

## Jamna vs State Of U.P on 21 September, 1993

**Equivalent citations: 1994 AIR 79, 1994 SCC SUPL. (1) 185, AIR 1994 SUPREME COURT 79, (1994) SC CR R 106, 1994 CHANDLR(CIV&CRI) 652, (1993) 3 ALL WC 1788**

**Author: G.N. Ray**

**Bench: G.N. Ray**

PETITIONER:

JAMNA

Vs.

RESPONDENT:

STATE OF U.P.

DATE OF JUDGMENT 21/09/1993

BENCH:

REDDY, K. JAYACHANDRA (J)

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REDDY, K. JAYACHANDRA (J)

RAY, G.N. (J)

CITATION:

1994 AIR 79

1994 SCC Supl. (1) 185

JT 1993 (5) 334

1993 SCALE (3) 824

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J.- This is an appeal under Section 379 CrPC read with Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act. There are eight appellants. They along with eight others were tried for offenses punishable under Sections 147, 148, 302/149, 324/149 and 323/149 IPC. The trial court acquitted all of them. The State preferred an appeal and the High Court while confirming the acquittal of the other accused, convicted the appellants. Appellants 1 to 4 are convicted under Sections 302 read with 149 IPC and each of them is sentenced to undergo imprisonment for life. The remaining four

appellants are convicted under Sections 326/149 IPC and each of them is sentenced to undergo two years' RI. Ghanshyam, appellant 4 and Shyam Lal, appellant 5 are further convicted under Section 147 IPC and sentenced to undergo six months' RI and the remaining six appellants are convicted under Section 148 IPC and sentenced to undergo one year's RI. All the eight appellants are further convicted under Sections 324/149 and 323/149 IPC and each of them is sentenced to undergo one year and six months' RI respectively. Appellant 1, Jamna is reported to be dead and a death certificate is filed. Permanand, appellant 3 is also reported to be dead as per the office report dated July 21, 1988. Therefore the appeal stands abated in respect of these two appellants.

2. The prosecution case is as follows: One Shakoor, a nephew of PW 6 is the deceased in the case. PW 6 is the wife of PW 4. Roshan Khan, PW 1 is the informant. These three witnesses and two other women, members of PW 6's family received injuries in the occurrence. 20 or 25 days prior to the present occurrence, Kallu, a member of PW 6's family attempted to outrage the modesty of the wife of Shyam Lal (appellant 5), who lodged a report to the police. Kallu was arrested and released on bail about one week prior to the present occurrence. On account of this incident, all the 16 accused bore grudge and were inimical towards Kallu and other members of the family. The feelings got further strained because of initiation of proceedings under Section 107 CrPC. On February 7, 1974, it is alleged that the 16 accused went to the house of PW 6 at about 1 p.m. armed with spears, guptis, sangs and lathis. Shyam Lal exhorted others and thereafter all the 16 accused started assaulting PW 4, who happened to be present outside his house at that time. Hearing the noise, the deceased, PW 6 and the other two ladies came out of the house. Thereupon they were also assaulted by the accused. Shakoor, the deceased, who had a lathi, started wielding it in defence of members of his family. Thereupon Kanhiya, appellant 2 said that Shakoor should be dead. Thereupon he himself, Jamna, appellant 1, Permanand, appellant 3 and Ghanshyam, appellant 4 attacked the deceased. Ghanshyam inflicted some blows with lathis and the others who were armed with guptis and spears attacked the deceased and inflicted a number of incised injuries and killed him on the spot. Thereafter they ran away. The occurrence was also witnessed by PW 9 and some others who arrived at the scene of occurrence on hearing the noise. PW 1 went to the police station, seven miles away, and lodged an FIR at 3.50 p.m. on the same day. The investigation commenced and S.I. reached the scene of occurrence. He sent the injured for medical examination who were examined by Doctor, PW 2 on the same night. The dead body of the deceased was sent for postmortem and PW 2 conducted the postmortem. He found a number of incised and punctured wounds, four contusions and some abrasions. On internal examination he found that several ribs had been cut, occipital (sic) was cut and lungs were also injured. The Doctor opined that the deceased died due to shock and haemorrhage due to these punctured and incised wounds. All the accused pleaded not guilty. The learned Sessions Judge discarded the evidence of the eyewitnesses including the injured witnesses on the ground that the time and place of occurrence are in doubt. According to the learned Sessions Judge, in view of the medical evidence that there was semi-digested food in the stomach of the deceased, the occurrence must have taken place earlier some time in the morning and not in the midday. The place of occurrence was doubted because the blood stains were not found. Then the learned Sessions Judge proceeded to consider the omissions and discrepancies and ultimately held that the witnesses cannot be relied upon particularly when they are all interested. The High Court, on the other hand, held that the injured witnesses are reliable to the extent that specific overt acts were attributed to the accused. The High Court further held that the common object of the unlawful

