
(2003) 02 AHC CK 0186
In the Allahabad High Court
Case No : Criminal Appeal No. 1581 of 1981

Somaru and Others (in Jail) APPELLANT

Vs

State of U.P. RESPONDENT

Date of Decision : 11-02-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302
Uttar Pradesh Children Act, 1951 — Section 2(4), 27

Citation : (2003) 2 ACR 1033

Hon'ble Judges : M.C. Jain, J;K.N. Sinha, J

Bench : Division Bench

Advocate : Bhagwant Prasad, Ram Niwas Singh, N.P. Singh, R.N. Bhakta and Om Prakash Yadava, for the Appellant; G.S. Bisaria, A.G.A., for the Respondent

Judgement

M.C. Jain, J.—The appeal is directed against judgment and order dated 15.7.1981 passed by Sri B. B. Agrawal, the then IInd Additional Sessions Judge, Varanasi in S.T. No. 224 of 1979. Originally there were four Appellants, namely, Somaru and his four sons, Tilakdhari, Chhedi Ram, Rama and Bachchey Lal. All of them have been convicted u/s 302, I.P.C. read with Section 149, I.P.C. and sentenced to life imprisonment, u/s 324 read with Section 149, I.P.C. and sentenced to one year's rigorous imprisonment and u/s 323, I.P.C. read with Section 149, I.P.C. with sentence of one year's rigorous imprisonment. The Appellant Rama has further been convicted u/s 148, I.P.C. and sentenced to one year's rigorous imprisonment whereas remaining Appellants have been convicted u/s 147, I.P.C. with sentence of six months' rigorous imprisonment. All the sentences have been ordered to run concurrently. The Appellant Somaru died during the pendency of appeal and it has been abated so far as he is concerned under order dated 9.7.2002. Presently, therefore, the Court is concerned with the remaining four Appellants named above, who are sons of deceased Appellant, Somaru.

2. Skeleton facts leading to this appeal may be set forth. The genesis of the

prosecution case was the written F.I.R. lodged at police station Cholapur, district Varanasi on 27.5.1978 at 13.05 p.m. by Lalta Prasad P.W. 3. The incident took place on that date at about 12.00 O'clock noon in the sugarcane field of complainant Lalta Prasad in village Garsara. One Luxmi, father of the complainant, died in this incident whereas Basanta, Nanda and Bhagana Devi sustained injuries. Somaru (deceased Appellant), Tilak Dhari, Bagesari, Bachchey Lal and Rama also allegedly sustained injuries on the side of the Appellants. Both the parties were residents of the same village Garsara, residing side by side with their fields also near their houses in the said village. On 27.5.1978, the Appellant Tilak Dhari was grazing his goat in the sugarcane field of the complainant Lalta Prasad. The complainant side made a complaint of it and expressed protest before Somaru (deceased Appellant). It was disliked by his sons Chhedi Ram and Bachchey Lal Appellants who started hurling abuses on the complainant and his party. Lalta's father Luxmi then held out that he was going to lodge a report of their misdeeds. When he was going to police station to do so and reached near the sugarcane field of Somaru (deceased Appellant) outside the village, the Appellants surrounded him and started assaulting him. Luxmi raised shouts which attracted the complainant Lalta Prasad P.W. 3, his brother Basanta P.W. 4, Nanda and his sister Bhagana Devi. All of them rushed up to save Luxmi. However, they were also assaulted by the Appellants. Rama Appellant was holding knife while other Appellants had lathis. Luxmi died at the spot due to injuries inflicted by the Appellants at 12.00 O'clock on 27.5.1978. The incident was witnessed by Sidh Nath, Hori Lal, Niddhi and others who intervened.

3. On the lodging of the F.I.R., a case was registered and the police swung into action. It appears that the Appellants also reached the police station to lodge their report but they were arrested and detained at the police station whereafter they were sent to jail.

4. Post mortem over the dead body of the deceased was conducted by Dr. P. S. Reddy P.W. 8 on 28.5.1978 at 3 p.m. The deceased was of about 50 years of age and 1-1/2 days have passed since he died. The following ante-mortem injuries were found on his person:

(1) Incised wound 1-1/2 - 1/4 - 1/4 cm. (scalp deep) midline of scalp, 11 cm. above the glabella.

