

CASE NO.:
Appeal (crl.) 263 of 2004

PETITIONER:
Hafiz

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 04/10/2005

BENCH:
S.B. Sinha & R.V. Raveendran

JUDGMENT:
J U D G M E N T
WITH

CRIMINAL APPEAL NO. 1163 OF 2004

State of U.P.

\005Appellant

Versus

Hafiz
Rafiq
Sharif
Lal Mohammed

\005Respondents

S.B. SINHA, J :

These two appeals arising out of a common judgment and order dated 26.8.2003 passed by the High Court of Judicature at Allahabad in Crl. A. No. 1795 of 1981 were taken up for hearing together and are being disposed of by this common judgment. Criminal Appeal No. 263 of 2004 is by Accused No. 1 and Criminal Appeal No. 1163 of 2004 is by the State.

The incident occurred at about 7 P.M. on 28.10.1976 wherein Abdul Rahman, deceased, was said to have been killed by the accused persons, viz., Hafiz, Rafiq, Sharif and Lal Mohammed (the Appellant in Criminal Appeal No. 263 of 2004 and Respondents 2 to 4 in Criminal Appeal No. 1163 of 2004). Hafiz, Rafiq and Sharif are brothers. Lal Mohammad is their cousin. The deceased (Abdul Rahman) and his brother Suleman, PW-1 were residents of village Khitauli. Indisputably, the fields of the deceased and the accused are adjacent to each other being divided by a water channel. The said water channel is connected with one Mohanpur Branch canal. The irrigation of the agricultural lands of both the parties used to be done through the said canal. Allegedly, 2-3 days prior to the occurrence, altercations had taken place between the accused persons and the deceased as regard taking of water from the said canal for irrigational purpose. As the deceased allegedly had taken water from the canal for making his field ploughable, the accused persons objected thereto.

At about 7 P.M. on 28.10.1976, PW-1 accompanied by the deceased went to their field allegedly for checking as to whether the same had become ploughable. The accused armed with lathies are stated to have come to the field. It is further stated that the accused had asked the deceased as to why he had taken water from the canal as a result whereof the channel of the canal was allegedly broken resulting in stoppage of flowing of the water to their field. Stating they would not leave him alive, lathi blows were inflicted on him. PW-1 raised alarm whereupon Ghasi Khan PW-2 and Darab Khan,

PW-3 came to the spot but when an attempt was made by them to save the deceased they were threatened and chased away by the accused persons. They ran towards the village leaving the deceased in the field. A First Information Report was lodged at about 9.05 P.M. on the same date. Allegedly, the body of the deceased was brought in a tractor by the accused persons themselves accompanied by 16-17 persons whereupon they were arrested.

Upon completion of the investigation pursuant to or in furtherance of the said First Information Report, the accused stood their trial before the learned Sessions Judge. During trial the accused raised two divergent defences : (i) The deceased had cut the crop of bajra which was ripe from their field and having been so found by them, he ran away towards his field but was caught by Hafiz. The deceased had a sickle with him and as he intended to cause injuries upon Hafiz, he in exercise of his right of private defence hit him on his head with lathi; and (ii) When the deceased was caught and brought to the police station, he sat on a stool and the Daroga while interrogating kicked him as a result whereof he fell down and complained of pain in his stomach. A doctor was called and thereafter he was taken in custody.

The learned Sessions Judge in his judgment rejected both the defences and found them guilty of commission of an offence under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life.

On appeal, the High Court, however, accepted the defence of right of private defence raised by the accused opining that they have shown preponderance of probabilities therefor in view of the statements made by the prosecution witnesses in their cross-examination. The second defence raised by the accused, namely, the incident which took place in the police station, i.e., a Daroga while interrogating kicked the deceased whereupon he fell down and died was, however, disbelieved.

According to the High Court, Appellant Hafiz had, however, exceeded his right of private defence. It, therefore, acquitted the other three (Rafiq, Sharif and Lal Mohammed) on the ground that they could not have shared any common intention with him as he had merely exceeded his right of private defence which is an individual act. While holding the Appellant Hafiz, guilty for commission of offence under Section 304, Part II of the Indian Penal Code, the High Court sentenced him to undergo rigorous imprisonment for a period of seven years. The appeal preferred by Rafiq, Sharif and Lal Mohammad was, thus, accepted and they were acquitted on being given the benefit of doubt.