assembly was not to commit murder but was only to cause grievous hurt. But the first four appellants who attacked the deceased, I could be held guilty under Sections 302/34 IPC. The High Court also convicted all of them for causing injuries to the witnesses. Since no overt acts were attributed to the remaining eight accused, the High Court confirmed their acquittal.

3. Shri R.K Garg, learned senior counsel appearing for the appellants submitted that the learned Sessions Judge has given a number of reasons for not relying upon the evidence of the injured witnesses and the view taken by him is quite reasonable and therefore the High Court erred in interfering with the findings of the trial court. He also submitted that PW 1, who is the author of the earlier report, was a highly interested witness and the version given by him was repeated by the other witnesses and having regard to many discrepancies and omissions, the evidence of all the witnesses has to be rejected. Learned counsel also pointed out that the High Court has not examined all the reasons given by the Sessions Court and therefore the judgment of the High Court is liable to be set aside.

4. From the above-stated facts, it can be seen that PWs 1, 4 and 6 are the injured witnesses. The learned counsel, however, tried to show that the injury on PW 1 was only a traumatic swelling. But the Doctor says that the same could have been caused by a blunt weapon and that is the version of PW 1. PWs 4 and 6 received quite a few injuries and their presence at the scene of occurrence cannot be doubted. The evidence of PWs 5 and 9 was not treated to be very material. Therefore we have to proceed on the footing that PWs 1, 4 and 6 were present at the scene of occurrence and had witnessed the same. When once their presence is established, even assuming that there are some discrepancies regarding the actual time of occurrence, that is not at all material. Learned counsel, however, submitted that if the occurrence had taken place in the morning then having regard to the fact that the FIR was given only at 3.50 p.m. then it must be presumed that there was lot of time for consultations and therefore it must be held that the FIR was a result of such consultations. It is needless to say that the delay by itself is not a circumstance to doubt the prosecution case. Further, in the instant case, the presence of semi-digested food in the stomach by itself is not an indication that the occurrence must have taken place in the early hours. On the other hand, it stands to reason that the deceased might have taken his food some time in the morning at about 9 or 9.30 a.m. In any event, in our view, this is not at all a significant factor. PW 1 in his chief-examination has given all the details about the relationship of the deceased and other witnesses and the relationship of the accused among themselves. He has also given details about the earlier incident where Kallu was said to have misbehaved with a lady and the consequent ill-feelings. Coming to the occurrence, he has mentioned the names of all the 16 accused who came in a group. Then he deposed that among the accused Kanhiya, appellant 2, Jamna, appellant 1 and Permanand, appellant 3 were armed with ballams and Ghanshyam, appellant 4 was armed with a lathi and all the four of them attacked Shakoor, the deceased. He has also mentioned about the presence of PWs 4 and 6 and that they received injuries. He further deposed that on the same day, he went to the police station and gave a report at about 4 p.m. He was cross-examined at length. The first part of the cross-examination was with reference to the motive to which we need not advert. The next part of the cross-examination was about Section 107 CrPC proceedings. Then coming to the occurrence, the cross-examination proceeded to elicit about the nature of the weapons and as to who attacked first etc. This witness specifically stated that these four accused attacked the deceased as instigated by Kanhiya. Some of

