

**(1982) 02 RAJ CK 0022**

**In the Rajasthan High Court**

**Case No :** Criminal Appeal No's. 209 and 266 of 1975

State of Rajasthan and Ganesh Ram

APPELLANT

Vs

Ota and Others

RESPONDENT

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**Date of Decision :** 11-02-1982

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 120B, 147, 148, 149, 302

**Citation :** (1982) WLN 25

**Hon'ble Judges :** N.M. Kasliwal, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## **Judgement**

N.M. Kasliwal, J.—Both the aforesaid appeals arise out of the same judgment of the learned Additional Sessions Judge, Jalore dated October 21, 1974, as such we are disposing of both the appeals by one common judgment.

2. A challan was filed against seven accused-persons viz., Ota, Ganesha, Pratapa, Lachhiya, Hukma, Geniya and Kapura. The learned trial court framed charges under Sections 147, 148, 302/149, 452, 323/149 and 120B IPC against accused Ota, Ganesha, Hukma, Geniya, Kapura and Lachhiya. The accused-Pratapa was charged under Sections 147, 148, 302/149 and 120B IPC only. The learned Addl. Sessions Judge acquitted accused Hukma, Geniya, Kapura, Lachhiya and Pratapa. Accused Ota was convicted under Sections 323 IPC and sentenced to one year's rigorous imprisonment. Accused Ganesha was convicted u/s 304 part II, I.P.C. and sentenced to five years' rigorous imprisonment and a fine of Rs. 500/-and in default D.B, Criminal Appeal Nos. 209 & 266 of 1975- Decided on 11-2-1982 of payment to fine to suffer further imprisonment for six months. The above two accused-persons were acquitted of all the other charges. The State has filed Appeal No. 209 of 1975 against all the accused-persons and accused Ganesha has filed Jail Appeal No. 226 of 1975 against his conviction and sentence.

3. We are informed by learned Counsel for the accused-persons that both Ota and Ganesha have already served out the sentence awarded to them.

4. Briefly, the case of the prosecution is that at about 9 PM on May 28, 1972, one Bhura resident of Dayalpura lodged an oral report in Police Station, Umedpura, which was reduced to writing as Ex P.I by S H.O. Police Station Umedpura. According to the prosecution case, as set up in the FIR, Was that one Narsa son of Bhuraji, resident of Dayalpura was the uncle of the complainant Bhoora. Mst. Hamana daughter of Narsa had been engaged with the accused Ganesha son of Ota and in exchange of this, the daughter of Ota had been married with Ganesha son of Narsa. Narsa and Ota had developed strained relations between themselves and hence, Narsa had refused to give his daughter Hamana in marriage to Ganesha son of Ota. At about 2. 30 PM Ota and his son Ganesha alongwith four other persons came in a Jeep on the Bera Nava of Narsa in order to take Mst. Hamana by force. Prosecution case further is that the accused-persons were armed with (sic)lathies and first came towards the Bera and then approached near the house, where Narsa was living. Ganesha and two more persons had come forward and the remaining two persons stayed near the Jeep. At that time, Narsa alongwith his wife and others were sitting. Then all went into the house and closed the door from inside, on the floor and seeing the Jeep, thereafter accused Ganesha and one of his companion jumped the thorn fencing and entered inside the house. They started crying that bring the girl otherwise the complainant party would be murdered. Meanwhile, Mst. Hamana went inside one of the rooms and concealed her presence. Accused Ota and his companions, as such, wanted to make a search of the girl and when Mst Hansi wife of Narsa obstructed them, the accused-persons raised a cry that Narsa should be killed and all the accused-persons started beating Narsa by lathies. Narsa fell down and became unconscious. The prosecution case further is that the accused-persons thought that Narsa was dead and as such, left Narsa and again started searching Mst. Hamana. The accused-persons, however, could not trace out Mst. Hamana and by that time, many other persons had collected, as such the accused 1-persons set in the jeep and ran away. Bhoora, then went to the Police Station and narrated the aforesaid incident. He then went to the spot and found that Narsa was in a serious condition and he was taken to the Hospital at Ahore. But since the Doctor was not there, deceased Narsa was taken to the Hospital at Jalore. In the mean while, Bhoora went to the Police Station Umedpura and lodged report Ex.P. 1. The police registered a case under Sections 452, 147, 148 and 149 and started investigation. On that very night, Narsa died at the Jalore Hospital and an information about this was sent to the S H.O., Umedpura and hence the case was altered under Sections 147, 148, 149, 324, 323 and 302 IPC. The Police after usual investigation filed a challan against all the seven accused-persons mentioned above. The charges were read over and explained to the accused-persons, who denied the guilt and claimed to be tried.

