

(2015) 08 RAJ CK 0037

In the Rajasthan High Court

Case No : Criminal Appeal No. 946/2008 and Criminal Revision Petition No. 1104 of 2008

Neetu and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 319
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2015) 08 RAJ CK 0037

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J; Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Biri Singh Sinsinwar, Senior Counsel, Suresh Sahni and Rajesh Choudhary, for the Appellant; N.S. Dhakad, Public Prosecutor, Advocates for the Respondent

Judgement

Kanwaljit Singh Ahluwalia, J—Neetu @ Anil Kumar S/o. Brij Lal, Ram Gopal S/o. Hansraj, Harish Kumar S/o. Brij Lal, Hansraj S/o. Jagannath, Girdhari Lal S/o. Sohan Lal, Ram Lubhaya S/o. Mohan Lal and Ram Prakash S/o. Nand Lal were sent for trial by the Investigating Officer of the case FIR No. 21/02 (Exhibit-P/2) registered at Police Station Sikari, District Bharatpur for the offence under Sections 147, 148, 323, 341, 302 and 302/149 IPC.

2. After the said accused were charged and the trial had proceeded, an application under Section 319 Cr.P.C. was filed and the trial court after allowing such application summoned Balwant S/o. Harbansh, Om Prakash S/o. Dayal Singh, Madan S/o. Sohan Lal, Rammi @ Ramgopal S/o. Mukund Lal and Daya Chand S/o. Harbansh, as additional accused.

3. The court of Additional Sessions Judge (Fast Track) No. 4, Bharatpur, having headquarter at Deeg, vide impugned judgment dated 27.8.2008, acquitted Ram Prakash S/o. Nand Lal, Balwant S/o. Harbansh, Om Prakash S/o. Dayal Singh, Rammi @ Ramgopal S/o. Mukund Lal, and Daya Chand S/o. Harbansh of offences

under Sections 148, 323, 341, 302/149 IPC and accused Ram Prakash was also acquitted of offence under Section 147 IPC. The trial court convicted Ram Gopal of offence under Sections 302, 148, 323 and 341 IPC, whereas remaining accused namely Neetu @ Anil Kumar S/o. Brij Lal, Harish Kumar S/o. Brijlal, Hansraj S/o. Jagannath, Girdhari Lal S/o. Sohan Lal, Ram Lubhaya S/o. Mohan Lal and Madan S/o. Sohan Lal were convicted for the offences under Sections 148, 323, 341 and 302/149 IPC.

4. Having convicted the appellants for the above said offences, the trial court vide a separate order of even date sentenced them as under:-

"Appellants Neetu @ Anil Kumar, Ram Gopal, Harish Kumar, Hansraj, Girdhari Lal, Ram Lubhaya and Madan:-

U/s 148 IPC- to undergo two years R.I. and to pay a fine of Rs. 2,000/- each, in default of payment of fine, to further undergo one month S.I.

U/s 323 IPC- to undergo six months R.I. and to pay a fine of Rs. 500/- each, in default of payment of fine, to further undergo fifteen days S.I.

U/s 341 IPC- to undergo one month R.I.

Appellant Ram Gopal under Section 302 and remaining accused under Section 302/149 IPC: to undergo life imprisonment, and to pay a fine of Rs. 5,000/-, in default of payment of fine, to further undergo six months S.I."

5. Aggrieved against their conviction and sentence, the appellants have filed the instant appeal D.B. Criminal Appeal No. 946/2008 and has prayed that their conviction and sentence recorded by the trial court be set aside and they be acquitted of all the charges.

6. The State of Rajasthan has not filed an appeal to assail the acquittal of the accused. However, Sharab Khan (P.W.1) has filed a Revision Petition No. 1104/2008 praying that acquittal of the acquitted accused be set aside and they be convicted and sentenced for the charges framed in accordance with the provisions of law. We shall decide appeal filed by convicted accused and revision petition filed by the complainant together, as in both common judgment has been assailed.