Both Hafiz and the State of U.P. are in appeal before us from the said judgment.

At the outset, we have to reject the second defence of the accused, that is, Abdul Rahman, though given some lathi blows, was alive when he was brought to the police station, and died of injuries sustained by him from a kick on his back given by the Daroga and his consequent falling down on the floor. Satish Chandra (DW1), on whose evidence strong reliance is placed to show that Abdul Rehman was brought alive to the police station, only says that Abdul Rehman was slapped by the Daroga. He does not say anything about Abdul Rehman being kicked by the Daroga or his falling down hitting his head on the floor.

The learned counsel appearing on behalf of the accused would submit that the prosecution has failed to prove any enmity between the parties and in fact PW-1 and PW-3 had accepted that there had been none, with regard whereunto, our attention has also been drawn to the following finding of the learned Trial Judge:

"\005but it has come in evidence that there exists no enmity from before of his occurrence between them and accused."

It was urged that even motive for commission of the offence has not been proved in regard whereto our attention in this behalf has been drawn to the following observations of the High Court :

"When Bajra, Arhar and Sugarcane crops were existing in the fields of appellants 1 to 3, there was no occasion for the above appellants to take water from water channel to make it ploughable and there was no other fields of the appellants near the said water channel. Moreover, in case Abdul Rahman deceased had taken water from water channel to make his field ploughable water channel was not blocked and the appellants 1 to 3 were not affected by the above act of Abdul Rahman deceased. This being so there was no occasion for appellants 1 to 3 to complain to Abdul Rahman deceased that on account of taking water by him (deceased) they could not take water to their field to make it ploughable. This shows that the motive alleged by the prosecution is improbable and it could give no occasion for the appellants 1 to 3 to exchange altercation."

The genesis of the occurrence, the learned counsel would contend, has been suppressed inasmuch as in the First Information Report, it had not been disclosed that the deceased was alive when he was brought to the police station by the accused persons in a tractor. Had the prosecution story been correct, it was submitted, the witnesses (particularly the brother of the deceased) despite having been chased away would have come back with others to the field to find out as to whether the deceased had succumbed to his injuries or not. Even without making any attempt to ascertain the condition of his brother, PW-1 is said to have proceeded to the police station although he could not have been sure about the death of his brother.

Taking us through the deposition of the witnesses, the learned counsel would submit that the prosecution witnesses contradicted themselves and, thus, they should not have been relied upon. In any event, the accused Hafiz was entitled to exercise his right of private defence.

Mr. Sahdev Singh, learned counsel appearing on behalf of the State of U.P., on the other hand, would contend that from the tenor of cross-examination as also their statements under Section 313 of the Code of Criminal Procedure, the accused persons have admitted the place of occurrence and the time of occurrence. It further stands admitted, it was urged, that one lathi blow had been given on the deceased.

Drawing our attention to the fact that the deceased suffered a number of injuries, the learned counsel would submit that the internal injuries received by the deceased could not have been caused by one single blow. The accused persons, according to the learned counsel, had sufficient motive to commit the crime having regard to the fact that there had been altercations and exchange of hot-words relating to irrigation of their respective fields two days prior to the date of incident.

The High Court, it was submitted, has committed a serious mistake in coming to the conclusion that the prosecution has not been able to establish the motive. It was urged that the prosecution has proved motive on the part of the accused for assaulting Abdul Rahman (deceased). The genesis of the occurrence, the learned counsel would contend, has also been established. It was further submitted that nothing has been brought on record to show that it

was the deceased who had cut the ear-corn of bajra.

Mr. Singh would argue that it is only PW-3 who alleged that sickle was lying in the bajra field; but therefor only he was declared hostile, as no such statement was made by him either in the examination-in-chief or in his statement before the police under Section 161 of the Code of Criminal Procedure. Had any sickle been found when the accused persons brought the body of the deceased to the police station for the purpose of lodging a First Information Report against him, they could have brought the same with them and in any event, during investigation it could have been pointed out to the Investigating Officer. As it has not been established that the deceased had cut ear-corn of bajra or was having a sickle in his possession, the plea of exercising a right of private defence cannot be given any credence.

We have been taken through the depositions of the witnesses brought on record. Indisputably there exist certain discrepancies in the statements of the prosecution witnesses but, in our opinion, from the broad feature of the case to which we will advert to a little later, it would appear that the prosecution has been successful in bringing home the charges leveled against the accused.

