

State of U.P.

Vs

Jodha Singh and Others

Criminal Appeal No. 87 of 1979

(S. Natarajan, Kuldeep Singh JJ)

19.07.1989

JUDGMENT

NATARAJAN, J. –

1. Where the II-Temp. Civil and Sessions Judge, Budaun convicted respondents 1 to 7 under Sections 147/148 IPC, Section 302 read with Section 149 IPC (2 counts) and Section 307 read with Section 149 IPC and sentenced them to imprisonment for life for the conviction under Section 302 read with Section 149 IPC and to lesser terms of imprisonment for the convictions under the other charges, the High Court allowed the appeals preferred by the respondents and set aside their convictions and acquitted them of all the charges framed against them. Hence, the State of U.P. has preferred this appeal against the acquittal of the respondents.

2. To prove its case, the prosecution examined seven witnesses among whom PW 1 Jagdish Singh, PW 2 Ram Din and PW 3 Bangali Singh were eye-witnesses. PW 5 Dr. M. C. Sharma conducted the autopsy on the dead bodies of the two deceased viz., Nathu Singh and Jai Ram Singh. PW 4 Dr. V. K. Chopra examined the injuries sustained by PW 1 and issued the wound certificate for him. PW 6 Head Constable Munshi Lal and PW 7 Karan Singh, Investigating Officer testified to the investigation done in the case. The prosecution evidence which found acceptance with the Sessions Judge was briefly as under :

Deceased Jai Ram Singh and A 1 were cousins. A 2 to A 4 are the sons of A 1 and A 5 to A 7 are his nephews. Jai Ram Singh was the father of deceased Nathu Singh and PW 1 Jagdish Singh. There was a case against Jai Ram Singh and his two sons for an offence under Section 307 IPC. In the trial of that case, Jai Ram Singh wanted A 1 to appear as a defence witness and give evidence in his favour but A 1 declined to do so despite witness summons being served on him. The case ended in conviction and while deceased Nathu Singh was released on probation, Jai Ram Singh and PW 1 were awarded sentence. They had preferred appeals and obtained orders of bail from the appellate court. The failure of A 1 to appear as a defence witness and testify had brought about estrangement between deceased Jai Ram Singh and his sons on the one hand and A 1 and the members of his family on the other.

3. On the day of occurrence viz., November 19, 1972, the two deceased and PW 1 went to the "pair" (grain storage yard) to pay off the money due by them to one Soni. After the money had been paid, the deceased and PW 1 happened to meet all the seven accused persons who had also come to the "pair". On seeing A 1, Jai Ram Singh asked him as to why he had let him down by refusing to appear as a defence witness in the criminal case which had resulted in conviction for himself and his

sons. This led to an exchange of words between Jai Ram Singh and his sons on the one hand and the accused on the other and the wordy quarrel eventually led to an attack on Jai Ram Singh and his two sons by the accused. A 1 and A 5 were armed with lathis, A 2 to A 4 and A 6 were armed with kantas and A 7 was armed with a tamancha. On the prosecution side, PW 1 had a lathi and deceased Nathu Singh had a small two feet long "patti". On the instigation of A 1, A 2 to A 6 attacked Jai Ram Singh and his two sons with kantas and lathi and caused injuries to them. In retaliation PW 1 is said to have wielded his lathi and caused injuries to A 2. The occurrence was witnessed by PWs 2 and 3 and one Krishan Pal Singh and on the intervention of these witnesses the accused stopped their attack on Jai Ram Singh and his sons. However, before leaving the scene. A 7 asked A 2 to stretch his hand and on the latter doing so, he fired a shot from his tamancha and caused injuries to A 2 on his right hand. A 7 remarked thereafter that by reason of the gunshot injuries caused on A 2's hand, evidence has been created in their favour and therefore they can overcome any charge levelled against them for having caused injuries to Jai Ram Singh and his sons. After A 7 had made the triumphant announcement, the accused ran away from the scene.