7. The occurrence in the present case has taken place on 4.2.2002 at 10:00 AM. Sharab Khan (P.W.1) on 5.2.2002 at 11:30 AM, submitted a written report (Exhibit-P/1) before Manoj Gupta (P.W.15), who was then posted as SHO, Police Station Sikari, District Bharatpur. On the basis of written report, a formal FIR (Exhibit-P/2) bearing No. 21/02 was registered at Police Station Sikari, District Bharatpur. The said written report when translated into English reads as under:-

"To

SHO Police Station Sikar,

It is submitted that on 4.2.2002, at about 10:00 AM, I along with Ismail S/o.

Maha Singh, Jekab S/o. Ibbat and Shabbir S/o. Buti, who belong to my brotherhood, were going to our fields. When I reached public passage, accused Ram Gopal S/o. Hansraj, Balwant Singh, Om Prakash S/o. Dayal Singh, Ram Lubhaya S/o. Mohan Lal, Girdhari S/o. Sohan Lal, Harish @ Khillu, Anil @ Neetu S/o. Brij Lal, Madan S/o. Sohan Lal, Rama S/o. Nand Lal, Dayanand S/o. Harbansh Lal, Hansraj S/o. Jagannath, Rami @ Ramgopal S/o. Mukund Lal by caste Khatri, residents of Sihawali, with common intention armed with lathi, Farsi and gun encircled us. Om Prakash after showing his gun, exhorted his companions to kill us and he further said that he will face the consequences, upon which Ram Gopal S/o. Hansraj caused a Farsa blow on the head of Ismail. Balwant caused a lathi blow on the right foot knee of Ismail. Harish @ Khillu caused lathi blow on the head of Jekab, Anil @ Neetu caused lathi blow on the left hand of Jekab. Hansraj caused lathi blow on the right foot of Jekab. Madan caused lathi blow on the right hand of Shabbir. Girdhari caused lathi blow on left hand of Shabbir. Others caught hold of me and took me into their grips. On the noise raised by us, Sumer S/o. Misalli, Asar Khan S/o. Sirdar etc saved us. Ram Gopal etc after leaving, threatened and said they will see us later. Due to injury caused with Farsi by Ram Gopal S/o. Hansraj on the head of Ismail, he became unconscious. We have taken Ismail in a serious condition to Nagar hospital. After the treatment was administered to him, for the whole night, condition of Ismail had not improved. Doctor had referred Ismail to Bharatpur hospital. I have returned to Nagar. Others have taken Ismail whose condition was serious to Bharatpur. I have come to lodge the report. Action be taken.

Applicant

Sharab Khan S/o. Jhaggad

Mev, Sihawali"

8. A perusal of the above written report (Exhibit-P/1) reveals that Ram Gopal had caused a Farsi blow on the head of deceased Ismail, whereas Balwant acquitted accused has caused a lathi blow on the right foot of Ismail. Injuries were caused in the occurrence to Jekab, Shabir and Sharab Khan. Ismail due to injuries received died after ten days of the occurrence on 14.2.2002. The injured, Sharab Khan, Shabbir Khan and Jekab appeared in the court as P.W.1, P.W.4 and P.W.5, respectively.

9. Besides above three injured witnesses, the prosecution examined Ashar Khan (P.W.2), Ishav (P.W.3), Sumer (P.W.7) and Sahab Khan (P.W.12) and as eyewitness of the occurrence. The prosecution in all had examined sixteen witnesses to prove its case and has relied upon documents Exhibit-P/1 to Exhibit-P/19. The statement of the accused were recorded under Section 313 Cr.P.C. and accused in defence had examined thirteen witnesses and had placed reliance upon document Exhibit-D/1 to Exhibit-D/21.

10. Before we revert to the evidence of the eyewitness, we shall take note of the medical evidence.

11. Dr. Daulat Ram Patel (P.W.6) on 4.2.2002, at 6:40 PM, medico-legally examined Ismail S/o. Maha Singh and as per Injury Report (Exhibit-P/5) found following injuries on his person:-

"(i) Incised wound, occipital region, 3 x 1cm, bone deep, sharp.