(2) Incised wound 1-1/4 - 1/4 - 1/4 cm. (scalp) left front quadrant of scalp 4 cm. to the left and behind injury No. (1).

(3) Lacerated wound 2-1/2 - 1/2 - 1/2 cm. bone deep in the midline and behind the injury No. 1 by 3 cm.

(4) Incised wound 1/2 - 1/4 - 1/4 cm. over the right behind quadrant of scalp 13 cm. above the right ear and 0.2 cm. to the right of midline.

(5) Incised wound 2-1/2 - 1/2 - 1/2 cm. (bone) right hind quadrant 11 cm. behind right ear.

(6) Abrasion 2 - 1 cm. behind the right shoulder.

(7) Abraded contusion 8 - 3/4 cm. across the upper flank (right) 17 cm. below the posterior axillary fold (right) (axilla).

The cause of death was shock as a result of injuries to the head.

5. The injuries sustained by Basanta, Nanda and Bhagana should also be related here for facility of appreciation. They were examined by Dr. N. K. Singh P.W. 9 on 27.5.1978 on 2.30 p.m., 2.55 p.m., 3.05 p.m. respectively. Their injuries were as follows:

Injuries of Basanta:

(1) Incised wound 2 cm. - 1 cm. - 3 cm. on left buttock 6 cm. medially and above the left hip joint.

(2) Incised wound 2.5 cm. - 0.5 cm. - 4 mm. on left ring finger in middle phalanx.

(3) Lacerated wound 1 cm. - 0.5 cm. - 4 mm. on left parietal bone 1 cm. laterally from midline 13 cm. above the left eyebrow.

Injuries were simple. Injuries No. 1 and 2 were caused by sharp weapon and injury No. 3 was caused by blunt weapon. Duration was fresh.

Injuries of Nanda:

(1) Lacerated wound 1 cm. - 0.5 cm. In midline of occipital parietal suture.

(2) Contusion 6 cm. - 0.5 cm. red in colour on left shoulder joint.

Injuries were simple, caused by blunt weapon and duration was fresh.

Injuries of Bhagana:

(1) Lacerated wound 3 cm. - 0.5 cm. - 3 mm. on right parietal region.

(2) Lacerated wound 2 cm. - 2 mm. - 2 mm. on left parietal bone 14 cm. above the prime of left ear.

Injuries were simple, caused by blunt weapon and duration was fresh.

6. The same Doctor (Dr. N. K. Singh P.W. 9) had examined the injuries the same day of Somaru, Tilak Dhari, Rama, Bachchey Lal and Bagesari at 3.20 p.m., 3.30 p.m., 3.45 p.m., 4.00 p.m. and 4.15 p.m. respectively. Their injuries were as follows:

Injuries of Somaru:

(1) Contusion red in colour 6 cm. - 3 mm. on left fore arm 4 cm. above the left wrist joint.

(2) Contusion 6 cm. - 3 cm. on left calf muscle.

(3) Contusion 5 cm. - 3 cm. on surface of right palm red in colour.

(4) Contusion red in colour 3 cm. - 2 cm. on right shoulder joint.

Injuries were simple, caused by blunt weapon and duration was fresh.

Injuries of Tilak Dhari:

(1) Lacerated wound 2 cm. - 3 mm. - 3 mm. on left side of occipital bone 6 cm. laterally from midline.

(2) Lacerated wound 2.5 cm. - 0.5 cm. - 3 mm. on occipital bone in midline.

Injuries were simple, caused by blunt weapon and duration was fresh.

Injuries of Rama:

(1) Lacerated wound 3.5 cm. - 3 mm. - 2 mm. on left parietal bone extending from midline to laterally 12 cm. above the left ear.

(2) Incised wound 1 cm. - 0.5 cm. - 3 mm. on left zygomatic 3 cm. away from tinges of left ear.

(3) Lacerated wound 0.5 cm. - 2 mm. - 3 mm. below the inner eye lid of right eye.

Injuries were simple. Injury Nos. 1 and 3 were caused by blunt object and injury No. 2 by sharp weapon. The duration was fresh.

