

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

JUSTICE ACHAL KUMAR PALIWAL

CRIMINAL APPEAL No.1061 of 1999

BETWEEN:-

1. KASHIRAM S/O GANPAT YADAV,
AGED ABOUT 40 YEARS, R/O
VILLAGE NAIGAWAN, POLICE
STATION NOWGAON,
CHHATARPUR (MP)
2. SURAJ ALIAS BHAIYAN YADAV,
S/O GANPAT YADAV, AGED
ABOUT 35 YEARS, R/O VILLAGE
NAIGAWAN, POLICE STATION
NOWGAON, CHHATARPUR (MP)

.....APPELLANTS

***(BY SHRI S.C. YADAV – ADVOCATE ALONG WITH SHRI SHYAM
YADAV – ADVOCATE)***

AND

**THE STATE OF MADHYA PRADESH
THROUGH: POLICE STATION
NOWGAON, DISTRICT CHHATARPUR
(MP)**

.....RESPONDENT

(BY MS. KAMLESH TAMRAKAR - PANEL LAWYER)

Reserved on : 04.09.2023
Pronounced on : 29.09.2023

*This criminal appeal having been heard and reserved for
judgment, coming on for pronouncement this day, Justice Achal Kumar
Paliwal pronounced the following:*

JUDGMENT

This appeal has been filed by appellants under Section 374(2) of Code of Criminal Procedure, 1973 (in short “the Cr.P.C.”) against judgment dated 9.4.1999 passed by learned Fourth Additional Sessions Judge, Chhatarpur, passed in Sessions Trial No.236/1996, whereby appellant No.1 was held guilty for commission of offence under Section 307 of IPC and sentenced to undergo R.I. for 7 years with fine of Rs.1000/- and appellant No.2 for commission of offence under Section 307/34 of IPC and sentenced to undergo R.I. for 7 years with fine of Rs.1000/-, with default stipulation.

2. That, the case of prosecution in brief is that complainant Tutti @ Shivdayal lodged a report on 13.7.1996 at Police Station Nowgaon, District Chhatarpur, to the effect that he is cultivating government *Parti* land approximately for last three years. Today at about 8 AM in the morning, Kashiram ploughed above land. On this news, complainant went to ask them not to plough the land. There, he found Kashiram’s son Munna. He asked him why did he plough the land which was being ploughed/cultivated by him. After that, he was coming back to village. At about 9.30 AM, near Govind’s field, Kashi Yadav and Bhaiyan @ Suraj met on the way. He stopped them too and asked them why did they plough the land cultivated by him. On this, a dispute arose between them and Kashiram and Bhaiyan abused him and Bhaiyan exhorted Kashiram *lago sare ko*. Thereupon, Kashiram shot him in the right side of chest with the intention to kill. Kattu Lodhi and nephew Janki came there and complainant told them that Kashiram has shot him. When brother Ramgopal came there, then, Bhaiyan assaulted him also. When he gained consciousness, then, Chunni Lodhi, Kattu Lodhi & Janki Lodhi brought

him to District Hospital Chhatarpur on tractor and from there, he has come to report the matter.

3. On the basis of above, S.I. A.S. Narvariya (PW-8) registered F.I.R. No.161/1996 Ex.P/1 under Section 307/34 of IPC against Kashiram and Suraj. After registering the FIR, S.I. A.S. Narvariya sent complainant Tutti for medical examination alongwith MLC form Ex.P/13-A. Dr. K.P. Tripathi (PW-7) examined injured Tutti and prepared report Ex.P/13. He also examined injured Ramgopal and prepared report Ex.P/14. Dr. K.K. Chaturvedi (PW-5) treated injured Tutti and prepared discharge certificate Ex.P/11. During investigation, S.I. Narvariya (PW-8) recorded statements of witnesses Laxmi (PW-3), Tutti (PW-1), Ramgopal (PW-2), Chunnilal (PW-4) etc. & recovered blood stained/plain soil, empty 12 bore cartridge from the scene of incident vide recovery memo Ex.P/4 and also prepared site map Ex.P/9. S.I. A.S. Narvariya also recovered sealed packets etc. brought by Head Constable Riyaz from District Hospital vide recovery memo Ex.P/3.