the discrepancies elicited are that in the earlier statement, he failed to state about Shyam Lal being incited in the first incident and that he has not stated that the deceased was also beaten after he fell down. Then he was cross-examined with reference to the injuries found on him. The witness denied the suggestion that some strangers had attacked the witnesses and the deceased in the earlier part of the day. Having gone through the evidence in general as well as the cross-examination, we are not able to find any material discrepancy or infirmity in the evidence of PW 1. He has stated almost all these particulars in the FIR also. Learned counsel, however, submitted that some of the details given in respect of the attack have not been mentioned. Further, with regard to the attack on the deceased, it is specifically mentioned in the FIR that the four appellants attacked the deceased and inflicted the injuries.

5. PW 4 is the next important witness. He had a number of injuries on him and his presence at the scene of occurrence is not in dispute. This witness also has given the details and descriptions of the accused. Now, coming to the occurrence, PW 4 deposed that all the 16 accused came in a body and stated that his family members are insulting them and the accused started beating him. On his shouting, his wife PW 6, the deceased and the two other ladies came out from the house. Thereafter he gave the details of the attack on the deceased. Then, he further stated that Kamla, appellant 6 hit him on the head with a pharsa and somebody also hit him with a ballam and he also received some lathi injuries. In the cross-examination, this witness stated that he had no personal knowledge about Kallu having insulted the wife of Shyam Lal. He was also cross-examined at length with reference to the earlier incident. Then he was cross-examined with reference to his statement under Section 161 CrPC. It appears that in that statement he stated that first Dullan had tried to rescue him and then the deceased Shakoor wielded his lathi whereas in the present version he has stated that Shakoor, the deceased wielded his lathi and tried to save them. Then the other discrepancy is whether Kallu was at the door and ran away after seeing the people. We think these two discrepancies are not at all material. Then he was cross-examined with reference to the proceedings under Section 107 CrPC. Thereafter he was cross-examined with reference to the injuries and when he became unconscious. This witness clearly stated that he had no enmity as such with Shyam Lal. PW 6 is the next injured witness, who is none other than the wife of PW 4. She also had fairly serious injuries. She deposed in the chief-examination that accused Kanhiya, Permanand, Jamna, Mavnu and Shyam Lal were holding ballams and some others were holding guptis and the rest were holding sticks. She has given a detailed account of the occurrence. She also stated that she pleaded with the accused not to beat them. She specifically stated that the accused Kanhiya, Jamna, Permanand and Ghanshyam attacked and inflicted injuries on the deceased. She further stated that Shyam Lal hit her with a ballam and other accused also hit her. She was also cross-examined at length with reference to the misbehaviour of Kallu. As far as the occurrence is concerned, she also asserted in the cross-examination that the accused surrounded them and beat them. She was cross-examined with reference to her earlier statement under Section 161 CrPC. She stated that the next day her statement was recorded by the police officer at 2 p.m. She denied the suggestion that some unknown persons entered their house in the darkness and attacked them.

6. The evidence of these three injured witnesses is simple and straightforward at least with reference to the attack on the deceased and on themselves. The reasons given by the learned Sessions Judge for doubting their evidence are very much strained. We have gone through the judgment of the

learned Sessions Judge carefully and he is right to the extent that the witnesses are all interested. But that by itself is not a ground to reject their evidence. Much of the criticism of the prosecution case was about Kallu having not been attacked. But it is the prosecution case that Kallu was not there and he managed to go away. Learned Sessions Judge has commented much about the motive aspect. But when once there are direct witnesses, the motive assumes less or little importance. The other discrepancies and omissions pointed out are not at all material. The omission which was very much highlighted was that the deceased starting wielding his lathi and on this question the earlier statement and the present version are compared so meticulously, which, in our view, is not at all such an important thing. In the evidence of PW 1, the discrepancies in his statement about the presence of interconnecting door in between the two houses is also commented upon very much. We are only pointing out some of these discrepancies just to show that the appreciation of the evidence by the learned Sessions Judge was wholly unsound and we think it is not necessary to examine every such finding in respect of these discrepancies. The High Court has rightly come to a different conclusion.

