

# SUPREME COURT OF INDIA

Kunwar Bahadur

Vs.

State of U.P.

Crl.A.No.131 of 1972

(S. Murtaza Fazl Ali and A. D. Koshal, JJ.)

22.02.1979

## JUDGEMENT

### **FAZAL ALI, J.:-**

1. This appeal by special leave is directed against the judgment of the Allahabad High Court dated 5-10-1971 upholding the conviction of the appellants under S. 302 / 149, I. P. C. but commuting the sentence of death to one of life imprisonment. The appellants were also convicted under S. 307 / 149 and sentenced to five years rigorous imprisonment and under S. 148 to two years rigorous imprisonment. We have heard Mr. Mulla, counsel for the appellant at great length and we have also heard Mr. Uniyal for the State. We have been taken through the judgment of the High Court and the evidence of the High Court and the evidence of the eye-witnesses. After perusing the record we find that the prosecution case against the appellants has been fully proved as held by the High Court and there does not appear to be any error of law or misreading of any evidence so as to warrant our interference in special leave. Mr. Mulla, however, specially stressed the cases of two of the appellants, namely, Raja Ram and Nand Kishore. As regards Raja Ram, Mr. Mulla placed reliance on the finding of the High Court which appears to have found that even though Raja Ram was alleged to have been armed with a gun he may have caused an injury with a lathi as he has admitted in his statement under S. 342. The evidence of P. W. proves clearly two facts against this appellant.

Firstly the appellant before the occurrence exhorted the other assailants of the deceased persons and the injured to open the assault by gun and other weapons. Secondly, that this appellant was also armed with a gun and there is consistent evidence of the eye-witnesses that all the three guns were fired though only one fire hit Nathu. The mere fact that only one person was hit by the gun cannot exclude the possibility of the other guns having been fired because it may be that even though the other guns were also fired their bullets did not hit anybody. In this view of the matter the High Court was not justified in holding that Raja Ram was armed with a lathi. Moreover, Raja Ram in his statement under S. 342 has not denied his presence at the spot but has admitted his presence there and has even stated in his statement under S. 342 before the committing Magistrate that he had also assaulted the prosecution party with lathi. In this view of the matter there is absolutely no reason to acquit Raja Ram of the charge framed against him. The High Court was, therefore, fully justified in upholding his conviction though not for the reasons given by it. The first countention put forward by the learned counsel for the appellant is, therefore, overruled.

2. It was then argued that so far as appellant Nand Kishore is concerned, he appears to be only 15 years at the time when the occurrence took place and it appears that when he was sent to prison the Jailor referred him to the Sewa Sadan under S. 7 of the United Provinces Borstal Act, 1938. Under this section where a prisoner is sentenced for transportation i.e. life imprisonment and is below the age of 21 years he should be sent to Borstal School where he cannot be detained for more than five years. The law thus contemplates that for such an offender the sentence of five years will be equivalent even to a higher sentence of life imprisonment. It is not disputed before us that the appellant Nand Kishore had already served 5 years in that institution and has been released therefrom. The question, therefore, of his surrendering to serve the remaining sentence does not arise. With this modification the appeal is dismissed.

Orders accordingly.