(ii) bruise with swelling, right ankle joint, 4 x 2cm, blunt."

12. Ismail while admitted in Neuro Surgery Ward, on 14.2.2002, expired and Dr. H.L. Bairwa (P.W.13) on 15.2.2002 at 12:05 PM, being posted as Medical Jurist, conducted autopsy on the dead body of Ismail. In Post Mortem Report (Exhibit-P/16) doctor had noted six injuries on the person of Ismail which included surgical wounds and stitched wounds, as a result of neuro surgery conducted on his body. As per opinion of the doctor, the cause of death was Coma as a result of injuries to skull and brain and the injuries ante mortem in nature.

13. We may notice here that in the FIR (Exhibit-P/2), it is specifically stated that Ram Gopal had caused Farsi blow on the head of Ismail and Balwant an acquitted accused had caused injury on his right foot. At the time of his examination, in injury report (Exhibit-P/5), also only two injuries have been found on the person of Ismail.

14. Dr. Daulat Ram Patel (P.W.6) on 5.2.2002 at Community Health Center, Nagar, medico legally examined Sharab Khan (P.W.1) and in injury report (Exhibit-P/4) found following two injuries on his person:-

"(i) Bruise, 2 x 1cm, right upper finger, blunt, simple.

(ii) Abrasion, 3 x 2cm, right knee area, blunt, simple."

As per opinion of the doctor, the injuries suffered by Sharab Khan (P.W.1) were suffered within 2-3 days.

15. Dr. Daulat Ram Patel (P.W.6) on 4.2.2002, at 6:40 PM, also examined Jekam (P.W.5) and as per injury report (Exhibit-P/6) found following three injuries on his person:-

"(i) Bruise, 3 x 2cm, dorsum of left hand, blunt, simple.

(ii) Abrasion, 1 x 1cm, right lower 1/3rd of leg, blunt, simple.

(iii) Lacerated wound, 4 x 4 x 1cm, right hand region, blunt."

16. Dr. Daulat Ram Patel (P.W.6) on the said date, at 6:30 PM, also examined Shabbir (P.W.4) and as per injury report (Exhibit-P/7) had found following injuries on his person:-

"(i) Lacerated wound, right dorsum of hand, 1 1/2 x 1 x 1 cm, blunt.

(ii) Abrasion, 1 x 1/2 cm, dorsum of left hand, blunt, simple."

17. Injuries on the person of all three witnesses namely, Sharab Khan (P.W.1),

Shabbir (P.W.4) and Jekam (P.W.5) were found simple in nature and were caused by blunt weapon. All the injuries on three witnesses are not of much consequence.

18. On 5.2.2002, at 5:20 PM, Dr. Daulat Ram Patel (P.W.6) had also examined Poonam wife of Ram Lubhaya convicted accused appellant and as per injury report (Exhibit-D/5) had noted following injuries on her person:-

"(i) Multiple abrasions, 1 x 1 to 1/2 to 1/2 cm, left side of neck, blunt, simple.

(ii) Multiple abrasions, 1 1/2 to 1 to 1/2 to 1/2 cm, right side of cheek, blunt, simple.

(iii) Multiple abrasions, 2 x 1 to 1/2 x 1/2 cm, left wrist joint, blunt, simple."

19. On the same date, at 5:00 PM, Dr. Daulat Ram Patel (P.W.6) had examined Girdhari convicted accused appellant and as per Injury Report (Exhibit-D/6) had found following two injuries on his person:-

"(i) Bruise, 6 x 2cm, left shoulder region, blunt, simple.

(ii) Bruise, 4 x 2cm, left lumbar region, blunt, simple."

20. The said doctor (P.W.6) on the said date at 5:10 PM, had examined Harish convicted accused appellant and as per injury Report (Exhibit-D/7) had found following injuries on his person:-

"(i) Multiple abrasions, 2 x 1 to 1 x 1cm, dorsum of left hand, blunt, simple.

