Appellant Jai Ram was further convicted u/s 323, I.P.C. and sentenced to pay a fine of Rs. 50. In default of payment of fine, they were further sentenced to undergo R.I. for

a period of one month and 15 days respectively.

2. The complainant Subhash Rai has preferred Criminal Revision No. 1409 of 1980 against the acquittal of above Appellants under other sections.

3. The prosecution story, briefly stated, was that all the Appellants were residents of village Parasahar, P. S. Ghanghata, district Basti, while Subhash Rai and prosecution witnesses were residents of village Goreya Ghat, P. S. Mahuli, district Basti. River Kuwano was flowing in between the villages Parasahar and Goreya Ghat. Village Parasahar was situate on the eastern side of the river, while village Goreya Ghat towards western side. In front of village Parasahar the river was flowing by bifurcating into two streams. In between the two streams of the river sand was left. There was a custom that residents of particular village, would own the sandy part of the river in whose village territory it was left and income/rent from the land had to go to Gram Samaj of the concerned village.

4. In the year 1977, the sand of river Kuwano was left towards village Goreya Ghat. It is alleged that Gram Samaj of village Goreya Ghat had auctioned the said land in favour of Ram Pat and Ram Milan, who had sown water melon crop over the said land. But the people of village Parasahar wanted to forcibly realise income of the said land. A panchayat was convened in this regard on 17.5.1977 and it was decided that on 24.5.1977 again panchayat would be convened in which it would be decided on the basis of measurement in territorial limit of which village the above land was lying.

5. On the morning of 19.5.1977 at about 10 a.m. the people of village Parasahar armed with lathi, pharsa, spear and gun came to the said land and forcibly started plucking water melons. The persons of village Goreya Ghat went there and objected the persons of village Parasahar from plucking water melons. But Appellants Jagdish Singh and Tribhuwan Singh who were armed with guns exhorted the persons of village Goreya Ghat and started firing from their respective guns. The remaining Appellants and Bansraj (since dead) started wielding lathi, ballam and pharsa, due to which Balram Rai, Subhash Rai, Harihar Rai, Vijai Nath Rai, Ramdhir Rai, Rajender Rai, Sheet Basant, Bahal, Parag, Nagai Ram, Ram Ashish Rai, Vibhuti Rai and wives of Mohan Rai, Nagai Rai, daughter of Kadir and wife of Balihari, who were taking bath in the river Kuwano sustained injuries. The Appellants and Bansraj chased the persons of village Gorya Ghat up to abadi of said village and on arrival of other persons of the village, they took away Subhash Rai and Girja Rai, who had sustained gun shot injuries and were lying on sand of the river. Balram Rai, who was injured was taken to his house, but after sometimes he died. Persons of village Goreya Ghat also plied lathis in their self defence. Sureman Rai of village Goreya Ghat got prepared report (Ext. Ka-1) of the occurrence from Ram Singh and lodged the same at police station Mahuli at 12.30 p.m. On the basis of above written report, a case was registered against the Appellants and Bansh Raj under Sections 147, 148, 149, 307, 324, 342, 302 and 323, I.P.C.

6. Investigation of the case was taken up by Sri Rama Kant Upadhyaya, Investigating Officer (P.W. 12). He reached the spot and conducted inquest of the dead body of Balram Rai and sent the dead body for post-mortem. Thereafter, he interrogated other witnesses and went to village Parasahar to rescue Girija Rai and Subhash Rai, where he was informed that police of P. S. Ghanghata was present and had sent the above persons for medical examination. The Investigating Officer inspected place of occurrence, prepared site plan and took into possession blood stained and simple earth and also collected blood stained and simple earth from the house of Balram Rai.

7. The injured Randhir Rai, Haridwar Rai, Smt. Purkesha, Smt. Ramdei, Ram Bahal, Ram Bhabhut Rai, Ram Ashish Rai, Seet Basant, Viajai Kumar, Smt. Surati, Parag, Smt. Shamina, Nagai Rai, Nagendra Rai, Subhash Rai, Bhuwar Singh and Harihar Singh were medically examined at District Hospital, Basti.

8. Girija Rai, died in the way to hospital. Autopsy on the dead bodies of Balram Rai and Girija Rai were conducted on 20.5.1977 by Dr. R. C. Verma (P.W. 14) who found gun shot injuries on their persons and cause of death as shock and haemorrhage.

9. The Investigating Officer on completion of investigation submitted charge-sheet against the Appellants as Bansraj had died by that time.