7. The High Court has further held that the common object of the unlawful assembly was not to commit murder and that the deceased was not killed in prosecution of such a common object. On the other hand, the finding was that the common object of the unlawful assembly was only to cause grievous hurt and in fixing the membership of the unlawful assembly, the High Court applied overt acts test namely that only such of those accused to whom specific overt acts in respect of the attack on the deceased and the witnesses were attributed, can be taken to be the members of the unlawful assembly, the common object of which was only to cause grievous hurt. The High Court, however, convicted appellants 1 to 4 under Sections 302/149 IPC on the ground that they alone had the common intention to kill the deceased and the same was not shared by the other accused, who did not participate in the attack on the deceased. Therefore the High Court confirmed the acquittal of the eight accused to whom specific overt acts were not attributed. The High Court convicted all the eight appellants under Sections 326, 323 and 324 read with Section 149 IPC having held that the common object of the unlawful assembly was to cause grievous hurt. So far as the first four appellants are concerned, they are convicted for their specific overt acts of attacking the deceased. Appellants 1 to 4 are held to share the common intention and in the result Section 34 IPC was applied. Learned counsel, however, submitted that the first four appellants can be convicted under Sections 326/149 IPC since against them also there is an omnibus allegation.

8. The evidence of PWs 1, 4 and 6, the three injured witnesses whose evidence has been accepted by the High Court, is to the effect that appellants 1, 2 and 3 were armed with ballams and the medical evidence establishes that a number of punctured wounds, many of which proved fatal, should have been inflicted only with ballams. To that extent, appellants 1 to 3 can even be convicted under Section 302 simpliciter also. However, so far as Ghanshyam, appellant 4 is concerned, he was no doubt a member of the unlawful assembly, again the common object of which was to cause grievous hurt only and he was armed only with a lathi and according to the medical evidence, there were some contusions on the deceased which were simple injuries. Therefore his case also would be the same as appellants 5 to 8 who are made constructively liable under Sections 326/149 IPC even in respect of the attack on the deceased. The case of appellant 4 is in no way different from these accused. It is only appellants 1 to 3 who attacked the deceased with ballams and caused a number of

fatal injuries.

9. When the finding is that the common object of the unlawful assembly in general was only to cause grievous hurt, if anybody has exceeded the same, he or they would be liable for their individual acts. In this view of the matter, Ghanshyam, appellant 4 cannot be said to have shared the common intention along with appellants 1 to 3 who instantly killed the deceased by inflicting injuries with ballams. Therefore he would also be liable under Sections 326/149 IPC.

10. As already noted appellants 1 and 3 have died but the conviction of appellants 1 to 3 under Sections 302/149 is correct and in that view of the matter, the conviction and sentence of Kanhiya, appellant 2 have to be confirmed under Sections 302/149 IPC.

11. In the result, the appeal against appellant 1, Jamna and appellant 3 Permanand, though their convictions are confirmed, stands abated. The appeal against appellant 2, Kanhiya is dismissed and all the convictions and sentences awarded to him are confirmed. So far as appellant 4, Ghanshyam is concerned, his conviction under Sections 302/149 IPC and the sentence of imprisonment of life awarded thereunder are set aside. Instead he is convicted under Sections 326/149 IPC and sentenced to undergo two years' RI. All other convictions and sentences awarded in respect of all the appellants namely 2, 4, 5, 6, 7 and 8 are confirmed. The appeal is allowed partly in respect of appellant 4, Ghanshyam and dismissed against the remaining appellants namely 2, 5, 6, 7 and 8. If they are on bail they shall surrender and serve out the remaining sentence.