(ii) Multiple abrasions, 2 x 1 to 1/2 x 1/2 cm, dorsum of right hand, blunt, simple.

(iii) Bruise, 4 x 2cm, left forearm, blunt, simple.

(iv) Abrasion, 1 x 1cm, left ankle joint, blunt, simple."

21. We may also notice that Naresh Kumar brother of convicted accused Neetu @ Anil Kumar and Harish was also medico legally examined vide injury report (Exhibit-D/15 and Exhibit-D/7) and in the said injury report, following wounds were noted on his person:-

"Multiple punctured, lacerated wound of size 3/4 x 3/4 cm with 1/3 x 1/3 cm over both side buttock and left hip joint area, firearm."

22. A perusal of the injury report (Exhibit-D/15) reveals that Naresh Kumar had suffered fire arm injuries on his person and as per X-ray Report (Exhibit-D/16) two metallic radio opaque shadows were found.

23. Ram Lubhaya convicted appellant was also examined on 4.2.2002 at 9:50 PM, on the police request and as per injury report (Exhibit-D/17) following three simple injuries were found on his person:

"(i) Abrasion, 9cm x 1 1/2 cm on the right upper front of chest near shoulder, simple, blunt.

(ii) Bruise, 6cm x 5cm, on the upper half of right forearm, simple, blunt.

(iii) Bruise, 7cm x 4cm, on the ant. surface at the left thigh, simple, blunt."

24. On the same day, at 9:30 PM, Satya Bai wife of Ram Lubhaya was also examined and as per injury report (Exhibit-D/18), one bruise was found on her person. The said injury is reproduced below:-

"Bruise, 14cm x 12cm, on the posterior surface of upper half of left leg, blunt."

25. The statement of Sharab Khan (P.W.1), Ashar Khan (P.W.2), Ishav (P.W.3), Shabbir (P.W.4) and Sumer (P.W.7) were also recorded on the application under Section 319 Cr.P.C. was filed and additional accused were summoned. After the additional accused were summoned under Section 319 Cr.P.C., trial court proceeded with the trial de-novo and recorded the statement of Sharab Khan (P.W.1) on 16.3.2007, Ashar Khan (P.W.2) on 19.5.2007, Ishav (P.W.3) on 16.7.2007 and Shabbir (P.W.4) on 23.7.2007. We shall confine ourselves to the evidence of these witnesses emerging in the subsequent statement recorded after additional accused had caused appearance.

26. Sharab Khan (P.W.1) reiterated as to what was stated by him in written report (Exhibit-P/1). The translation of which we have already reproduced. This witness further stated that they came to police station, took one constable along with them and thereafter, got themselves admitted in the hospital and Ismail had died in the hospital at Jaipur. He admitted in the court that if they go from their village, police station Sikari fall on their way. Then this witness stated that first they have gone to police station, again said Sikari Police Station had sent one constable along with them and they came to hospital at Nagar. This witness further stated that he is not able to name the constable who had accompanied them from Police Station Sikari. This witness stated that when he came to the hospital, he had not got himself medico legally examined and he was medico-legally examined on the next day as he had not suffered serious injuries. This witness further stated that he had not seen injury on the person of accused Daya Chand, Ram Lubhaya and Rammi. This witness further stated that they were not having any previous grudge with the accused. This witness stated that Ismail if was having any grudge, he is not aware about the same. This witness stated that Ismail suffered only one Farsi blow on his head. Nobody had fired from the gun. This witness stated to be wrong that somebody made an attempt to commit rape upon Poonam daughter of Ram Lubhaya. This witness further admitted that his son Cheni and nephew Jekab both have been prosecuted for the offence under Section 376/511 IPC. This witness denied that both the sides have pelted stones on each other. This witness further denied that his son Tasleem had fired a shot from country made pistol on the person of Naresh Kumar. This witness further stated that he is not aware that in the site plan (Exhibit-P/3) whether it has been rightly or wrongly recorded that number of stones are lying at the spot. This witness stated that at the time of preparation of site plan, he had not stated anything about pelting of stones.