Injuries of Bachchey Lal:

(1) Lacerated wound 5 cm. - 3 mm. - 3 mm. on right side of the parietal bone 3 cm. laterally from mid line.

(2) Lacerated wound 3 cm. - 2 mm. - 3 mm. on parietal bone in mid-line.

(3) Lacerated wound 2 cm. - 0.5 mm. - 4 mm. on skin of right tibia 17 cm. below the right knee joint.

(4) Contusion red in colour on right forearm 3 cm. - 2 cm. - 13 cm. below the right elbow joint.

Injuries were simple, caused by blunt weapon and duration was fresh.

Injuries of Bagesari:

(1) Lacerated wound 2.5 cm. - 0.5 cm. - 3 mm. on left side of forehead 4 cm. above the left eye brow.

(2) Lacerated wound 2 cm. - 2 mm. - 2 mm. on terminal phalanx of right index finger.

(3) Contusion 2 cm. - 3 cm. red in colour on left scapula.

Injuries were simple, caused by blunt weapon and duration was fresh.

All of them had been produced for medical examination by the police.

7. The defence was that on 27.5.1978 at 12.00 O'clock noon, Tilak Dhari Appellant was grazing his cattle in his own sugarcane field. In the meantime, Basanta reached there and asked him that his goat had grazed his sugarcane crop. When Tilak Dhari denied this fact, an altercation took place. In the meantime, Lalta, Nanda and Luxmi also reached there to support Basanta. Lalta was holding a knife and the remaining persons had lathis. Basanta stated that Tilak Dhari had grazed his cattle in his sugarcane field. Thereupon all these persons started assaulting Tilak Dhari. On the alarm raised by Tilak Dhari, Rama, Bachchey Lal and Somaru also reached the spot including Somaru's wife Bagesari. Lalta Prasad gave a knife blow with intention to commit the murder of Rama. Rama tried to save himself and sustained knife injury in his ear. In the meantime, Bachchey Lal snatched the knife and used it in self-defence. Tilak Dhari also plied lathi in self-defence due to which the persons on complainant side received injuries. During the incident, Bhagana sister of Lalta also reached there and she also received some injuries. The incident, according to defence version, was seen by several persons who intervened. The Appellants went to lodge the F.I.R. and narrated the incident there at the police station. After some time, Lalta Prasad also reached there. The report of Lalta Prasad was scribed earlier and they were arrested and detained. Their F.I.R. was scribed later on, though they had reached earlier at the police station. The F.I.R. was got scribed through some other person and the thumb impression of the Appellant Rama was taken thereon. The police did not take any action on their F.I.R. They lodged the complaint after being released on bail which formed the basis of cross case.

8. The prosecution, in all, produced 9 witnesses including two doctors and Investigating Officer. The eye-witnesses examined were Banni P.W. 1, Sidh Nath P.W. 2, Lalta Prasad P.W. 3 and Basanta P.W. 4. No oral evidence, was, however, adduced by the defence, though they produced some documents. Believing the prosecution case and evidence on record, the trial Judge recorded the impugned judgment which has been assailed by the Appellants before this Court by means of this appeal.

9. We have heard Sri Bhagwant Prasad, learned Counsel for the Appellants and Sri G. S. Bisaria learned A.G.A. from the side of the State and have gone through the record which has been summoned before us. We propose to deal with below the arguments advanced at the bar having regard to the material and evidence on record.

10. It has first been argued by the learned Counsel for the Appellants that admittedly as many as five persons received injuries on the side of the accused-Appellants. Out of them, Somaru, Tilak Dhari, Rama and Bachchey Lal came to be the accused facing trial in the case, but no mention was made in the F.I.R. regarding injuries having been suffered on the side of the accused-Appellants. True, the F.I.R. did not mention about the injuries having been suffered on the side of the accused, but it has to be kept in mind that F.I.R. is not an encyclopaedia of every minute detail. Moreover, the incident had taken place at