4. Jai Ram Singh and Nathu Singh succumbed to the injuries sustained by them at the spot itself. PW 1 went to the police station at Bilsa and lodged a report Ex. Ka-1 at 6.30 p.m. Even prior to that, A 2 had appeared at the police station at 5.30 p.m. and lodged a report Ex. Ka-8 against four persons viz., Jai Ram Singh, Nathu Singh, PW 1 and PW 3. He alleged that he and A 3 had been attacked and injured by the abovesaid four persons.

5. PW 4 Dr. Chopra examined PW 1 on November 21, 1972 and found on him six injuries as per report Ex. Ka-4. While injuries 2,4 and 6 were abrasions on the hands and leg, injury 1 was a traumatic swelling 1 cm x 1 cm on the left side of the parietal region and injury 5 was an incised wound 6 cm x 1 cm x bone deep on the back of right hand cutting through the right middle and ring finger at the metacarpophalangeal joint. According to PW 5 injury 5 was grievous in nature and could have been caused by a Kanta while the other injuries could have been caused by blunt weapons at about 2 p.m. on November 19, 1972.

6. PW 5 Dr. Sharma, who conducted the autopsy found on the dead body of Jai Ram Singh four incised wounds, 7 abrasions and one lacerated wound. On the dead body of Nathu Singh he found 5 incised wounds and 3 abrasions and some multiple abrasions. As the defence had not disputed the sustainment of injuries by Jai Ram Singh and Nathu Singh and the injuries being the cause of their death, it is not necessary to give a detailed description of the injuries found on the two dead bodies. Suffice it to say that PW 4 had certified that both the deceased had died on account of shock and haemorrhage resulting from the injuries sustained by them and they would have sustained the injuries at about 2 p.m. on November 19, 1972.

7. The defence set up by the accused was that only A 2 and A 3 were present at the scene and not the other accused. According to A 2, he and A 3 were at the "pair" and PWs 1,3 and the two deceased started he was assaulted with lathi and deceased Nathu Singh fired at him with a tamancha. On receipt of gunshot injuries on his right hand, he fell down unconscious. A 3 supported the version of A 2 and further stated that when the four persons attacked him and A 2, he and A 2 retaliated with the kantas in their hands and this had resulted in the sustainment of injuries by some of the four persons. He further stated that after Nathu Singh had fired his tamancha at A 2, he was trying to reload the weapon and at that time he (A 3) struck him on his hand with a kanta and this made Nathu Singh drop down his tamancha and thereupon he picked up the tamancha and took it to the police station and gave it to the police when A 2 gave his report. Even as their report was being recorded, PW 1 came there and gave his report. Thereupon, the police ignored their report and

placed them in the lock up.

8. The defence examined DW 1 Dr. S. R. Singh to speak about his having examined A 2 and A 3 on November 22, 1972 and November 23, 1972 respectively for certain injuries said to have been sustained by them, on November 19, 1972 at about 2 p.m. DW 1 stated that he found on A 2 the following injuries :

(1) Multiple gunshot abrasions 1/8" x 1/8" in size; some were skin deep with pellets palpable underneath in an area of 7" x 5" on front side of right forearm. No scorching or tattooing seen.

(2) Lacerated wound 3/4" x 1/4" skin deep on left parietal region.

DW 1 has further stated that he found two abrasions on the left wrist (back side) of A 3.

9. After a detailed and careful consideration of the evidence adduced by the prosecution and the defence, the learned Sessions Judge came, to the conclusion that all the seven accused persons should have been present at the scene and that the occurrence should have taken place in the manner spoken to by PWs 1 to 3. He rejected the defence version as to how A 2 had come to sustain gunshot injuries on his hand. As regards the other injuries on A 2 and the abrasions on A 3 the Sessions Judge held that they should have been caused by PW 1 when he wielded his lathi in defence. In accordance with such conclusions, the Sessions Judge found the accused guilty of the offence of rioting, murder and attempt to commit murder and sentenced all of them to suffer imprisonment for life for the conviction under Section 302 read with Section 149 IPC. He further sentenced A 1 and A 5 to RI for six months under Section 147 IPC and the other accused to RI for one year under Section 148 IPC. He also sentenced all the accused to RI for seven years for the conviction under Section 307 read with Section 149 IPC. The Sessions Judge directed all the sentences to run concurrently.