27. Ashar Khan (P.W.2) reiterated as to what was stated by Sharab Khan (P.W.1). However, in the cross-examination, this witness stated that he had not stated that while Ismail was lying fallen, stones were pelted. The attention of the witness was drawn to the statement (Exhibit-D/1), wherein it was recorded that stones were pelted by both the sides. This witness further stated that he is not aware that whether due to attempt made to commit rape on Poonam by Cheni and Jekab, the occurrence had ensued.

28. Ishav (P.W.3) stated that in year 2002 (however incident pertains to 2004), he was in his house. At about 10:00 AM, he was giving water to his buffalo. Hearing noise coming from the passage, he came and saw that fight was going on between punjabis and mevs. ". Then Omi Master said to the punjabis to murder Ismail and Ram Gopal gave a Farsi blow on the head of Ismail. This witness admitted that both the sides were causing injuries with lathis. Then this witness stated that he had not seen exchange of stones and lathis. This witness was confronted with his statement recorded by the police. It will be apposite here to reproduce following exact words emerging in the cross-examination of the witness as under:-

29. Shabbir (P.W.4) in the court stated that Ram Gopal pelted stones on the head of Ismail and Balwant caused injury on his foot. Ismail fell and became unconscious. To be precise, Shabbir in the court stated as under:-

30. This witness in the cross-examination admitted that on the day of occurrence against Cheni and Jekab case was registered for making an attempt to commit rape upon Poonam daughter of Ram Lubhaya. The exact words emerging in the cross-examination of the witness are as under:-

31. This witness further admitted that there was no previous grudge between the parties and the houses of punjabis and mevs are situated near to the place of occurrence and house of punjabis is towards South and in the North side the residences of Mevs are situated. This witness in the court stated as under:

32. Jekab (P.W.5) denied that he along with his brother Cheni had made an attempt to commit rape upon Poonam. However, he also denied that before the date of occurrence, they had any grudge against the accused.

33. We need not refer the testimony of Sumer (P.W.7) as he has also reiterated the testimony of other eyewitnesses. Sahab Khan (P.W.12) in the court stated that he is not aware that Naresh Kumar had suffered gun shot injury.

34. What is material for us is to note that Bhajanaram (P.W.14) who had partly investigated the case admitted that it came in his investigation that fight had taken place between the parties as Cheni and Jekab made an attempt to commit rape upon Poonam daughter of Ram Lubhaya and both parties for this reason had pelted stones on each other. The exact words stated by Bhajanaram (P.W.14) in his cross-examination are as under:-

35. Having noted the entire evidence of the prosecution and hearing counsel for

the parties, following facts are discernible in the testimony of the witnesses:

"(a) Ismail deceased had suffered two injuries, one injury on the head and another on foot. Injury No. 1 on the head was caused by Ram Gopal by Farsi. However, Shabbir (P.W.4) has stated that Ram Gopal had caused said injury on the head of Ismail with stone. Injury No. 1 on the head of Ismail is attributed to Ram Gopal and had proved fatal.

(b) Sharab Khan (P.W.1), Shabbir (P.W.4) and Jekab (P.W.5) had suffered simple injuries with blunt weapon in the occurrence. Similarly, Poonam daughter of Ram Lubhaya, Girdhari convicted appellant, Harish convicted appellant, Ram Lubhaya and his wife Satya Bai had suffered simple blunt injuries in the occurrence, whereas and Naresh brother of convicted accused appellant Neetu @ Anil Kumar and Harish has suffered simple gun shot injuries in the occurrence.

(c) The investigating officer has admitted that for the reason that Cheni and Jacom made an attempt to commit rape upon Poonam, daughter of Ram Lubhaya, the occurrence had ensued and both the parties had pelted stones on each other.