10. The Appellants were charged with the offences punishable under Sections 302 read with 149, I.P.C., 325 read with 149, I.P.C., 324 read with 149, I.P.C., 342, I.P.C. and 148, I.P.C. The Appellants pleaded not guilty and contended that river Kuwano was flowing within the territorial limits of their villages and entire river belt was in possession of residents of their village. They also set up a cross version that on 19.5.1977 they had gone to house of Heera Barahai at village Goreya Ghat to participate in the marriage of his daughter. The people of village Goreya Ghat had boycotted Heera Barahai as his brother had been murdered by the people of his village. The residents of village Goreya Ghat did not like the participation of the Appellants in the said marriage. Bali Ram Rai, Vishambhar Rai, Girija Rai, Bhabhuti Rai, Ram Samujh Rai, Nagendra Rai and others armed with lathi, spear and pharsa abused the Appellants and also chased them. The Appellants ran towards their village. At the eastern side of river Kuwano, the above persons and other persons of their village assaulted Harihar and Bhuwar with spear, who fell down on the sand. The other persons crossed the river and reached in village Parasahar. Balram Rai and others incited other people to snatch away the gun of Tribhuwan Singh, Appellant and to kill him. He and other persons then tried to snatch gun of Tribhuwan Singh, who opened fire in his self defence. Bhuwar and others also wielded their lathi and pharsa in their self defence. Report of the cross version was also lodged.

11. The prosecution in support of its case examined Ram Ashish Rai (P.W. 1), Ram Bhabhut (P.W. 2) and Lalita Rai (P.W. 3) as witnesses of fact, besides constable Adya Prasad (P.W. 4), Ram Briksha Pradhan of village Goreya Ghat

(P.W. 5), Constable Ram Bali Yadav (P.W. 6), Sub Inspector Sita Ram Yadav (P.W. 7), Constable Jairam Maurya (P.W. 8), Constable Ram Asrey Rai (P.W. 9), Ram Singh scribe of report (P.W. 10), Dr. S. P. Singh (P.W. 11), Rama Kant Upadhyaya, Investigating Officer (P.W. 12), Bansbahadur Singh, second Investigating Officer (P.W. 13) and Dr. R. C. Verma (P.W. 14).

12. The Appellants examined Virendra Lal Srivastava, Record Keeper, police office, Basti (D.W. 1) and constable Surendra Nath Mishra (D.W. 2).

13. The learned Sessions Judge on considering evidence of the prosecution held that Appellants side was aggressor, but the common object of unlawful assembly was not to commit murder of the two deceased and its common object was only up to establishing their right over the Reta (sand) beyond which they differed in their objects. Tribhuwan Singh and Jagdish Singh fired from their guns on account of which, the two deceased died and, therefore, they were individually liable for murder, as they had knowledge that they were committing the act, which was so eminently dangerous that in all probability it could cause death and that they also caused hurt to other injured and wrongfully confined Girja Rai and Subhash Rai and, therefore, were also liable under Sections 148, 323 and 342, I.P.C. He further held that remaining accused were not liable for the murder. Jai Ram, who gave lathi blow to Balram was liable for the offence punishable u/s 323, I.P.C. and accused Ranjeet voluntarily caused hurt by ballam. Therefore, he was liable for the offence punishable u/s 324, I.P.C. and other accused carried away Subhash Rai and Girija Rai to their own village and wrongfully restrained them so as to prevent them from proceeding beyond circumscribed limits and, therefore, they were liable for the offence punishable u/s 342, I.P.C. With these findings he convicted and sentenced the Appellants as mentioned above.

14. Aggrieved with their conviction and sentence the Appellants separately filed two appeals and Subhash Rai filed criminal revision against the acquittal of Appellants from other offences.

15. Both the appeals and criminal revision arises out of same judgment and, therefore, the two appeals and criminal revision are being decided by a common judgment with the consent of learned Counsel for the parties.

16. Laxmi Singh, Appellant No. 1 of Criminal Appeal No. 1415 of 1980 died during pendency of the appeal, as per the report of C.J.M., Basti, dated 24.2.2003. Therefore, the appeal preferred by Laxmi Singh stood abated.

17. We have heard Sri P. N. Misra, learned Counsel for the Appellants and Sri Siddhartha holding brief of Sri Govind Saran, learned Counsel for the revisionist Subhash Rai and learned A.G.A. for the Respondents in both the criminal appeals and have perused entire evidence on record.