10. The High Court, to which the accused had preferred four appeals, in a brief judgment without much of discussion about the evidence disagreed with the view taken by the Sessions Judge and set aside the charges framed against them. The High Court deemed it fit to allow the appeals preferred by the accused despite noticing that "the learned counsel for the appellants has not disputed that the incident took place near about the time mentioned by the prosecution", and that "the location at which the incident took place cannot also be doubted". The High Court also noticed the fact that the three eyewitnesses viz., PW 1, who was also an injured witness and PWs 2 and 3 had substantially adhered to the prosecution version given in the first information report and had named all the appellants. Even so the High Court chose to set aside the convictions awarded by the Sessions Judge on the following grounds :

(1) There was no motive for the accused to commit the crime and on the contrary it was the deceased and PW 1 who were aggrieved with A 1 for the his having refused to appear as a defence witness on their behalf in the case filed against them under Section 307 IPC.

(2) Though according to PWs 1 to 3, four of the accused were armed with kantas and only two were armed with lathis, there were more number of injuries caused by lathis than injuries caused by kantas on the two dead bodies and this feature cast doubts on the veracity of the testimony of PWs 1 to 3.

(3) If A 7 was armed with a tamancha, it is inconceivable he would not have made use of it to shoot Jai Ram Singh and his sons.

(4) The prosecution case that A 7 had used the tamancha against A 2 in order to create evidence in their favour was too unnatural a version to merit acceptance.

(5) Only three witnesses PWs 1 to 3 have been examined to speak about the occurrence and no independent witnesses have been examined. PW 1 is an interested witness and PWs 2 and 3 are chance witnesses. The presence of PW 3 at the scene was also somewhat doubtful. Moreover, PWs 2 and 3 had figured as witnesses in a case registered under Sections 107 and 117 CrPC on a report given by one Hakim Singh.

(6) Neither the prosecution nor the defence have come out with a true version of the occurrence. The prosecution version as to how A 2 sustained gunshot injuries was not a convincing version. Viewed in that light, there is no explanation for the gunshot injuries sustained by A 2 and in that situation it can be assumed that the accused had a right of private defence and therefore they are entitled to the benefit of doubt.

Mr. Prithvi Raj, learned counsel appearing for the State took us through the relevant portions of the evidence and the judgments of the Sessions Judge and the High court and argued that while the Sessions Judge has examined the evidence with minute care and given cogent and convincing reasons for convicting the accused of the offences charged against them, the High Court has failed to consider the evidence in depth and has based its conclusions to acquit the accused on unimportant and inconsequential matters. Mr. R. S. Singh, learned counsel appearing for the accused disputed the statement of the appellant's counsel and contended that the prosecution case suffers from many infirmities and therefore the High Court had acted correctly in setting aside the convictions and acquitting the accused.

11. On a careful consideration of the relevant materials and the arguments of the counsel for the State and the respondents, we find that the High Court has allowed itself to be carried away by minor factors in spite of its realisation that the time and place of occurrence are sufficiently established and that PWs 1 to 3 have given cogent and consistent evidence as to how the occurrence had taken place. We will now set out the several errors committed by the High Court in construing the evidence which has resulted in miscarriage of justice.

12. Admittedly Jai Ram Singh and Nathu had died on account of multiple injuries sustained by them and PW 1 had also sustained several injuries. If Jai Ram Singh and his sons were the aggressors and if only A 2 and A 3 were present at the scene they could not have by their acts of self-defence alone caused the death of two persons and also caused injuries to PW 1. Another significant factor is that the two deceased and PW 1 had received different kinds of injuries viz., incised wounds, lacerations and abrasions. Injuries of such nature could not have been caused by A 2 and A 3 alone with the respective weapons in their hands.

13. A major error committed by the High Court is its rejection of the evidence of PWs 1 to 3 in spite of the High Court finding their evidence to be consistent and conforming to the version given in the FIR.