5. The prosecution in all examined 19 witnesses in support of their case. While the defence examined 5 witnesses. The plea set up by the accused Ota was that

he was not present on the spot and has been falsely implicated. Thus, Ota set up a plea of alibi. So far as, accused Ganesha is concerned, he set up a plea that he had been invited by Narsa to settle the dispute. Ganesha had gone as such to the house of Narsa and while discussing the matter to arrive at a settlement, suddenly the deceased Narsa attacked him by a sword. He raised his hands to save him and in so doing, his little finger was chopped off and when Narsa again wanted to attack him, then his companions lifted the lathies which were lying there and gave blows by lathies on Narsa. In these circumstances, he took the plea of right of private defence.

6. The learned trial Court disbelieved the plea of alibi taken by Ota. As regards accused Pratapa, the learned trial court found that the Public Prosecutor himself admitted that no case was proved against accused Pratapa and he did not press the case against him. The learned trial court was also satisfied that there was no evidence against accused Pratapa and, therefore, he was entitled to be acquitted. The prosecution in support of its case examined Devaram (P.W.2), Smt. Hansi (P.W.3), Smt. Pabu (P.W.4) and Raja (P.W. 16) as eye witnesses of the occurrence. It may be mentioned that Devaram (P.W.2) is the son of deceased Narsa. Smt. Hansi (P.W.3) is the wife of deceased Narsa and Pabu (P.W.4) is daughter-in-law of the deceased. Raja (PW16) was a friend of the complainant party. As regards the story of the prosecution that the accused-persons were also armed with a sword, the learned trial court found that the fact that the accused-persons were carrying a sword was not mentioned in F.I.R. It was, thus, found that the probability was that the sword was actually lying in the house of Narsa and some trouble may have taken at that place and in so doing, the sword might have been used. The learned trial court, after carefully examining the statements of the eye witnesses Devaram (PW.2). Smt, Hansi (PW.3), Smt. Pabu (PW 4) and Raja (PW. 16) arrived at the conclusion that it was established that Ganesha might be armed with lathi but he was not carrying a sword with him and Ota was not even having a lathi with him. As regards the accused-persons other than Ganesha and Ota, the learned trial court discussed the number of material discrepancies between the statements of the prosecution witnesses and found that their presence and participation in the crime was not proved by the prosecution. However, as regards Ganesha and Ota, the learned trial court found that their presence of the place of the incident was proved beyond any manner of doubt.

7. Accused Ganesha was also examined clinically on May 29 1972 by Dr. S.C. Sukla (P.W.9), who has proved the injury report (Ex.P.12). The following injuries were found on the persons of accused Ganesha in Ex.P.12.

1. Incised wound on the left fore-arm extending upto little finger at the level of metacarpalphalangeal joint. The Ulna is dislocated from the wrist joint and is visible to naked eye and piece of lower end of Ulna is detached;

2. The little finger which is completely lying separate from metacarpo phalangeal joint except a thin skin of 1/3%. The wound was profusely bleeding. These

injuries were grievous in nature and caused by any sharp object.