The learned counsel appearing on behalf of the Appellant-Hafiz did not question the correctness or otherwise of the sketch map prepared by the investigating officer. The sketch map shows that the place of occurrence is the irrigated field of the deceased measuring 14 bighas. In the field of Wazir, father of the Appellant-Hafiz, there were standing crops of bajra, sugarcane and arhar. The crops of bajra were grown on the north side of the field abutting Mohanpur Branch canal. A part of the said crops was found to have been cut. The place of occurrence, however, is almost at the middle of the field of the deceased and situate by the side of the water canal. The crops which were cut was towards the north of the field of Wazir. According to PW-3, the sickle was found there. If the defence case is to be believed, the sickle should have been found in the hands of the deceased or near the place where the incident took place. It is not in dispute that Hafiz and other persons came to the police station purportedly for the purpose of lodging the First Information Report against the deceased on the premise that he had cut the bajra crops from their field. According to them, he was alive then. It was, therefore, necessary for the defence to bring the said sickle with them either for the purpose of showing that with it the crop of bajra was being cut and/or it was with the said weapon he intended to assault Hafiz giving rise to exercise his right of private defence. The purported exercise of right of private defence cannot also be accepted in view of the fact that even the First Information Report lodged by Hafiz has not been brought on record.

The High Court, therefore, apart from not assigning sufficient and cogent reasons did not consider the case from this aspect. In view of the evidence brought on record, the genesis of the occurrence appears to be as disclosed by the prosecution. No reason whatsoever was assigned by the High Court as to why the statements of the PWs in this behalf shall be discarded.

The contention of the learned counsel that the fact that Abdul Rahman (deceased) was either brought alive or otherwise, should have been disclosed in the First Information Report, cannot be accepted, in view of the fact that the First Information Report was lodged before the dead body was brought.

Furthermore, according to the accused only one blow of lathi was inflicted on the head of the deceased. The autopsy report, however, shows that the following injuries were received by the deceased :

"1. Contused wound 4 cm x 0.8 cm x bone deep
over front part of the head 9 cm above root of the

nose with swelling all around.
2. Contused wound 2 cm x 0.5 cm x muscle deep on the back surface of left forearm.
3. Abrasion 2 cm x 1 cm at back surface right elbow.
4. Lacerated wound 1 cm x 0.2 cm x muscle deep on the left front surface index finger left hand.
5. Contused swelling 10 cm x 8 cm on the left chest lower part at the portion of axillary line.
6. Multiple abrasions of the various size on the back of chest in an area of 18 cm x 12 cm.
7. Contusion 3 cm x 2 cm on the left side back scapula region.

Internal examination showed that skull was congested under injury no. 1. Frontal bone crushed and depressed in an area of 1.5 cm x 1 cm under injury no. 1. Membranes were congested. Brain was congested on both sides. Walls were congested. 5th, 10th and 11th ribs were fractured under injury no. 5. Peritoneum cavity contained about one and half litre blood. Stomach contained semi digested food. Small intestine contained digested food. Large intestine contained some faecal matters. Cause of death was coma and haemorrhage as a result of ante mortem injuries."

Both the Trial Judge as also the High Court have arrived at a finding that the date, time and place of occurrence stood admitted.

From the foregoing discussions, it must be held that the prosecution proved that the occurrence took place in the field of the deceased and not in the bajra field of the Appellant.

We are also unable to accept the findings of the High Court that having regard to the fact that the crops of bajra, arhar and sugarcane were standing, the accused persons were not required to take water from the water channel to make it ploughable. It is the case of prosecution that the deceased and Suleman, PW-1, had gone to their field for checking whether the land has become ploughable and it is not the case of defence that they had gone to their field to check whether their land has become ploughable. The High Court has failed to consider that even the standing crops of sugarcane and arhar could require water for irrigational purpose. It is not in dispute that the land of the deceased was fallow and stood irrigated which also give credence to the prosecution story. Thus, we agree with the conclusion of the learned Sessions Judge that the accused persons had the motive to pick up quarrel with the deceased. If this aspect of the prosecution story is believed, the High Court must be held to have fallen into an error in coming to the conclusion that the prosecution has suppressed the origin and genesis of the occurrence.

It may be noticed that the defence witness (Satish Chandra \026 DW1) does not say about the standing crop. He did not even say that he had been told by the accused persons that the deceased had cut the standing bajra crop. Such a statement has been made only by PW-3 who was declared hostile.