4. During investigation, A.S. Narvariya (PW-8) interrogated accused Kashi and prepared memorandum Ex.P/10 and recovered a 12 bore katta along with an empty cartridge and one live cartridge, in pursuance of memorandum Ex.P/6. Investigating Officer A.S. Narvariya also recovered bamboo stick from accused Suraj vide recovery memo Ex.P/5. He also recovered injured Tutti's sealed clothes vide recovery memo Ex.P/15. Thereafter, he recovered a black umbrella and leather shoes etc. vide recovery memo Ex.P/15 and sent recovered articles for FSL examination vide draft Ex.P/16 and P-17 and report thereof is Ex.P/18 and P-19. During investigation, prosecution sanction Ex.P/20 was also obtained from the concerned District Magistrate. After completion of investigation, charge-sheet was filed under Section 307/34 of IPC and 25/27 of Arms

Act against appellants in the Court of JMFC Nowgaon and same was committed to the court of Sessions Judge at Chhatarpur.

5. Learned Sessions Court framed charges against appellant Kashiram under Section 307, 323/34 of IPC and 25(1-B)(a)/27 of Arms Act and under Section 307/34, 323 of IPC against appellant Suraj @ Bhaiyan and same were read over to appellants, who pleaded not guilty & denied the charges and claimed to be tried for the offences, they were charged with. To bring home the charges against the appellants, the prosecution examined in all 9 witnesses. Prosecution also brought on record documentary evidence through aforesaid witnesses. In defence, appellants have also filed documents Ex.D/4 to D/6. After completion of prosecution evidence, appellants were examined u/s 313 Cr.P.C. & appellants pleaded total denial & stated that they have been falsely implicated.

6. Appellant Kashiram has also stated in his above examination that Tutti etc. assaulted him with *Ballam (bhala)* and *lathis*. He was assaulted with Bhala in the abdomen, which pierced his right thigh. He also sustained head injuries. They also assaulted his brother Suraj. He had filed report against Tutti etc. Police got them medically examined and their treatment continued for a number of days. Against Tutti etc., a case under Section 307 of IPC is also pending in this Court. They were already in possession of land and they (complainant party) have forcibly/deliberately disputed the same. Appellant Suraj has also stated almost similarly in his examination under Section 313 of Cr.P.C. After evaluating the evidence that came on record, the learned 4th Additional Sessions Judge vide judgment dated 9.4.1999 convicted & sentenced appellants as mentioned above.

Submissions of learned counsel for the appellant:-

7. Learned counsel for the appellants submits that prosecution has utterly failed to prove the necessary ingredients of offence under Section 307 of IPC. Statement of prosecution witnesses are full of contradictions, improvements and omissions, hence, no implicit reliance could be placed on such kind of testimonies. There is no evidence on record to indicate pre-meeting of mind so as to apply Section 34 of IPC. Learned trial Court has not taken into consideration report Ex.D/6, in which it was mentioned that complainant party was aggressor and they have caused grievous injury in the right thigh by Barchi/Ballam. Learned trial court should have held that appellant No.1 has acted in right of private defense of his person and also in defense of appellant No.2. Prosecution witnesses have not explained the injuries sustained by appellants. Learned trial Court has not properly appreciated the evidence on record in its proper perspective and has erred in convicting and sentencing the appellants. On the basis of above, it is prayed that impugned judgment of conviction and sentence deserves to be set aside & appellants be acquitted of the charges leveled against them.

Submissions of Learned Government Advocate:-

8. Learned counsel for the State has vehemently opposed the contentions made by the learned counsel for the appellants and has supported the impugned judgment. He further submits that learned trial Court has properly appreciated the evidence on record and has rightly convicted & sentenced the appellants, as above. Hence, appeal is liable to be dismissed.

9. I have heard learned counsel for the parties and perused the record of the trial Court minutely.

Findings:-

10. From testimonies of Tutti @ Shivdayal (PW-1), Ramgopal (PW-2), Laxmi Prasad (PW-3), Chunni Lal (PW-4), Dr. K.K. Chaturvedi (PW-5), Dr. K.P. Tripathi (PW-7), Investigating Officer A.S. Narvariya (PW-8) & FIR (Ex. P/1), recovery memos (Ex. P/3 to P/6 and P/15), site map (Ex. P/9), discharge ticket (Ex. P/11), MLC (Ex. P/13 and Ex.P/14) and FSL draft/report etc. Ex. P/16 to P/20, appellants' examination under Section 313 of Cr.P.C., appellants' MLC Ex. D/4 and D/5, FIR lodged by appellant Kashiram (Ex. D/6), submissions of learned counsel for the appellants and grounds taken by the appellants in appeal memo etc., it is clearly established & there is no dispute in this regard that at alleged date time and place present incident took place and at the time of said incident, appellants and complainant Tutti @ Shivdayal, Ram Gopal were present and in the said incident, Tutti @ Shivdayal and appellants sustained injuries as mentioned in the aforesaid MLCs and in the said incident Tutti @ Shivdayal has suffered gunshot injuries. From above, it is also clearly evident that above incident took place between the parties on account of dispute with respect to possession/cultivation of some unoccupied government (*Parti land*). From above, it is also evident that with respect to present incident and in connection with report lodged by the appellant Kashiram, a cross-case was also registered against complainant Tutti @ Shivdayal and Ram Gopal etc..

