

CASE NO.:
Appeal (crl.) 1411 of 2007

PETITIONER:
Kishan Chand & Ors

RESPONDENT:
State of U.P

DATE OF JUDGMENT: 10/10/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. Phool Chand (Accused No. 1) was a retired Army Officer. He was allegedly allotted some land bearing plot No. 596 at village Paigamberpur Hamlet, Jarganwan, title whereof was in dispute. He was in possession thereof but his right to make any construction thereupon was in dispute. His earlier attempt to raise constructions on the said land had met with resistance by the villagers. They made a complaint to the officers of the Tehsil. Before the police authorities, Phool Chand is said to have given an undertaking not to make any construction.

We may place on record that he had also intended to put up constructions earlier but did not succeed. Villagers were claiming their right to make common use the land in question, viz., for keeping \021Ghoor\022 of the village folks.

3. On 3.02.1978 at about 9 a.m., the said Phool Chand armed with a double barrel gun, his brother Kishan Chand (Accused No. 2) armed with a single barrel gun in the company Bhagauti (Accused No. 3), Badadin (Accused No. 4) and Sheo Prasad (Accused No. 5) who were said to have been armed with lathis came to the land in question. They started construction thereupon with the help of hired labourers. A large number of villagers assembled at the place. Accused were requested not to make any construction till the disputes between them were determined by the competent court.

4. Amongst the villagers, Ram Asrey (since deceased), his son Mishri Lal (first informant), Hardev, Suraj Lal, Ram Singh, Ram Dass, Vishram, Ram Saran, Shiv Pal, Mohan Lal, Shiv Prasad, Umrao, Pyare, Ram Lakhan, Karam Ali and Ram Prasad were present. Allegedly, Phool Chand and others started abusing them. Mishri Lal and his co-villagers asked him not to do so. Accused Nos. 3 to 5, viz., Bhagauti, Badadin and Sheo Prasad, allegedly exhorted Phool Chand and Kishan Chand to shoot Mishri Lal and others whereupon Phool Chand ran towards the roof of the nearby \021Kothri\022 owned by Mishri Lal and from the roof thereof, he started firing. Kishan Chand is also said to have fired from his gun. Ram Asrey standing at the Galiyara received a gun shot injury. He died at the spot. Mishri Lal and others also received firearm injuries. One of the persons, viz., Ram Harak who had also sustained gun shot injuries breathed his last in the hospital. On receipt of such gun shot injuries, the condition of Suraj Lal, Hardev, Mahan Lal, Ram Dass and Ram Singh allegedly became serious.

Mishri Lal son of the deceased Ram Asrey lodged a First Information Report at about 11.30 a.m. on the said date alleging death of Ram Asrey and

Ram Harak at the hands of the accused persons and receipt of injuries by as many as 15 persons, viz., Mishri Lal, Pyare, Shiv Pal, Mohan Lal, Ram Dass, Suraj Lal, Ram Singh, Hardev, Karam Ali, Shiv Prasad, Umrao, Vishram, Prem Prasad, Ram Saran and Ram Lakhan.

5. The defence version in regard to the incident was that the \021Patta\022 of the disputed land was executed in the name of Phool Chand in the year 1973. He allegedly had raised constructions on eastern and western wall. However, in the year 1977, i.e., after his retirement when he was going to construct his house thereupon, his attempt to do so was opposed by Mishri Lal, Hardev, deceased Ram Asrey and others. An undertaking was said to have forcibly been taken by Lekhpal and Station House Officer of the police station. However, at a later stage, the Tahsildar of the area allegedly directed the Station House Officer of police station Asandra to render all help to him. However, the said order was not complied with. In the written statement filed by the accused persons, the incident that the had taken place on 3.02.1978 at about 9.00 a.m. was accepted but it was contended that while the said Phool Chand with the help of others including hired labourers started constructions, the deceased Ram Asrey and Ram Harak along with a large number of persons being armed with guns and lathis reached there and caused obstructions. Upon protest having been lodged, all of them advanced towards him with a view to kill him. He then ran to the roof of his father\022s Baithaka but Ram Asrey and his companions surrounded his house. They also entered therein. An attempt was also made to molest Smt. Shakuntala Devi, sister of Phool Chand. Only at that time, with a view to save the modesty and honour of his sister as also save the life of other members of the family, they caused injuries to various persons. It was alleged that an endeavour was made to lodge a First Information Report by Smt. Shakuntala Devi but the same was not registered. It was further alleged that Smt. Shakuntala Devi came to Barabanki with her father, uncle and brother Gokul Chand and all of them were medically examined by a private doctor whereafter a report was sent to the District Magistrate.

6. The prosecution in support of its case examined 13 witnesses. Mishri Lal (PW-1), Suraj Lal (PW-2) and Ram Saran (PW-3) examined themselves as eye-witnesses to the occurrence. They proved the genesis of the occurrence as also the manner in which it took place. Other witnesses examined by the prosecution were the doctors who had conducted post mortem examination on the body of the deceased Ram Asrey and Ram Harak as also examined the injuries on the body of 15 injured persons.