14. The presence of PW 1 at the scene can never be disputed because of various factors. He was one

of the victims of the attack and he had sustained injuries. The accused also admits his presence there. He is the first informant in the case. Such being the position, his evidence cannot be brushed aside lightly by saying he is an interested witness. As regards PW 2, he has given satisfactory explanation for his presence at the scene. His shirt, which became blood-stained, when he caught hold of PW 1 in order to prevent his from falling down after he sustained the injuries, has been seized by the police. His name has been mentioned in the FIR given soon after the occurrence. Hence his evidence cannot be thrown overboard by saying he was a chance witness. As regards PW 3, the accused themselves admit his presence at the scene. In fact their version is that he joined Jai Ram Singh and his sons in attacking A 2 and A 3, In such circumstances it passes our comprehension as to how the High Court can doubt his presence at the scene. His name has also been mentioned in the FIR. As to PWs 2 and 3 having figured as witnesses along with PW 1 in a case registered under Sections 107 and 117 CrPC on the report given by a third party, that is no reason why they should align themselves against the accused and give false evidence against them.

15. The further error committed by the High Court for disbelieving PWs 1 to 3 is that since the deceased and PW 1 had sustained more number of abrasions than incised wounds, it was unlikely that four of the accused would have been armed with kantas and only two would have been armed with lathis.

16. The High Court has observed as follows :

It appears from the injuries that there were more assailants armed with lathis and less with kantas in the incident, or it may be possible that there was no lathi in the hands of the assailants and only kantas which were used either with cutting end reversed in the assault.

In fact there are a large number of injuries on the two dead persons and PW 1 which should have been caused by kantas. As regards the abrasions, the High Court itself has realised that they could have been caused by kantas also if the blunt side of the kantas had been used to attack the deceased. Hence the nature of the injuries sustained by the two deceased and PW 1 do not falsify the evidence of PWs 1 to 3.

17. Coming now to the non-user of the tamancha by A 7, against Jai Ram Singh and his sons, the High Court has failed to notice that the tamancha was a very ineffective weapon as demonstrated by the trivial injuries sustained by A 2. A 7 may have fully realised the futility of using the weapon and did not therefore make use of it. Alternatively he may have fired the tamancha during the fight and the pellets may have accidentally hit A 2 on his right hand. One important factor the High Court has failed to notice is that according to A 2 and A 3, Nathu Singh had the tamancha and he had used it once and while he was reloading it, A 3 beat him on the hand and he dropped it and thereafter A 3 picked it up. If that was so, A 2 and A 3 would have produced the weapon at the police station when they went there and gave a report. They have not done so and they have not also offered any explanation as to what became of the weapon. It is therefore obvious that only the accused should have brought the tamancha and that is why they had not produced it at the police station.

18. Only two other factors which have weighed with the High Court remain to be dealt with. The High Court is no doubt right in stating that the tide of grievance flowed only from the side of Jai Ram Singh and his sons because of A 1's failure to appear as a defence witness and give evidence on their behalf in the criminal case filed against them but that does not mean that a quarrel would not have taken place when Jai Ram Singh questioned A 1 about his hostile attitude despite being a

relation. The last factor is that the High Court has concluded that the accused can be held to have caused injuries to the deceased and PW 1 in exercise of their right of private defence because the prosecution has failed to explain satisfactorily the presence of gunshot injuries on A 2. The High Court has failed to examine the position whether even if the accused had a right of private defence, they had exceeded that right. For all these reasons we find that the High Court has completely misdirected itself in construing the evidence adduced by the prosecution and acquitting all the accused which has led to miscarriage of justice. We therefore set aside the judgment of the High Court.

19. We are now left to determine the nature of the offence committed by the accused. The evidence on record, as found by the Sessions Court and the High Court also, establishes beyond doubt that an occurrence had taken place at the 'pair' at about 2 p. m. on November 19, 1972 and it had resulted in Jai Ram Singh and Nathu Singh receiving fatal injuries and PW 1 also sustaining several injuries, one of them being grievous. Likewise A 2 and A 3 had also sustained simple injuries on their person. According to both sides a wordy quarrel had taken place and the quarrel had led to the use of weapons by both the parties against each other. It is not therefore a case where the accused had deliberately attacked the deceased and PW 1 with an intention to kill them. On the other hand it is a case which would fall under Exception 4 to Section 300 IPC. The High Court has failed to notice this position because of its obsession over minor details in the case.