18. In this case marpit between the parties, the death of Balram Rai and Girija Rai on account of gun shot injuries and injuries on the persons of Randhir, Haridwar Rai, Smt. Turkish, Smt. Ramdei, Ram Bahal, Bhabhuti Rai, Ram Ashish

Rai, Sheet Basant, Vijai Kumar, Smt. Surati, Parag, Smt. Shamina, Nagai Rai, Nagendra Rai and Subhash Rai as well as on the Appellants Bhuwar Singh and Harihar Singh are admitted to the parties.

19. The case of the prosecution was that the persons of village Goreya Ghat were in possession of the sandy portion of river Kuwano and the said land was auctioned by Gram Samaj of their village over which water melon crop was sown. That the Appellants formed an unlawful assembly and were jointly plucking water melons from the above belt of river and when the prosecution side including the two deceased went to object them Appellants Tribhuwan Singh and Jagdish Singh fired from guns, which caused injuries to the two deceased namely Balram Rai and Girija Rai, who died of the said injuries and other injured persons, who were taking bath in the river Kuwano also sustained injuries and some of other Appellants caused lathi and spear injuries to other injured persons and took away Balram Rai and Subhash Rai to their village where they wrongfully confined them. On the other hand, the case of the Appellants was that they had gone to attend the marriage of daughter of Heera Barahi, which was objected by the prosecution side and abusing them they asked them to go out of their village. When the Appellants side was going towards their village, the prosecution side chased them and Balram Rai, Bhabhuti Rai, Ram Samujh Rai assaulted Appellants Bhuwar Singh and his brother Harihar Singh, Tribhuwan Singh fired from his gun in self defence, due to which Balram Rai, Girija Rai, Bhabhuti Rai and certain other persons and ladies, who were plucking water melons sustained injuries.

20. The questions therefore, which arise for determination are whether Appellants were members of an unlawful assembly and were aggressors or whether they acted in exercise of right of private defence and which party was aggressor and which party acted in self defence.

21. The learned Counsel for the Appellants contended that the case of the prosecution was that prosecution side was owner in possession of the water melon crop, but this fact has not been proved and in fact the water melon crop belonged to Appellants from which the prosecution side was forcibly plucking water melons. He further contended that no motive has been alleged and the Appellants side acted in exercise of right of private defence and therefore, they cannot be said members of unlawful assembly and in case any overt act was done by some of the Appellants, it was in the exercise of right of private defence.

22. The learned Sessions Judge has held that sandy part of the river over which water melon crops was existing was lying within the limits of village Goreya Ghat and auction of the above land appears to have been held by Gram Samaj Goreya Ghat in favour of Ram Pat and Ram Milan and the prosecution had sufficiently proved the auction sale as well as cultivation of water melons crops by Ram Pat.

23. Ram Ashish Rai (P.W. 1) stated that sandy part of the river Kuwano was within the territory of village Goreya Ghat and belonged to Gram Samaj of said

village. That Gram Samaj of Goreya Ghat had auctioned the above sandy part of land in favour of Ram Pat and another person, who had cultivated water melon crop over it. He further stated on 17.5.1977 a panchayat was convened, in which it was decided that measurement of said land would be done by Patwari on 25.5.1977 to find out in which village the above water melon crop was lying and rightful party would be entitled to the said crop. But in the meantime, occurrence took place on 19.5.1977. In his cross-examination, he admitted that no water melon crop was sown on the disputed land prior to the year of occurrence and no auction was done prior to it. That previously grass grew on the said sandy part, which was being auctioned by Gram Samaj and its produce were being deposited in Gram Samaj Goreya Ghat. He further admitted that no auction of disputed land was done by Gram Samaj Goreya Ghat prior to the year of occurrence, but the residents of the village used to cut the grass and he wrongly stated that grass was being auctioned and its produce was being deposited with the Gram Samaj. Ram Bhabhuti (P.W. 2) also admitted in his cross-examination that no crop was being grown over the sandy portion of the river prior to the year of occurrence and no dispute had arisen between the two villages regarding said land. That the persons of villages Goreya Ghat and Parasahar were claiming their rights over the disputed land and on account of it, a panchayat was convened on 17.5.1977, in which it was decided that demarcation of the land would be done on 25.5.1977 and then the ownership of respective village would be decided.