11. In view of grounds taken by the appellants in appeal memo and submissions of learned counsel for the appellants and in view of over all evidence on record, the sole question that remains for consideration before this Court is, whether appellant Kashiram fired at and injured

Tutti @ Shivdayal in exercise of his right of private defence of person/property. In the instant case from evidence on record, it is also clearly evident that present incident took place between the parties on account of dispute with respect to possession/cultivation of some unoccupied government (*Parti land*). Therefore, questions arises as who was in possession of above land on the date of incident, i.e. whether appellants were in possession of above land or complainant/injured Tutti @ Shivdayal was in possession of above land.

12. From depositions of complainant/injured Tutti @ Shivdayal, Ram Gopal and suggestions given to them in their cross-examinations on behalf of appellants, FIR Ex. P/1, which has been lodged immediately after the incident, on the date of incident itself, site map Ex. P/9 and FIR Ex. D/6, lodged by the appellant Kashiram immediately after the incident on the date of incident itself, it is clearly established that disputed government land was initially in the possession of appellant Kashiram but approximately three years prior to the present incident, complainant/injured Tutti @ Shivdayal had taken possession of above disputed land and had started cultivating the same but on the date of incident, in the morning at about 8:00 am, appellants had ploughed the disputed land by tractor. Thus, from above, especially in view of admission made by the appellant Kashiram in his FIR (Ex. D/6), it is evident that on the date of incident, complainant Tutti was in possession of disputed land and it is appellant Kashiram etc., who had ploughed the disputed land on the date of incident in the morning.

13. Further, from above and testimonies of Tutti @ Shivdayal, Ram Gopal, Laxmi Prasad, Chunni Lal and Investigating Officer A.S. Narvariya & FIR Ex. P/1 and D/6, recovery memo (Ex. P/2) and site map (Ex. P/9), it is evident that present incident had taken place after

appellants had ploughed the disputed field on the date of incident and that incident took place in the field of Govind Das and not in disputed land itself.

14. From depositions of Dr. K.P. Tripathi (PW-7) and his MLCs (Ex. D/4) and D/5 prepared by him, FIR (Ex. D/6) and Investigating Officer A.S. Narvariya, it is evident that in the present incident, appellant Kashi Ram has also sustained penetrating injury on right thigh, caused by sharp and pointed weapon and a lacerated wound on head and appellant Suraj @ Bhaiyan yadav has also sustained lacerated injury on head. Perusal of testimonies of complainant Tutti @ Shivdayal and Ram Gopal reveal that they have not explained the injuries sustained by the appellants in the present incident.

15. In the instant case, the defence of appellant Kashiram is that he had fired and shot Tutti @ Shivdayal in exercise of right of private defence. Now, it is to be seen whether appellant Kashiram had any right of private defence.

16. From discussion in the forgoing paras and analysis of evidence on record, it is clearly established that on the date of incident, disputed land was not in possession of appellant Kashiram, still Kashiram had ploughed the disputed land on the date of incident in the morning i.e. prior to present incident and present incident has taken place after ploughing of above disputed land by appellants & present incident has not taken place in the disputed field itself, but in the field of some Govind Das. It is also evident from evidence on record that at the time of incident appellant Kashiram was armed with firearm and it is not proved that said firearm was a licensed one and it appears to be an illegal firearm. Appellant Kashiram has nowhere explained, both in cross-examination of

prosecution witnesses & his examination under section 313 of Cr.P.C., as to why he was armed with an unlicensed firearm at the time of incident.