20. On the question whether all the accused or only some of them should be convicted for the injuries caused to the deceased and PW 1, we must say even at the outset that the accused cannot be convicted for the offence of rioting because the attack on the victims had taken place in the course of a sudden quarrel. The accused had not formed themselves into an unlawful assembly in order to commit the offence of rioting. Hence none of the accused can be convicted under Section 147 or Section 148 IPC. Insofar as the injuries caused to the deceased and PW 1 are concerned, we find that though A 1 was armed with a lathi and A 7 was armed with a tamancha, they had not made use of them on the deceased or PW 1. Therefore, A 1 and A 7 cannot be convicted for the injuries caused to the deceased and PW 1 and their acquittal has to be sustained, though for different reasons. As regards A 2 to A 4 and A 6, they were armed with tamancha and they had caused injuries to PW 1 besides causing fatal injuries to the deceased. A 5 was armed with a lathi and he had used the same against the victims. The evidence does not establish who among the assailants caused the fatal injuries to the two deceased. Consequently A 2 to A 6 merit conviction under Section 304 part II IPC read with Section 34 IPC. As regards the attack on PW 1 it cannot be said that A 2 to A 6 had attempted to murder him because the injuries had been caused in the course of a sudden quarrel. They can therefore be convicted only under Section 326 read with Section 34 IPC and not under Section 307 read with Section 34 IPC. Accordingly we convict A 2 to A 6 under Section 304 Part II IPC read with Section 34 IPC (two counts) and under Section 326 read with Section 34 IPC.

21. Since the occurrence had taken place nearly 17 years ago and since the accused were acquitted by the High Court more than 11 years ago, the question seriously for consideration whether the convicted accused should be sent to jail for serving out a further term of imprisonment for the convictions awarded to them. Were it not for the time factor we would have sentenced A 2 to A 4 and A 6 to undergo RI for 5 years for their conviction under Section 304 Part II read with Section 34 IPC and RI for one year for their conviction under Section 326 read with Section 34 IPC, the sentences to run concurrently and A 5 (who had used only a lathi) to RI for 3 years under the first count and RI for 6 months under the second count. the sentences torun concurrently. It was represented to us by the respondent's counsel, that all these accused have now settled down to their

normal avocations and are looking after their family members and it will cause them as well as their family members very great hardship if they are to be sent to prison at this late stage to serve out further terms of imprisonment. This submission cannot be brushed aside as being entirely without force. Consequently, while confirming the acquittal of accused A 1 and A 7 of all the charges and convicting A 2 to A 6 under Section 304 Part II IPC read with Section 34 IPC we sentence them to the period of imprisonment already undergone by them and in addition sentence A 2 to A 4 and A 6 to pay fine of Rs. 5000 (Rs. Five Thousand) each in default to undergo RI for two years and A 5 to pay a fine of Rs. 2500 (Rs. Two Thousand and Five Hundred) and in default to undergo RI for one year. For the conviction under Section 326 read with Section 34 IPC we sentence the accused to undergo imprisonment for the period already undergone by them and in addition to pay a fine of Rs. 250 (Rs. Two Hundred and Fifty only) each, in default to suffer RI for three months. Out of the fine amount, imposed on A 2 to A 6 for the conviction under Section 304 Part II read with Section 34 IPC, if collected, we direct 75 per cent of the fine amount to be given shares i.e. 37 1/2 per cent each to the heirs of Jai Ram Singh and Nathu Singh respectively. Out of the fine amount collected for the conviction under Section 326 read with Section 34 IPC we direct 75 per cent of the amount to be given to PW 1 Jagdish Singh.

22. The appeal is thus allowed in part in the manner indicated above.

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