

## **State Of U.P. vs Mohammad Musheer Khan And Ors. on 29 July, 1977**

**Equivalent citations: AIR1977SC2226, 1977CRILJ1897, (1977)3SCC562, 1977(9)UJ546(SC), AIR 1977 SUPREME COURT 2226, 1977 3 SCC 562, 1977 CRI APP R (SC) 298, 1977 ALLCRIR 472, 1977 SCC(CRI) 565, 1977 U J (SC) 546, 1977 SC CRI R 339**

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**Bench: N.L. Untwalia, P.N. Shinghal**

### **JUDGMENT**

N.L. Untwalia, J.

1. In this appeal by special leave filed by the State of Uttar Pradesh, there are three respondents-(1) Mohammad Musheer Khan; (2) Mohammad Shamim Khan and (3) Siraj Ahmad Khan. All the three were tried by the Sessions Judge of Sultanpur for the offence of committing the murder of Nirmaljeet Singh, brother of Bimaljeet Singh, P.W. 1. Respondent No. 1 was convicted under Section 302 of the Penal Code and sentenced to death. The other two respondents were convicted for the said offence with the aid of Section 34 and each of them was awarded a sentence of life imprisonment. The respondents filed an appeal in the Allahabad High Court and a reference for the confirmation of the death sentence imposed upon respondent No. 1 was also made by the Sessions Judge. The High Court has rejected the reference allowed the appeal and acquitted all the three respondents. Hence this appeal by the State.

2. There is a college known as B.P. Intermediate College at Kurwar, P.S.Kotwali, in the District of Sultanpur. Several students from different villages were reading in the various classes of the college, including the respondents, the deceased, his brother P.W. 1 and some other P.Ws. There existed a bad blood and enmity between the two factions and groups of students-one hailing from village Naugawan Teer and the other belonging to village Dharain. The respondents belonged to the latter group. The deceased had associated himself with the former faction. On February 16, 1973 at the instigation of the respondents, it is said, one Balram-a student of class IX-A went to the class room of VII-B and gave a few slaps and blows to Birendra Bahadur, P.W. 8 who is a resident of Naugawan Teer. Nirmaljeet Singh intervened and rescued Birendra Bahadur. Thereupon, the respondents are said to have given a threat to Nirmaljeet Singh. A day later on February 17, 1973 when the Tiffin interval started at 1.00 P.M. students came out in the play ground of the college. At that time in the field, respondents 2 and 3 instigated respondent 1 to assault Nirmaljeet. The said two respondents caught hold of his hands and respondent 1 plunged his knife deep into the back of Nirmaljeet. After

receiving the knife blow, Nirmaljeet staggered, fell down and collapsed immediately, The occurrence was witnessed by Bimaljeet, P.W. 1, Rajendra Prasad Singh, P.W. 2, Siya Ram, P.W. 3 and Mangla Rai, P.W. 4. The dead body of Nirmaljeet was taken in a bus to the Police Station, nine miles away and the First Information Report was lodged by Bimaljeet at 2.00 P.M.

3. The respondents denied their complicity in the occurrence. In the Committal Court in their statements under Section 342 of the CrPC, 1898, none of them said a word pleading any right of defence or any assault on Mohammad Shamim Khan, respondent No. 2. In the Sessions Court, however, Mohammad Musheer stated:

On 17-2-73 a quarrel had taken place between accused Shamim and deceased Nirmaljeet. In course of that scuffle Shamim was being beaten meantime, while mediating, someone stabbed Nirmaljeet.

Shamim's statement in the Sessions Court under Section 342, in this regard, was in these terms:

The reason of my absconding was that on 17-2-73, during interval time, Bimaljeet Singh and 10-15 boys had, saying that on 16-2-73, in the evening at Kurwar Market I had got Nanhoo beaten by Balram, beaten me in the play ground. And on my raising alarm some boys had gathered there. While saving me some one out of the crowd inflicted knife injury to Nirmaljeet in his back and he fell down then and there.

It may be stated here that in the cross-examination of Bimaljeet it was suggested to him that Shamim had received injury due to attack on him by Bimaljeet and other. Bimaljeet denied the suggestion. No evidence was adduced by the defence in support of their plea that Shamim was attacked, beaten and injured in the college play ground on the date and at the time of the occurrence. One defence witness namely Dr. R.R. Misra, D.W. 1 was examined in support of the injuries having been found on the person of Shamim. According to his evidence, he examined Shamim on 23-2-1973 and found eight scabbed wounds and abrasions on the various parts of his body including the head. All the injuries were simple and of a very superficial kind. The Doctor was not in a position to give any definite opinion as to when they might have been inflicted or caused. There was no other evidence, as already stated, in support of the halting plea of the defence that injuries had been caused to Shamim during the occurrence in question resulting thereafter in the giving of the fatal blow to Nirmaljeet by some one. Even so the High Court, in our opinion, wholly erroneously and unjustifiably, accepted the respondents plea of right of private defence and acquitted them under a wrong impression that according to the defence it was Nirmaljeet Singh and other who launched an assault upon Shamim and then someone stabbed Nirmaljeet giving the fatal blow in order to rescue Shamim.

4. The High Court has affirmed the finding of the Trial Court as regards the incident which took place on February 16, 1973. That finding was correct and unassailable. But on pure conjuncture and

surmises it had led itself to accept the respondent plea of right of private defence.

5. In the State of Gujarat v. Bai Fatima and Another one of us (Untwalia, J. delivering the judgment of this Court with approval at page 1483 a passage from the judgment of Hegde, J., in the case of Munshi Ram v. Delhi Administration, (1968) 2 Section C.R. 455. It will be useful to extract that passage in this judgment also. It runs as follows:

It is true that applicants in their statement under Section 342 Cr. P.C. had not taken the plea of private defence, but necessary basis for that plea had been laid in the cross-examination of the prosecution witnesses as well as by adducing defence evidence. It is well settled that even if an accused does not plead self-defence, it is open to the court to consider such a plea if the same arises from the material on record-see in re Jogali Bhaigo Naiks and another AIR 1927 Mad 97. The burden of establishing the plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

6. In the instant case one can say justifiably that there was no plea of right of private defence set up by any of the respondents. A vague suggestion given to P.W. 1 in his cross-examination and the belated stand taken by respondents 1 and 2 in their statements under Section 342 Cr.P.C. in the Sessions Court was of no avail to the defence. There was no suggestion to P.W. 1 that Nirmaljeet had any part to play in the alleged attack on Shamim at the time of the occurrence. Musheer Khan in his statement named Nirmaljeet as one of the attackers, but was not bold enough to claim that he had given the blow to Nirmaljeet to rescue Shamim. Shamim in his statement named Bimaljeet as one of the attackers but did not name Nirmaljeet at all. He also had not the courage to take a stand that it was because of the attack on him that Musheer Khan inflicted the fatal blow on Nirmaljeet with a knife. The Doctor's evidence was too shaky to show even on the basis of preponderance of probabilities that the injuries on Shamim were inflicted or caused on the 17th February at about 1.00 P.M. There was so to say, not an iota of evidence in support of this stand. Even assuming that Shamim got the injuries at the time of the occurrence, there was nothing to indicate that injury on Nirmaljeet was caused by Musheer or anybody else in order to defend Shamim.

7. In our judgment the High Court was in error in acquitting the respondents on the basis of their stand of right of private defence.

8. But, even so, we do not feel confident to say that respondent 2 and 3 can be held guilty for the murder of Nirmaljeet with the aid of Section 34 of the Penal Code. Only one blow had been given on the back of Nirmaljeet, The prosecution story that it was so given by Musheer at the instigation of the other two respondents or that each of them had caught hold of one hand of the deceased and then the blow was given by Musheer is a doubtful and inherently improbable story. Nirmaljeet was a lad of 16 years of age and there was no necessity as none appears on the ocular testimony of the prosecution witnesses, of catching hold of his hands in order to give the blow on his back. The blow must have been given by Musheer suddenly in a split second. We would therefore, maintain the acquittal of respondents 2 and 3 extending to them the benefit of doubt as regards their complicity

in the crime. But there can be no doubt that Mohammad Musheer, respondent No. 1 had inflicted the blow on the back of Nirmaljeet with a knife. The evidence of the four eye witnesses was fully trustworthy, could not be & has not been rejected even by the High Court. And believing that evidence, we hold that the charge of murder has been amply proved against Mohammad Musheer. The blow, according to the report and evidence of the Doctor who held the autopsy over the dead body of Nirmaljeet, was sufficiently deep and fatal. It was sufficient in the ordinary course of nature to cause his death. It did cause his instantaneous death. Musheer did intend to cause that injury and therefore, he is guilty under Section 302 of the Penal Code. We find no justification to accept the argument put forward by his learned Counsel that he could be held guilty under Section 304 and not under Section 302. But we think on the facts and in the circumstances of the case the extreme penalty of death sentence is not warranted. Ends of justice will be served by sentencing Musheer to life imprisonment.

9. In the result we dismiss the appeal as against Mohammad Shamim, respondent No. 2 and Siraj Ahmad Khan, respondent No. 3 and maintain their acquittal as recorded by the High Court but for different reasons. We allow the appeal against Mohammad Musheer Khan, respondent No. 1, set aside the High Court's order for acquittal passed in his favour, uphold the order of conviction made by the Sessions Judge under Section 302 of the Penal Code but instead of sentence of death imposed upon him by the Trial Judge, we sentence him to undergo imprisonment of life.