12.00 O'clock noon on 27.5.1978 and report was lodged without loss of time at 1.05 p.m. the same day. One Luxmi had died in the incident and three others, namely, Basanta, Nanda and Bhagana had received injuries. There is nothing unusual that the informant Lalta son of the deceased, being most concerned with the victims on his side, could not mention about the injuries sustained on the side of the accused-Appellants too in the F.I.R. After the incident, he hardly had time to think as to who on the side of the accused had received injuries. Therefore, non-mention of the injuries sustained on the side of the accused in the F.I.R. cannot be taken adversely against the prosecution. The truth of the matter is that during the adducing of the evidence in the Court, prosecution side candidly admitted that there were injured on the side of the accused also. Lalta (informant) P.W. 3 stated that Nanda and Basanta also snatched lathis from the accused and used the same in self-defence and that accused persons also received injuries. The factum of the accused side having received injuries has come in the testimony of other witnesses also, namely, Banni P.W. 1, Sidh Nath P.W. 2 and Basanta P.W. 4. Therefore, there is no room for this argument either that the prosecution has not offered any explanation regarding injuries suffered on the side of the accused.

11. Another argument of the learned Counsel for the Appellants is that the investigation in the case was not fair. It has been pointed out that as per the statements of Lalta and Basanta, the accused reached the police station earlier. But, it is a matter of record that F.I.R. from the side of the prosecution was taken at 1.05 p.m. whereas that of the accused had been taken down at 2.30 p.m. The submission of the learned Counsel for the Appellants is that the accused persons wanted to lodge their F.I.R. even before reaching of the prosecution side at the police station, but to give a twist in favour of the prosecution, the F.I.R. of the accused side was not taken down earlier in point of time despite their having reached the police station earlier. We are of the opinion that the mere fact that the accused had reached at the police station earlier in point of time but their F.I.R. had not been taken down first would not discredit the prosecution case and it would also not cloud the prompt lodging of the F.I.R. from the side of the prosecution. This insignificant aspect of the F.I.R. of the accused persons having not been lodged earlier, despite their having reached the police station before the prosecution side, would not affect the merits of the case. Of course, the Court has to judge the impact of the evidence adduced at the trial and to find out the truth on the basis of the same.

12. Another most important argument of the learned Counsel for the Appellants is that actually the prosecution side was the aggressor and they only acted in self-defence to repel the attack of the prosecution side. We should point out that the accused had not adduced any oral evidence in support of their alleged plea of self-defence. We may, however, hasten to add that right of private defence is not required to be specifically pleaded. We are conscious that it may be apparent or surface from the own evidence adduced by the prosecution or the attending circumstances. So, the whole gamut centres around the question as to whether

the facts, circumstances and evidence adduced at the trial make out a case of right of private defence in favour of the accused-Appellants.

13. There was no previous enmity between the parties. Both the parties were neighbours. The presence of the deceased and the injured on the prosecution side, namely, Basanta, Nanda and Bhagana injured at the time of the incident is beyond question. Even the presence of Lalta P.W. 3 informant, though he is not injured, cannot be questioned because he was also named as accused in cross F.I.R. On dispute due to the grazing of the crop by the goat of Tilak Dhari accused (son of Somaru, deceased Appellant), the parties came up with counter version in this behalf. According to the prosecution side, the goat of Tilak Dhari grazed the sugarcane crop of Luxmi deceased and Luxmi (deceased) with his sons went to Somaru to make protestation in this behalf, but Somaru and his sons objected to it and started showering abuses whereafter Luxmi proceeded to lodge F.I.R. at the police station when he was intercepted by the accused persons with assault and it was in this way that the incident occurred. On the other hand, the case of the accused-Appellants has been that Tilak Dhari was grazing goat in his own field when Basanta came and complained that his goat had grazed his field, leading to altercation and exchange of hot words. So, in short, according to the accused-Appellants, the quarrel arose on the alleged presumption or assumption on the complainant side that goat of Tilak Dhari had grazed the crop of the field of Luxmi. Point of the matter is that rightly or wrongly, the complainant side believed that Tilak Dhari's goat had grazed their crop. Now, it does not stand to reason that the accused would have thought so badly as to assault Luxmi and others on his side after hurling abuses on them simply because Luxmi was insisting to go to the police station to lodge the F.I.R. In fact, by that time, Luxmi had done nothing to incur the displeasure of the accused persons. Even if a report had been lodged by Luxmi regarding the grazing of goat, it was not likely to visit them with very serious consequences. On the basis of the evidence and attending circumstances, we form the impression that the issue of grazing of goat gave rise to sudden quarrel between the parties which started with the exchange of hot words. Soon, however, quarrel went out of hand. There were equal number of persons on either side and some on the side of the complainant too had lathis. The entire incident occurred in continuity. There was, however, no question of exercise of any right of private defence by the accused side.