(d) It has come in evidence that Ram Lubhaya had lodged a written report (Exhibit-D/10) against accused Cheni and Jacom for having made an attempt to commit rape upon Poonam. It has also come in evidence of Ishav (P.W.3) that on that day fight had taken place between punjabis and mevs.

(e) A perusal of the site plan (Exhibit-P/3) reveals that the occurrence had taken place at point "A" near the house of Ram Lubhaya convicted accused appellant and Balwant acquitted accused. The house of the complainant party is at point "D" at a distance from the house of Ram Lubhaya and Balwant. Ram Lubhaya happened to be father of Poonam and Ram Lubhaya sometime before the occurrence had lodged a report at police station that Cheni and Jacom, son and nephew of Sharab Khan (P.W.1), respectively, had made an attempt to commit rape on Poonam his daughter."

36. Thus, from the above facts, a reasonable inference can be drawn that after lodging of the report for attempt to commit rape upon Poonam, when Sharab Khan (P.W.1), Shabbir (P.W.4) and Jekab (P.W.5) and Ismail came in front of the house of the accused, the occurrence had started. We cannot say with certainty that Ismail and three injured witnesses namely Sharab Khan (P.W.1), Shabbir (P.W.4) and Jekab (P.W.5) came in front of the house intentionally as the complainant party has not explained simple gun shot injuries suffered by Naresh Kumar brother of Neetu @ Anil Kumar and Harish convicted accused.

37. A perusal of written report (Exhibit-D/10) reveals that Naresh Kumar S/o. Brij Lal had rescued Poonam. Thus, it can be safely said that the complainant party coming in front of accused intended to browbeat them and then suddenly on the spur of moment a sudden fight had ensued and parties clashed and caused simple injuries to each other except one injury on the person of Ismail,

which is on the head and had proved fatal. All the injuries suffered by the complainant, his witnesses and the accused in the occurrence are caused by blunt weapon and simple in nature, only an injury on the head of Ismail is an exception.

38. Consequently, a mutual conflict had developed at the spot and it cannot be determined as to which party was aggressor. The Hon"ble Supreme Court in the case of Jumman and Others Vs. The State of Punjab, AIR 1957 SC 469 : (1957) CriLJ 586 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."

39. Thus, we hold that in the present case, the occurrence had taken place on the spur of moment without any pre-mediation and only one injury which has proved fatal is attributed to Ram Gopal. Thus, Ram Gopal is held guilty of offence under Section 304-I IPC and not for offence under Section 302 IPC.

40. Consequently, we convert the conviction of appellant Ram Gopal from the offence under Section 302 IPC to 304-I IPC and set aside the sentence of life imprisonment awarded upon him under Section 302 IPC. Having converted the offence for Ram Gopal, we sentence him to undergo ten years R.I. and to pay a fine of Rs. 10,000/-, in default of payment of fine to further undergo one year R.I.

41. Since we have already held that it was a sudden fight, Section 149 IPC cannot be applied. Thus, all remaining appellants namely, Neetu @ Anil Kumar S/o. Brij Lal, Harish Kumar S/o. Brijlal, Hansraj S/o. Jagannath, Girdhari Lal S/o. Sohan Lal, Ram Lubhaya S/o. Mohan Lal and Madan S/o. Sohan Lal are acquitted of offence under Sections 302/149, 148 and 341 IPC. However, their conviction and sentence for offence under Section 323 is affirmed.

42. With the above modification in the impugned judgment qua conviction and sentence, D.B. Criminal Appeal No. 946/2008 is disposed of.

43. So far acquittal of Ram Prakash, Balwant, Om Prakash, Rammi @ Ramgopal and Daya Chand is concerned, the trial court has given cogent reasons to acquit

them. No appeal against their acquittal has been filed by the State of Rajasthan. Furthermore, we already have given finding of sudden fight, hence, we are of view that no interference is warranted in the revision petition filed by the complainant. Hence, D.B. Criminal Revision Petition No. 1104/2008 being devoid of any merit is dismissed.