17. Therefore, above facts (appellant Kashiram not being in possession of disputed land on the date of incident and still going to plough the dispute land & ploughing the same, and at the time of incident being armed with an unlicensed firearm etc.) clearly show that they (appellant Kashiram & Suraj) had gone to plough and to take possession of disputed land forcibly and with the intention to use firearm, if any opposition comes from complainant side. Otherwise there is no justification for being armed with an unlicensed weapon at relevant point of time. Therefore, in view of above, in this Court's considered opinion, it cannot be said that appellant Kashiram had any right of private defence of property/person at the relevant point of time

18. With respect to appellants' defence relating to right of private defence, one more aspect is also required to be taken note of. From evidence on record, it is also evident that in the present incident, appellants have also sustained serious injuries and the same have not been explained by the prosecution witnesses and that complainant party was also armed with deadly weapons & they were also prepared to use force, if necessary. Thus, it is apparent in the instant case that both the parties (complainant party & appellants) were already armed with deadly weapons & had proceeded with the preparation/intention to use the weapons, they were armed with & it is apparent that both the parties have used the arms carried by them. In the instant case, it is also not clear as to who was the aggressor. Therefore, clearly, it is a case of free fight and it is well established that in a case of free fight, no one has a right of private defence and each one is liable for his individual acts. From this angle also, in this Court's opinion, appellant Kashiram did not have any right of

private defence of property/person at the relevant point of time. In this connection, I would also like to refer ***Gajanand Vs. State of U.P., AIR 1954 SC 695 & Jumman Vs. State of Punjab, AIR 1957 SC 469.***

19. So far as “free fight” is concerned, Hon’ble apex court in ***Gajanand Vs. State of U.P., AIR 1954 SC 695***, has held that “free fight” means when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders.”

20. Availability of right of private defence & effect of non-explanation of injuries of accused persons in the case of “free fight” has been discussed by Hon’ble apex court in ***Jumman Vs. State of Punjab, AIR 1957 SC 469*** & therein it has held that “ in such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, would it be correct to assume private defence for both sides ? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict.....” Principles laid down by Hon’ble apex court in above mentioned cases are squarely applicable to the facts of present case.

21. In view of discussion in the foregoing paras and analysis of evidence on record, in this Court’s considered opinion, appellant Kashiram has failed to prove that at relevant point of time, he had right of private defence of person or property and it is not proved that he caused gunshot injury to complainant in exercise of his right of private defence of person or property. It is apparent from the evidence on record that appellant Kashiram had fired at Tutti @ Shivdayal and had caused

gunshot injury in right chest of complaint Tutti @ Shivdayal, a vital part of body. Thus, in view of use of firearm and injury on vital part of body, clearly a case under Section 307 of IPC is made out against the appellant Kashiram.

22. So far as appellant Suraj @ Bhaiyan Yadav is concerned, from evidence on record it is evident that the only role attributed to him is that he exhorted Kashiram to kill and thereafter Kashiram fired at Tutti @ Shivdayal. It is not established from evidence on record that appellant Suraj @ Bhaiyan Yadav had any arms at the time of incident and had used any weapon to assault anybody. From discussion in forgoing paras, it is also clear that it is a case of free fight and appellants have also sustained serious injuries but prosecution witnesses/prosecution has not explained the same. Therefore, in this Court's opinion appellant Suraj @ Bhaiyan Yadav cannot be convicted with the aid of Section 34 of IPC and for an offence attempt to commit murder of Tutti @ Shivdayal under Section 307 of IPC. Thus, so far as appellant Suraj @ Bhaiyan Yadav, ingredients necessary to constitute offence under Section 307/34 of IPC are clearly missing in the instant case.

23. Therefore, in view of discussion in the foregoing para and appreciation/evaluation of evidence on record, **appellant Suraj @ Bhaiyan Yadav's appeal is allowed & appellant Suraj @ Bhaiyan Yadav is acquitted of charge under Section 307/34 of IPC.** He be released forthwith, if not required in any other case & fine, if deposited, be also refunded.

24. But in view of discussion in the foregoing para and appreciation/evaluation of evidence on record, in this court's considered view, there is no illegality or perversity in the conclusions drawn by

learned trial court with respect to conviction and sentence of appellant Kashiram under Section 307 of IPC. The view taken by the learned trial court is a plausible one. In this court's opinion, in view of nature & surrounding circumstances of incident, it can not be said that the sentence imposed by the learned trial court is improper or disproportionate to the offence proved. Hence, **appellant Kashiram's appeal sans merit and is accordingly dismissed & impugned judgment, so far as it relates to appellant Kashiram's conviction & sentence u/s 307 of IPC, is hereby affirmed.**

25. A copy of this judgment be sent forthwith to concerned jail for information and compliance.

26. The Criminal Appeal is partly allowed to the extent as indicated above.

(ACHAL KUMAR PALIWAL)
JUDGE

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