14. Instead of being remorseful and assuring of taking up good care of their cattle in future guarding against their sneaking, the accused turned truculent and aggressive with the hurling of abuses on Luxmi and others on his side. They launched attack with knife and lathis instantaneously in prosecution of the common object of the unlawful assembly that they formed instantly. They targeted even the head of Luxmi for inflicting fatal injuries to him.

15. The argument of learned Counsel for the Appellants is also to the effect that though the complainant side only alleged to have used lathis, Rama received an

incised wound also in neighbourhood of his left ear. He laid stress on the defence case that Lalta on the prosecution side was holding knife and he gave knife blow to Rama. Bachchey Lal, it has been urged snatched the knife from Lalta and used it in self-defence. It has been pointed out that the incised wound sustained by Rama has not been explained by the prosecution. We find that incised wound of Rama was of insignificant dimension being 1 cm. - 0.5 cm. - 3 mm. on bony part near left ear. The learned trial court rightly observed that lacerated wound at such a bony part gives a look of incised wound and medical jurisprudence supports this view. Therefore, it could be a lacerated wound mistaken to be an incised wound. We are not prepared to subscribe to this reasoning that Bachchey Lal was of such a monstrous capacity that after snatching knife from Lalta, he could have caused as many as four incised wounds on the person of the deceased Luxmi and two on the persons of Basanta injured. What appears to be the truth on testing the evidence on record and attending circumstances in the crucible is that actually in a sudden quarrel which started with exchange of hot words between the two sides on the issue of grazing of goat by Tilak Dhari in the field of complainant side, when protest was made by Luxmi and others, accused-Appellants started assaulting Luxmi and others on his side. Rama wielded a knife whereas other Appellants used lathis. It is not uncommon that when Luxmi and others on his side had gone to lodge protest with the accused-Appellants regarding the grazing of the cattle, they also had lathis. Having of lathis by the villagers is a common feature in rural way of life. Two ladies, one on either side also happened to meddle in the scuffle and as a result, Bagesari wife of Somaru (deceased Appellant) also received a lacerated wound and one contusion and Bhagana on the side of the complainant also received two lacerated wounds. In a sudden quarrel that had ensued in the manner aforesaid, the complainant side also used lathis causing injuries to Somaru (deceased Appellant), Tilak Dhari, Rama, Bachchey Lal and Bagesari on the side of the accused-Appellants.

16. So, we veer around the conclusion that the case is covered by Exception 4 to Section 300, I.P.C. so far as the death of Luxmi is concerned. It was a case of culpable homicide not amounting to murder because of the incident having taken place without pre-meditation in a sudden fight in heat of passion. The accused-Appellants with deceased Appellant (Somaru) had formed an unlawful assembly in prosecution of common object of which the death of Luxmi was caused and injuries were inflicted on Basanta, Nanda and Bhagana. As one member of the unlawful assembly, namely, Rama had used a sharp edged weapon (knife) in causing injuries to Basanta too, the unlawful assembly committed an offence u/s 324, I.P.C. read with Section 149, I.P.C. also, besides that of Section 323, I.P.C. read with Section 149, I.P.C. for having injured Nanda and Bhagana in prosecution of common object of the unlawful assembly which had been formed by the accused-Appellants with deceased Appellant, Somaru.

17. Rama being armed with knife, committed an offence of rioting punishable u/s 148, I.P.C. and remaining Appellants committed offence of rioting as punishable u/s 147, I.P.C. as they were armed with lathis.