24. Ram Pat and Ram Milan, who allegedly were allottees of the land and had allegedly grown water melon crop over the disputed land were not examined by the prosecution. However, the prosecution examined Ram Briksha (P.W. 5), who stated that meeting of Gram Samaj Goreya Ghat under his Chairmanship was held on 20.11.1976 and it was resolved in the said meeting that the sandy part of the river would be auctioned in favour of highest bidder for cultivating water melon crop. That notice of public auction was given by beat of drum and auction was held on 27.11.1976. Ram Pati was highest bidder of Rs. 100 and therefore, auction bid terminated in his favour and he was allotted land for cultivating water melon crop. But in his cross-examination he admitted that the disputed land was never auctioned prior to 1976 and he could not assign any reason for it. He further stated that he could not say with certainty that the disputed land was recorded in the property register of Gram Samaj. He further stated that he did not know whether any lease deed was prepared and issued in favour of Ram Pat and others and an approval was taken from the Sub-Divisional Magistrate or not. That the persons in whose favour land was auctioned were also not residents of his village. The copy of resolution, receipt of deposit of auction money and lease deed were also not filed. The contention of the Appellants was that the above proposal was subsequently prepared. If the land in question was actually auctioned by public auction as stated by Ram Briksha (P.W. 5), there would have been documentary evidence of it. But no document was filed. Withholding of documentary evidence in this regard leads to draw an adverse inference against the prosecution.

25. The learned Sessions Judge held that the evidence of Ram Briksha (P.W. 5) proved the auction. But as mentioned above necessary documents to prove the auction and resolution of Gram Samaj in this regard have not been produced and, therefore, evidence of Ram Briksha (P.W. 5) has not established the alleged auction of the disputed land by Gram Samaj Goreya Ghat in favour of Ram Pat and Ram Milan. The alleged auction purchasers and the person who cultivated the disputed water melon crop were also not examined to prove the ownership of the crop.

26. The learned Sessions Judge had given much weight to the evidence of Supervisor, Kanoongo, Subhnarain Singh (P.W. 15) who stated that on 30.5.1977 under the orders of S.D.M. he measured the limits of village Goreya Ghat and Parasahar and prepared report (Ext. Ka-36) which shows that the disputed land was lying in the limits of village Goreya Ghat and, therefore, it is established that disputed land was lying in the limits of village Goreya Ghat. The measurement by Subh Narain (P.W. 15) was done much after the date of occurrence and as admitted by Ram Ashish Rai (P.W. 1) and Ram Bhabhuti (P.W. 2) persons of both the villages Goreya Ghat and Parasahar were claiming disputed land as their own. A panchayat was convened on 17.5.1977 in which it was decided that demarcation of the land would be done on 25.5.1977 and the ownership of disputed land would be decided on the basis of that measurement. Therefore, on the date of occurrence it was not decided as to residents of which village were the owners in possession of the disputed land and it is also clear from the evidence of above two witnesses that the Appellants side was having bona fide claim of ownership and possession over the disputed land and the claim of respective parties was to be decided in the panchayat to be held on 25.5.1977, i.e., after the occurrence. Therefore, the Appellants cannot be held rank trespassers. The learned Sessions Judge has also held that there was no motive for the Appellants and in all likelihood the assembly of the Appellants had a community of object only up to establishing their right over the sandy land (Reta) beyond which they differed in their objects.

27. From the evidence on record, it is also clear that Appellants side had bona fide right to protect the property over which they were having bona fide claim. Person asserting bona fide claim has no mens rea or criminal intent. The Apex Court held in the case of Subramani and Others Vs. State of Tamil Nadu, as below:

In case the Appellants acted in exercise of their right of private defence of property, it cannot be said that they committed a criminal act in furtherance of a common intention because Section 96, I.P.C. makes it abundantly clear that nothing is offence, which is done in the exercise of right of private defence. They did not intend to commit any criminal act or to do anything which may be described as unlawful. Their object was not to kill the deceased but to protect their property. It may be said that in a given case it may be found on the basis of material on record that some of them may have exceeded their right of private

defence and for that they may be individually held responsible. But it cannot be said that the murder was committed pursuant to a common intention to commit such crime. In some of the similar circumstances in State of Bihar Vs. Nathu Pandey and Others, this Court considered the question as to whether the accused could be convicted u/s 302 read with either Section 149 or Section 34, I.P.C. it observed:

In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly. Under the fourth clause of Section 141 an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 - 106 dealing with the right of private defence. u/s 96 nothing is an offence which is done in the exercise of the right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression "to enforce any right or supposed right" in the fourth clause of Section 141.