The deceased Narsa was examined by Dr. Mangal Sharma (PW.10), who has proved the injury report (Ex.P.20) and the Post Mortem report (Ex.P.22). In the Post Mortem report (Ex.P.22), the following injuries were found on the body of the deceased Narsa:

1. Lacerated wound ante mortem and black eye 1" x 1/8" x bone deep on the left side of the forehead 1" above and parallel to the left eye brow;
2. Ante mortem lacerated wound with clotted blood over it and black eye lacerated wound 1/2 x 1/8" x skin deep 1/4" below and 1/2" x and parallel to that out end of the the right eye brow;
3. Ante mortem abrasion with clotted blood over it with swelling of the bone 1/3rd of the right forearm and hand, 1/3" x 1/8" lying horizontally on the medial aspect at the right forearm joint;
4. One ante-mortem-lacerated wound in the swelling and antimortema on the whole of the middle of the head and both temporal region 1/2" x 1/8" x skin deep. Lacerated wound in the middle of the head 4" above the middle of the left but border at the forehead;
5. Ante-mortem incised wound 1" x 1/10" x skin cut on the middle of the right leg lying obliquely with lower end, directed outwards.
6. Ante-mortem bruise with swelling of the whole of the lower arm 1 x 1/8" lying horizontally on the front aspect of the left arm 2" above the left elbow joint.

In the opinion of the Doctor, the death of deceased Narsa was caused due to shock; and ante-mortem haemorrhage and injury No. 4 mentioned in the post-mortem report was individually sufficient to cause death,

8. As regards the appeal filed by accused Ganesha against his conviction u/s 304 Part II, IPC, learned Counsel for the appellant submitted that the (sic) accused-appellant Ganesha has already served out the sentence and he does not seriously challenge the appeal and we are also convinced that from the evidence of the eye witnesses Devaram (PW2), Smt. Hansi (PW3), Smt. Pabu (PW.4) and Rama (PW 16), it is clearly proved that accused Ganesha had inflicted injury No. 4 on the head of the deceased. So far as the presence of the accused Ganesha on the spot is concerned, it is not disputed even by the defence. We do not find any infirmity in the judgment of the learned trial court in arriving to the conclusion that accused Ganesha had inflicted lathi blow on the head of Narsa, which proved fatal. Thus, we find no force in the appeal filed by accused Ganesha and appeal No. 266 of 1975 is, hereby, dismissed.

9. It is contended by the learned Public Prosecutor that on the basis of injury No. 4, a case u/s 302, IPC was made out against accused Ganesha and the learned trial court committed an error in convicting him u/s 304 Part II, IPC. We find no force in this contention. It is proved from the evidence of the prosecution

witnesses that accused Ganesha had no intention to cause death of deceased Narsa, Out of six injuries found on the person of deceased Narsa, injuries No. 1, 2, 3 and 6 are simple in nature and caused by blunt weapon. As (sic)regaads injury No. 5, which is by a sharp weapon it cannot be attributed to accused Ganesha as already observed, the prosecution has failed to prove that any sword was taken by Ganesha or any other accused-persons. Thus, there remained only one injury No, 4, which has been caused by lathi. It cannot be said there was any premeditation or any conspiracy between the accused-persons to kill deceased Narsa.

10. It was held in Chand and Others Vs. State of U.P., by their Lordships of the Supreme Court as follows:

When in prosecution for offence of riot with murder it was found that since the accused persons wielded their lathis on the head of one of the victims they must have had knowledge that they were causing such bodily injuries to him as were likely to cause death, on such a finding they could be convicted only u/s 304 Part II and not u/s 304 Part I.

We do not find any infirmity committed by the learned trial court in taking the view that accused Ganesha never had the intention to kill Narsa nor he went prepared to his house for causing his death but while causing injury No. 4 he had knowledge that this may result in the death of Narsa.

11. As regards the acquittal of the accused parsons other than Ota and Ganesha, learned Public Prosecutor was unable to show any infirmity in the judgment of the trial court in acquitting these accused-persons. It may be mentioned here that accused Ota has not filed any appeal against his conviction u/s 323 IPC and he his already served out the sentence awarded to him by the trial court. From the prosecution evidence, it was not proved that accused Ota inflicted any injury on the person of the deceased which was likely to cause death and as such, there is no question of his being convicted u/s 302 IPC. We do not find any reason to take a different view from that taken by the trial court that accused Ota only inflicted injuries on deceased Narsa which were simple injuries.

12. In the result, we find no force in the appeal filed by the State and appeal No. 209 of 1975 is, accordingly, dismissed.