18. So far as death of Luxmi is concerned, the accused-Appellants committed the offence of culpable homicide not amounting to murder punishable u/s 304, I.P.C. Part I, the case being covered by Exception 4 to Section 300, I.P.C. As many as six injuries had been caused on the person of the deceased out of which four were incised wounds. Some of the injuries had been inflicted on the head (vital-part) and the death was as a result of injuries inflicted on the head. Needless to say that every body is supposed to know the natural and probable consequences of his act. All the Appellants with the deceased Appellant Somaru as members of unlawful assembly inflicted a number of injuries on the deceased with knife and lathis including on head. Therefore, they would be imputed the intention of causing such fatal injuries as were likely to cause his death. Therefore, they committed an offence punishable u/s 304, I.P.C. Part I.

19. Before coming to close, we should advert to another important aspect of the matter. The incident took place on 27.5.1978 and the statements of the accused u/s 313, Cr. P.C. were recorded on 13.4.1981. In the statement u/s 313, Cr. P.C. the accused Tilak Dhari gave his age as 13 years. The learned trial Judge has not recorded any observation concerning his age. The Appellant Tilak Dhari has to be taken as less than 16 years of age at the time of incident. U.P. Children Act, 1951, was in force at the relevant time when the incident took place. Section 2 (4) of U.P. Children Act, 1951 (U. P. Act No. 1 of 1952) defines a child as a person under the age of 16 years. Section 27 of the said Act says that notwithstanding anything to the contrary in any law, no Court shall sentence a child to imprisonment for life or to any term of imprisonment. Section 29 provides, so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the Court may order him to be sent to an approved school for such period as will not exceed the attainment of age of 18 years by the child. Supreme Court has held in the case of Bhola Bhagat v. State of Bihar AIR 1998 SC 236, that benefit of Children Act should not be refused on technical grounds. In the present case also, the benefit of Children Act should be afforded to the accused-Appellant Tilak Dhari. Though he was under the age of 16 years at the time of incident, but he must be about 35 years of age presently. Therefore, there can be no question of sending him to an approved school now.

20. The result would be that while maintaining his conviction, we would not pass any sentence of imprisonment against him as he is entitled to benefit of Children Act. So far as remaining Appellants are concerned, sentence of seven years" rigorous imprisonment u/s 304, I.P.C. Part I read with Section 149, I.P.C., one year"s rigorous imprisonment u/s 324, I.P.C. read with Section 149, I.P.C., one year"s rigorous imprisonment u/s 323, I.P.C. read with Section 149, I.P.C. would be sufficient to meet the ends of justice. Besides, Rama would undergo rigorous imprisonment for one year u/s 148, I.P.C. and the remaining Appellants shall undergo six months" rigorous imprisonment u/s 147, I.P.C. All the sentences shall be ordered to run concurrently.

21. In the net result, we finally conclude as under:

The appeal stands abated in respect of Appellant Somaru.

The appeal is partly allowed in respect of other Appellants. Appellants Tilak Dhari, Chhedi Ram, Rama and Bachchey Lal, instead of the conviction and sentences recorded by the trial court, are convicted u/s 304, I.P.C. Part I read with Section 149, I.P.C. They further stand convicted u/s 324, I.P.C. read with Section 149, I.P.C. and u/s 323, I.P.C. read with Section 149, I.P.C. The Appellant Rama is also convicted u/s 148, I.P.C. and the remaining three Appellants, namely, Tilak Dhari, Chhedi Ram and Bachchey Lal are convicted u/s 147, I.P.C. No sentence is passed against Appellant Tilak Dhari as he was child as per the U.P. Children Act, 1951, at the time of incident.

The Appellants, Chhedi Ram, Rama and Bachchey Lal shall undergo rigorous imprisonment for seven years u/s 304, I.P.C. Part I read with Section 149, I.P.C. one year's rigorous imprisonment u/s 324, I.P.C. read with Section 149, I.P.C. and one year's rigorous imprisonment u/s 323, I.P.C. read with Section 149, I.P.C. The Appellant Rama is further sentenced to undergo rigorous imprisonment for one year u/s 148, I.P.C. The Appellants Chhedi Ram and Bachchey Lal are sentenced to undergo rigorous imprisonment for six months" u/s 147, I.P.C. Sentences of all Appellants shall run concurrently.

The Appellants (1) Chhedi Ram (2) Rama and (3) Bachchey Lal are on bail. They shall be arrested and lodged in jail to serve out their sentences.