28. The learned A.G.A. and the learned Counsel for the revisionist contended that the report of Supervisor Kanoongo Shubh Narain Singh (P.W. 5) clearly established that the disputed sandy land (Reta) and river Kuwano was within territorial limit of village Goreya Ghat and, therefore, prosecution side was rightful owner of the disputed land and, therefore, the Appellants had no right of private defence of property against true owner. As mentioned above on the own showing of the prosecution, prosecution side was not sure about its possession over disputed land and it also failed to establish its possession or sowing of water melon crop. Assuming that sandy land fell in the territorial limit of village Goreya Ghat the prosecution side was true owner and the Appellant side was trespasser, no one including a true owner has a right to dispossess the trespasser by force. It was held by the Apex Court in Munshi Ram and Ors. v. Delhi Administration AIR 1968 SC 702 as below:

It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land in such a case unless he is evicted in due course of law he is entitled to defend his possession even against the rightful owner. But stray or intermittent acts of trespass do not give such right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over sufficiently a long period and acquiesced in by the true owner...

29. In the instant case, as admitted by Ram Ashish Rai (P.W. 1) and Ram Bhabhuti Rai (P.W. 2) the disputed land was never auctioned or cultivated by persons of village Goreya Ghat and no demarcation of disputed land was done prior to the date of occurrence. Prosecution side failed to prove ownership of water melon crop and on the date of occurrence there was bona fide dispute

between the parties regarding ownership of land. As such Appellants were entitled to protect their possession.

30. It was further contended that the plea of self defence raised by Appellants was not in respect of disputed land but their case was that they were attending marriage ceremony of the daughter of Heera Badhai where the prosecution side went chased the Appellants and attempted to cause grievous hurt to them. But in a given case the Court can consider the right of private defence even if the accused has not taken it, if the same is available to be considered from the material on record. (Vide Rizan and Another Vs. State of Chhatisgarh, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, . In the instant case, the material on record indicated that occurrence took place regarding assertion of right over water melon crop and the occurrence took place on the disputed sandy land, over which Appellants had bona fide claim. Therefore, in the absence of specific case in this regard will not affect the availability of right of private defence of property to the Appellants.

31. From the evidence on record we arrive at a logical conclusion that the prosecution side (deceased and party) came to the spot to enter into the sandy land where water melon crop was existing, and the Appellants exercised their right of private defence to safeguard the property. Finding of the trial court contrary to it, therefore, cannot sustain.

32. From the evidence on record, we further find that so far the case of Appellants Tribhuwan Singh and Jagdish Singh are concerned, they clearly exceeded the right of private defence and there was no justification in causing murder of the Balram Rai and Girja Rai. The fourth clause of Section 99, I.P.C. lays down the extent to which the right of private defence is available. It says:

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

33. The manner in which the two deceased were attacked and the injuries caused to them with dangerous weapon (gun) would reveal that the Appellants Tribhuwan Singh and Jagdish Singh had clearly exceeded the right available to them. Therefore, their case is covered by Exception No. 2 of Section 300, I.P.C. and they are liable for the offence punishable u/s 304 Part II, I.P.C.

34. So far the act of Ranjit Singh and Jai Ram is concerned, they have not exceeded right of private defence and, therefore, they cannot be said to have committed any offence. The individual role of other Appellants namely, Mannu Singh, Abhimanyu Singh, Vijae Singh, Kali Charan, Ghotai Singh, Sureman Singh, Harihar Singh, Bhuwar Singh, Rang Lal Singh, Ram Bahal, Raj Kishore, Ambika Singh, Tane Singh, Faujdar Singh, Rudal Singh, Sri Kant Singh and Ram Awadh Singh has not been assigned and, therefore, they cannot be convicted under Sections 148 and 342, I.P.C. as there was no mala fide intention on their part and they were also not members of an unlawful assembly.

35. From our above discussions and observations, we are of the view that Appellants Tribhuwan Singh and Jagdish Singh are liable for the offence punishable u/s 304 Part II, I.P.C. and remaining Appellants are entitled to acquittal and there is no force in the criminal revision filed by Subhash Rai.

36. Criminal Appeal No. 1472 of 1980 is, accordingly, partly allowed. The conviction and sentence of Appellants Tribhuwan Singh and Jagdish Singh under Sections 302, 323, 148 and 342, I.P.C. are set aside and instead of it, they are convicted u/s 304 Part II, I.P.C. and are sentenced to 5 years rigorous imprisonment.

37. Criminal Appeal No. 1415 of 1980 is allowed and conviction and sentence of Appellants are set aside and they are acquitted.

38. Criminal Revision No. 1409 of 1980 is dismissed.

39. The Appellants Tribhuwan Singh and Jagdish Singh are on bail. They shall surrender before the C.J.M. concerned to serve out the sentence as awarded by this Court.

40. The other Appellants are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender.