

Kallu And Others vs State Of U.P. on 2 January, 2018

HIGH COURT OF JUDICATURE AT ALLAHABAD

Court No. - 15

AFR

Case :- CRIMINAL APPEAL No. - 1832 of 1986

Appellant :- Kallu And Others

Respondent :- State Of U.P.

Counsel for Appellant :- Ravindra Rai, Deo Dayal

Counsel for Respondent :- A.G.A.

Hon'ble Arvind Kumar Mishra-I, J.

By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 30.06.1986 passed by the Additional Sessions Judge, Mirzapur, in Sessions Trial No.279 of 1983 State of U.P. Vs. Kallu and others, arising out of Case Crime No.3 of 1983, under Section 147, 304 Part II read with Section 149, 325 read with Section 149 IPC, 323 read with Section 149 IPC, Police Station- Jamalpur, District- Mirzapur whereby the appellants have been sentenced to undergo one year rigorous imprisonment under Section 147 IPC, five years rigorous imprisonment under Section 304 Part II read with Section 149 IPC, two years rigorous imprisonment under Section 325 read with Section 149 IPC and six months rigorous imprisonment under Section 323 read with Section 149 IPC. All the sentences have been ordered to run concurrently.

Relevant to mention that appellant no.5 Faujdar has died during pendency of this appeal. Therefore, the appeal qua appellant no.5 Faujdar stood abated by this Court vide order dated 22.12.2016.

Heard Sri Ravindra Nath Rai, learned counsel for the surviving appellants, Sri B.D. Nishad, learned AGA for the State and perused the record of this appeal.

Facts of this case as unfolded by the report Ext. Ka-1 reflect that the informant Gulab Sharma, son of the deceased Ram Dev lodged the written report at Police Station Jamalpur, District Mirzapur on 16.01.1983 at 8:40 a.m. against the accused-appellants alleging therein that he along with his family members were sitting in front of his house on 15.01.1983 when the accused-appellant Kallu spit at the door near ember (Kauda) which was objected by the informant whereupon the accused Kallu called his brothers numbering four in all who arrived on the spot possessing Lathis and began to beat the informant, his father and mother. On assault being caused to the father of the informant, he fell down in unconscious condition on the ground. In the meanwhile, Ramesh and Naresh co-villagers also arrived on the spot and they intervened and saved the informant. It was requested that report be lodged and appropriate action be taken. This written report was scribed by Gulab Sharma and the same is Ext. Ka-1.

Contents of the aforesaid information were taken down in the concerned Check FIR at Case Crime No.3 of 1983 under Sections 147, 323, 308 IPC, at Police Station Jamalpur, District Mirzapur, on 15.01.1983 at 8:40 a.m. Check FIR is Ext. Ka-10. On the basis of entries so made in the check F.I.R., a case was registered against the accused-appellants in the relevant G.D. at serial no.9 on 15.01.1983 at 8:40 a.m. at aforesaid case crime number at Police Station Jamalpur under aforesaid sections of I.P.C. against accused-appellants. Copy of general diary is Ext. Ka-11.

Record reflects that after the case was lodged against the accused-appellants, the investigation swung into motion. Subsequent to the lodging of the first information report, the injured Ram Dev, Gulab and Smt. Kumari Devi were medically examined by Dr. Kailash Kushwaha PW-4 at PHC, Jamalpur, the very same day around 10:30 a.m., 10:45 a.m. and 11:00 a.m., respectively.

The following injuries were found on the person of the injured Ram Dev.

1. Lacerated wound 2 cm x 0.5 cm x upto bone deep on the head 10.5 cm above the eye brow. Patient was unconscious and kept under observation.
2. Abrasion multiple in area of 5 cm x 4.5 cm in front of right knee joint.

Duration was Fresh. Injuries were caused by blunt object.

The following injuries were found on the person of the injured Gulab.

1. Abrasion with contusion 2.5 cm x 2 cm on the back of right elbow joint.
2. Contusion 19 cm x 2.5 cm on the back of right side.
3. Abrasion 1 cm x 0.1 cm in front of back of left wrist joint.
4. Abrasion 4 cm x 1.5 cm on the above of right foot.

All injuries were simple. Duration was about fresh and caused by blunt object.

The following injury was found on the person of Smt. Kumari Devi.

1. Contusion 6 cm x 4 cm on the back of left wrist joint.

Advised x-ray.

Injury was simple, caused by blunt object and duration about fresh.

The injury reports of the aforesaid injured have been proved by the doctor witness as Ext. Ka-2, Ext. Ka-3 and Ext. Ka-4, respectively.

It so happened that the injured Ram Dev was referred from PHC Jamalpur to the District Hospital, Mirzapur, from where he was sent to S.S.P.G. Hospital Kabir Chaura, Varanasi where he was admitted but during course of the treatment he succumbed to his injuries the very same day on 15.01.1983 at 7:10 p.m. Consequently, the inquest was held. The inquest witnesses concurred with the Investigating Officer that the dead body be sent for post mortem examination in order to ascertain real cause of death. The inquest report is Ext. Ka-17.

In the course of proceedings, relevant papers were prepared for sending the dead body for post mortem examination. Thereafter, post mortem examination on cadaver of the deceased Ram dev was done by Dr. C.B. Tripathi, on 16.01.1983 at 4:15 p.m. in the mortuary at District Varanasi wherein he noted the following ante mortem injuries:

1. Lacerated wound $2\frac{1}{2} \times 1\frac{1}{2}$ cm x bone deep over front of parietal region of head 11 cm above and behind bridge of nose, 1 cm left mid line.
2. Multiple small abrasion in an area of 4 cm x 2 cm over front of left elbow.
3. Contusion of scalp on reflection, over frontal both parietal and both temporal regions with paricranial haematoma over these regions.
4. Sutural fracture of coronal suture all along and connecting fissured fracture of both the temporal bones with radiating fissured fracture of frontal bone beneath injury no.1.

In the opinion of the doctor, cause of death was due to coma as a result of head injury.

This post mortem examination report is Ext. Ka-15.

The investigating Officer, Tirthraj Nigam PW-5 after taking note of the first information report and concerned general diary also prepared site plan of the place of occurrence which is Ext. Ka-5. The Investigating Officer, apart from recording statement of various persons and completing the investigation, came to the finding that charge sheet is liable to be filed against the accused-appellants whereupon he filed charge sheet and supplementary charge sheet against the

accused-appellants which are Ext. Ka-7 and Ext. Ka-9.

Pursuant thereto, proceedings were committed to the court of Sessions from where it was transferred for conduction and disposal of the case to the aforesaid trial court of Additional Sessions Judge, Mirzapur who in turn heard both the sides on point of charge and was prima-facie satisfied with case against the accused-appellants, accordingly, framed charges under Sections 147, 304 read with Section 149, 323 read with Section 149 IPC and alternative charge under Section 302 read with Section 149 IPC. Charges were read over and explained to the accused-appellants who abjured charges and opted for trial.

In furtherance of the proceedings the prosecution produced in all 9 witnesses. A brief sketch of witnesses is ut-infra:-

Gulab PW-1 is the informant and injured witness of the occurrence. He lodged the report as Ext. Ka-1. Smt. Kumari Devi PW-2 is also injured witness and wife of the deceased Ram Dev. Ramesh PW-3 is the witness named in the first information report. He has also deposed about the incident. Dr. Kailash Kushwaha PW-4 has medically examined the injured on the informant side as well as the accused Kallu on 15.01.1983 at PHC Jamalpur the very same day and has proved their injury reports. S.I. Tirthraj Nigam PW-5 is the Investigating Officer. He has detailed the various steps he took in completing the investigation and has proved charge sheet and supplementary charge sheet against the accused-appellants as Ext. Ka-7 and Ext. Ka-9, respectively. Head Constable Hawaldar Singh PW-6 has noted contents of the information in the concerned Check FIR and general diary of the date 15.01.1983 as Ext. Ka-10 and Ext. Ka-11, respectively. Constable Bhupesh Kumar Shukla has filed his affidavit and testified to the fact that on 16.01.1983 he was present (at 12:00 noon) and conveyed dead body of the deceased to the mortuary. Dr. C.B. Tripath PW-7 has conducted the post mortem examination on the cadaver of the deceased Ram Dev on 16.01.1983 and has proved the post mortem examination report Ext. Ka-15. Dr. K.M. Srivastava PW-8 has conducted radiological test of Smt. Kumar Devi wife of the deceased Ram Dev on 09.02.1983 and has proved x-ray report Ext. Ka-16. The x-ray plate has been proved as material exhibit-1. S.I. Tausid Husain PW-9 has prepared inquest report of the deceased Ram Dev and has proved the same as Ext. Ka-17. Except as above, no other evidence was adduced by the prosecution.

Therefore, evidence for the prosecution was closed. The statement of the accused was recorded under Section 313 Cr.P.C. wherein all the accused denied their involvement. The defence plea has been taken by the accused Kallu that the assault was caused initially by the informant's side by beating him and he acted in his self defence which caused injuries on the informant's side. However, the accused Kali Charan denied his involvement in the incident. Accused Jyut has stated that he was not present on the spot at the time of the occurrence.

No testimony, whatsoever, has been led by the defence.

The case was heard on merit by the learned trial Judge who after appraisal of facts and circumstances and evaluation of the evidence of the case, returned aforesaid finding of conviction against the appellants and sentenced the appellants under the aforesaid sections of IPC.

Consequently, this appeal.

Learned counsel for the appellants has claimed that it is a case where no proper motive has been assigned for committing any offence. The fact is that the accused-appellants have acted in self-defence only to ward off attack which was initiated on the accused by the informant's side and in the process, the accused-appellants were saved otherwise there was every possibility of their being killed by the informant side.

It has been further claimed that the presence of the accused on the spot is doubtful. It is apparent that the injury caused on the person of accused Kallu has not been explained by the prosecution though it is admitted fact that the medical examination of the accused Kallu was also done by Dr. Kailash Kushawaha on 15.01.1983 around 11:30 a.m. Non-explanation of the injury caused on the accused Kallu itself is sufficient to discard the theory of the prosecution case and to acquit the accused-appellants.

It has been claimed next that the genesis of the incident has been concealed. The so-called witnesses Naresh and Ramesh are not the eyewitnesses of the occurrence since in the testimony of PW-1, it has emerged that both these persons arrived on the spot after the incident had taken place. Therefore, their presence on the spot at the time of occurrence is admittedly dubious fact, which the prosecution can not deny particularly in the wake of injury caused on the person of the accused Kallu, which is itself suggestive of fact that he was beaten on the spot by the informant's side.

It has been lastly claimed that even in the worst position though not admitted but assuming it to be that some offence was committed then the same will fall within the purview of Section 325 IPC as such benefit of the first offenders Act should be given to the accused-appellants. The trial court was unmindful of above substantial aspects of the case and misread into evidence and wrongly recorded finding of conviction and imposed harsh punishment on the accused-appellants which is not justified under facts and circumstances of the case. Therefore, the accused-appellants deserve acquittal.

While retorting to the aforesaid arguments, learned AGA has submitted that insofar as the incident is concerned, it is admitted to the accused that the same took place on 15.01.1983 around 7:00 a.m. The circumstances and injuries caused on the informant's side are indicative of fact that the assault was caused on the informant's side wherein one of the injured Ram Dev succumbed to his injury on 15.01.1983

around 7:00 p.m. in S.S.P.G. Hospital Kabir Chaura, Varanasi. The circumstances as appearing on the spot are not conducive to fact that the incident was concealed. However, the injured witnesses have given consistent description of the incident as to how the incident took place. It was the very act of accused Kallu when he spit at the door near ember (Kauda) which was objected by the informant side and this infuriated Kallu resulting into assault being caused on the informant's side leading to the death of Ram Dev - father of the informant.

Learned AGA has further submitted that the post mortem examination report Ext. Ka-15 is suggestive of fact that cause of death was due to ante mortem head injury which injury cannot be said to be simple in nature because it becomes the cause of the death of the deceased Ram Dev. A man is supposed to know reasonable consequences of his act if he is not intoxicated and is not of unsound mind. The Investigating Officer has fairly conducted the investigation and has rightly filed charge sheet against the accused-appellants. The facts and circumstances of the case justify finding of conviction and the same cannot be faulted with at this stage. Therefore, the appeal lacks merit.

Also considered the above rival submissions and taken into consideration rival claims. In view of above, the point for determination of this appeal specifically relates to fact whether the prosecution has been able to prove charges against the appellants under the aforesaid sections of IPC beyond reasonable doubt and has sentenced condignly.

In this case, it is no denying fact that the incident is admitted to both the sides but the point for consideration varies to the ambit whether the offence was first initiated by the informant's side or by the accused side. In the above peculiar contextual situation, this Court comes across testimony of PW-1 and PW-2, the two injured witnesses. A combined reading of testimony of PW-1 and PW-2, reveals that it was around 7:00 a.m. on 15.01.1983 when the informant's side and the accused Kallu were present on the spot in front of the house of the informant, the accused Kallu spit at the door near ember (Kauda) which led to some altercation whereupon as per allegations made in the first information report the accused Kallu called his brothers on the spot who arrived on the spot possessing Lathis and thereafter they assaulted the informant's side causing injury on the persons of Gulab, Smt. Kumari Devi and Ram Dev. Injuries sustained by the informant's side have been proved by Dr. Kailash Kushawaha which after radiological examination, injury of Smt. Kumari Devi was noted as fracture and injury caused on the head of the deceased Ram Dev was opined to be fatal in nature resulting into coma and consequently to his death as suggested by Dr. C.B. Tripathi PW-7.

In the opinion of both the doctors who medically examined the injured and who conducted post mortem examination, the time of injuries being caused has been rated to be around 7:00 a.m. on 15.01.1983. Even accused Kallu has claimed to have

acted in his self defence. In this view of the matter, the incident is admitted to both the sides but the moot point that requires adjudication at this stage pertains to fact whether the incident took place all of a sudden in a heat of passion and the cause arose on the spot.

Argument has been raised to the extent that it was the informant's side who first assaulted the accused Kallu and thereafter he acted in his defence which caused injuries to the informant side.

However, learned AGA has intervened and submitted that the fact so claimed is not substantiated by testimony on record because there is nothing of sort which may suggest that any serious injury was caused on accused Kallu, though not admitted in fact, and there is no supporting material establishing fact that injury caused on the accused Kallu was either fatal or grievous in nature. This being so even in exercise of the right of private defence, infliction of more harm than it is necessary to inflict for the purpose of defence would stretch exercise of right of private defence to and within the purview of Section 304 IPC.

Learned AGA claimed that injuries caused on the informant's side are of grievous in nature and one of the injured (Ram Dev) died due to injury being caused to him. The accused side cannot be said to be lacking ordinary knowledge of a prudent common man that injury so caused would not result in it being grievous or fatal leading to the death of one of the injured. That being so, the accused would be imputed with the outcome of the injuries being caused by them on the informant side though not specifically intended.

Upon careful scrutiny and perusal of the testimony of PW-1 and PW-2, it appears that some injury was also caused on the person of the accused Kallu but that aspect has been cleverly concealed for the reason best known to the prosecution which gives credence to the claim of appellant Kallu that he was first assaulted by the informant side and he acted in self defence in order to ward off assault caused by the informant's side. This plea of self defence is liable to be sustained under circumstances of this case.

In this factual scenario, the accused side cannot be given any advantageous position that the nature of assault even though in the exercise of the right of private defence was of nature that justifies inflicting of harm of the nature sustained by the informant side. It was grievous and fatal leading to death of one injured Ram Dev. There is no material on record which may indicate that the injury caused on the accused Kallu was either serious or grievous in nature.

At this stage, it can be observed that there was no impediment before the injured - accused Kallu to have come out with specific claim about the nature of injury being caused on his person - whether the same was grievous one. As per mandate under

Section 100 IPC, there are as many as seven categories wherein even death of the offender can be caused while exercising the right of private defence. Category nos.1 and 2 are suggestive of fact that the assault which is of nature which may cause apprehension in the mind of a person that death would otherwise be the consequence and grievous hurt would otherwise be the consequence in case the right of private defence is not exercised. That way, this Court is of the view that no such circumstance was existing or evidence brought on record which may justify inflicting of more harm in exercise of private defence than the one necessary in self defence. Here the extent of causing injury on the informant side has led to causing fracture to Smt. Kumari Devi and injury to the deceased Ram Dev on his vital part - say head - ultimately resulted into his death.

The doctor witness PW-7 found contusion of scalp on reflection, over frontal both parietal and both temporal regions with paricranial haematoma over these regions. Sutural fracture of coronal suture all along and connecting fissured fracture of both the temporal bones with radiating fissured fracture of frontal bone beneath injury no.1.

In this view of the matter, even if the plea of the right of private defence is sustained even then it is obvious that more harm than that was required was caused on the informant side which transgresses periphery of the right of private defence. But the point for consideration is that as per testimony of the prosecution witnesses itself, they have failed to specify as to what injury was caused by the other appellants except appellant Kallu on the informant side. Admittedly, all the appellants are real brothers.

It appears that in fact some assault was caused on the informant's side not by involvement of all the appellants, except accused Kallu, who admittedly was present on the spot. But a story was fabricated to the extent that after altercation took place on the spot, the accused Kallu called his brothers who arrived on the spot.

In this factual situation, testimony has come forth to the extent that after altercation took place, the accused Kallu went back to his home and he came on the spot along with his brothers then they conjointly caused assault on the informant side. Testimony of both the witnesses is contradictory on substantial points regarding the occurrence about participation of all the appellants. Their testimony (PW-1 and PW-2) on the wholesome appreciation and evaluation is indicative of fact that all the five appellants were not present on the spot. If it was so, the other accused must have been assigned specific role in causing injury to all the three injured - one among whom died later on.

In this view of the matter, it is obvious that the other three surviving appellants Kali Charan, Jyut and Lallu cannot be said to have been present on the spot at the time of occurrence. However, they have been roped in, falsely in this case because they are

real brothers of the prime accused Kallu. This way, their involvement in the incident is found to be false and they deserve to be acquitted of charges levelled against them and involvement of as many as five persons in the occurrence is ruled out.

The trial court while appreciating testimony vis-a-vis facts and circumstances of the case has failed to appreciate correctly testimony vis-a-vis circumstances of the case and has taken for granted participation of all the appellants in prosecution of the common object although there is no such reasonable singular circumstance which may give credence to fact that after the altercation took place, the accused Kallu went back to his home and then arrived in company with the other appellants - his brothers. Therefore, appellant nos.2, 3 and 4 namely Kali Charan, Jyut and Lallu have not participated in the occurrence. Consequently, they are acquitted of charges.

Insofar as the case of the appellant no.1 Kallu is concerned, specific testimony has been given by the prosecution witnesses that the assault was caused by Kallu on the informant side on the spot. That way, the assault given on the deceased Ram Dev was of nature as detailed by the doctor witness PW-7 in shape of ante mortem injury which by no means can be said to be simple in nature but it has resulted into death of the deceased Ram Dev. Assuming it to be that the right of private defence was exercised by accused Kallu but it was exceeded in violation of conditions imposed on such exercise under Section 99 IPC. Therefore, appellant no.1 Kallu is found guilty of exceeding the right of private defence. Thus sentence awarded to him under Section 304 II IPC cannot be said to be not proportionate to the offence committed by him. But insofar as conviction of the appellant Kallu under Section 147 IPC is concerned, the same is not sustainable for the reasons aforesaid.

In the final analysis, appellant no.1 Kallu is found to have committed offence under Sections 304 Part II, 325, 323 only. Thus his conviction is altered to the extent under aforesaid sections of IPC (304 Part II, 325, 323) and he is acquitted of charge under Section 147 IPC. Under facts and circumstances of the case, sentence awarded to appellant Kallu is justified and the same is proportionate to magnitude of the offences committed by him. Therefore, sentence awarded on him under aforesaid Section (304 Part II, 325, 323) of IPC are hereby maintained. He shall serve out remaining part of his sentence as above.

Accordingly, the instant appeal is allowed, partly in aforesaid terms.

Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

Order Date :- 02.01.2018 rkg