If the statement of PW3 to the aforementioned effect is discarded, no credence can be given to the plea of exercise of right of private defence set up by the accused. The said plea was raised, as noticed hereinbefore, in the context that the deceased intended to hit the Appellant, Hafiz with the sickle and then he exercised the right of private defence by hitting on his head with a lathi.

The High Court in its judgment has proceeded on a hypothesis that the deceased was cutting ear-corn of Bajra from the field of the Appellant and when he objected thereto he tried to inflict a blow on him and he acted in his self-defence. We are unable to subscribe to the said view.

Hafiz, thus, must be held to have accepted that he had assaulted the deceased on his head with a lathi.

The High Court also in its impugned judgment recorded:

"The contention of the appellants was that appellant Hafiz caused lathi injuries on the deceased though in exercise of right of private defence and, therefore, it was only appellant Hafiz who exceeded the right of private defence and his act comes within the purview of culpable homicide not amounting to murder punishable under Section 304 part-II I.P.C."

A concurrent finding of fact has, therefore, been arrived at by the courts below that Hafiz caused lathi injuries on the deceased.

The findings of the High Court that the prosecution has not clarified as to what was the size of moon in the night of occurrence must be held to be irrelevant in view of the fact that the accused persons have not denied or disputed the time and place of occurrence. It also stands admitted that the accused persons were involved in the occurrence.

It is now well-settled by various decisions of this Court that different persons act differently in a given situation. According to PW-1 and PW-3, they were threatened and chased away after the deceased was assaulted. They might not have, out of fear, ventured to go back to the field. They came to know of the death of Abdul Rahman from others. They got a report prepared with the assistance of one Anwar and left for police station. It may be correct that in aforementioned situation some other persons might have gone to the place of occurrence, with their relatives and other villagers, but only because they did not do so, would not by itself be a pointer to the fact that their testimonies cannot be relied upon for any purpose whatsoever.

It may be true that the right of private defence need not specifically be taken and in the event the court on the basis of the materials on records is in a position to come to such a conclusion, despite some other plea had been raised, that such a case had been made out, may act thereupon. The High Court, however, unfortunately proceeded to rely upon the defence version only i.e. on the basis that the place of occurrence was the field of the Appellant and sickle and the harvested bundles of ear-corn of bajra were lying.

Mutually destructive defences taken by the accused persons would also go a long way to disbelieve their story. Both the Trial Judge and the High Court has rejected the defence taken by the Appellant in his examination under Section 313 of the Code of Criminal Procedure.

We may notice that Mahesh Chand Dixit, PW-5 (Sub-Inspector of Police) stated that the dead body of the deceased was brought on the tractor of Nobat Ram Prasadi Lal. He recorded the statements of Suleman, PW1 in the police station and statement of Darab Khan at the same time. The deceased admittedly was assaulted with lathis by the Appellant. The lathis seized at the instance of Rafiq and Lal Mohammad were found to have been fitted with iron cap at the one end.

However, it must be recorded that even if we accept the statements of the prosecution witnesses, it would appear that the occurrence might have

occurred at the spur of the moment.

We, thus, agree with the conclusion of the High Court that Abdul Hafiz, Appellant in Criminal Appeal No.263 of 2004, is guilty of commission of an offence under Section 304 Part II IPC. Admittedly, Abdul Hafiz had caused a head injury and as such we do not intend to interfere with the judgment of the High Court even as regard quantum of sentence. In that view of the matter, the appeal preferred by Hafiz being Criminal Appeal No.263 of 2004 is dismissed.

So far as Rafiq, Sharif and Lal Mohammad, Respondent Nos. 2 to 4 in Criminal Appeal No.1163 of 2004 are concerned, there is no justification for giving them the benefit of doubt as has been done by the High Court. The fact that they had also beaten the deceased with lathis is established not only by the evidence of PW1 and PW2, but also by the evidence of PW3. It cannot, however, be said that they had any intention to cause death of the deceased Abdul Rahman. They might have come armed with lathies with a common intention of threatening the deceased and his brother and causing injuries upon the deceased. They are, therefore, found guilty for commission of the offence under Section 326/34 IPC and sentenced to three years' rigorous imprisonment. Criminal Appeal No.1163 of 2004 is allowed to the aforementioned extent.

The Accused may be taken in custody to serve out their sentences.