7. The defence examined Dr. L.K. Shukla (DW-1) who allegedly had examined Smt. Shakuntala Devi, Sri Dutt, Ramfal and Gokul Chand. Smt. Shakuntala Devi examined herself as DW-2.

8. The defence story was disbelieved both by the learned Trial Judge as also the High Court. They came to the conclusion that all the five accused were present at the place of occurrence and participated therein and used their respective weapons to inflict injuries upon the victims in execution of their common object and for the said purpose they had formed an unlawful assembly. The plea of right of private defence raised by the accused was also negatived. The purported injuries found on the person of the defence witnesses and others were held to be self-inflicted ones.

9. On the aforementioned findings, Phool Chand and Kishan Chand were convicted under Sections 148, 302/149 and 307 of the Indian Penal Code and Bhagauti, Badadin and Sheo Prasad were convicted under Sections 147, 302/149 and 307/149 thereof. They were sentenced to undergo rigorous imprisonment for life, four years rigorous imprisonment for attempt to murder, two years rigorous imprisonment under Section 148 of the Indian Penal Code and one year rigorous imprisonment under Section 147 thereof.

10. Indisputably, Accused No. 1 Phool Chand died during pendency of the appeal in the High Court. Accused No. 3 also is said to have died about three years back. Kishan Chand, Badadin and Sheo Prasad are before us.

11. Ms. Sandhya Goswami, learned counsel appearing on behalf of the appellants, took us through the evidences of Mishri Lal (PW-1), Suraj Lal (PW-2) and Ram Saran (PW-3) and submitted that from the deposition of the said witnesses, it would appear that the injuries having been caused only by Phool Chand (since deceased), the appellants cannot be said to have formed a common object so as to attract the provisions of Section 149 of the Indian Penal Code.

The learned counsel would point out that a large number of villagers took part in the incident. Had the appellants been present, they would have also sustained some injuries and, thus, their presence and participation in the occurrence becomes doubtful.

It was urged that Phool Chand (since deceased) had exercised his right of private defence inasmuch as from the prosecution case itself it would appear that there were at least 16 persons who intended to cause bodily harm to the accused persons apart from outraging the modesty of Smt. Shakuntala Devi. In the event, it is found, it was urged, that the said Phool Chand exceeded his right of private defence, other accused persons could not have been convicted under Section 302/149 of the Indian Penal Code particularly when it has been brought on record that Phool Chand alone had climbed up the roof and fired causing the deaths.

Ms. Goswami submitted that the courts below committed a manifest error in passing the impugned judgments insofar as they failed to take into consideration that the injuries had been sustained by the family of the accused.

It was further urged that in view of the finding of the High Court that the accused Phool Chand was in possession of the site and the side walls. It was brought to our notice that the Superintendent of Police Shri Jangi had passed an order (Ex. Kha-1) dated 27.01.1978 validating the possession of Phool Chand after he had given an undertaking to the officer incharge.

12. Mr. Shail Kumar Dwivedi, learned Additional Advocate General for the State of U.P. appearing on behalf of the respondent, on the other hand, took us through the judgments of the learned Trial Judge as also the High Court and submitted that for determining the question as to whether the accused shared common intention or common object, the backdrop of events including the fact that they had tried to raise constructions earlier which had been resisted by the villagers, the fact that the accused were armed with deadly weapons whereas the prosecution parties were absolutely unarmed, the undertaking of Accused No. 1 not to make any construction and the prejudice which would be caused to the villagers if such constructions are allowed to be made, viz., it will take away the right of some of the villagers to take their carts through the pathway concerned, the false defence raised by the accused persons are the determination factors.

13. The land in question was allotted to Phool Chand. He indisputably was in possession thereof. The ownership of the land was, however, disputed. Whether allotment in his favour was valid keeping in view the fact that the villagers in general had been claiming user of the said land for a particular purpose is not in dispute. It is furthermore not in dispute that the accused persons had made several attempts to raise constructions thereupon. Such attempts on their part had been foiled. Accused No. 1 had also given an undertaking that he would not make any construction.

14. From the materials brought on record, it is evident that the villagers never intended to dispossess Phool Chand. They were only resisting his right to raise any constructions thereupon. When the appellants together with Phool Chand and Accused No. 3 went to raise constructions, they were armed with deadly weapons. Accused Nos. 1 and 2 were armed with a double barrel gun and a single barrel gun respectively, the others were having lathis in their hands. They had hired labourers also with them. Only

when they started raising constructions, the deceased and the prosecution witnesses objected thereto. It had come on record that they were not required to raise construction till the lis is determined. The accused persons did not listen to the said advice. They started abusing the members of the prosecution party. They were requested not to use abusive language. At that juncture, it is alleged that Accused Nos. 3, 4 and 5 asked Accused Nos. 1 and 2 to kill them or to assault them. Accused No. 1 went to the roof top of a house. He was holding a double barrel gun. He fired shots at least aiming at two persons standing at two different places. He must have fired some other shots also. Deceased No. 1 Ram Asrey was standing at the Galiyara whereas deceased No. 2 was standing near the wall towards the West of the said Kothi. It has been proved that Accused No. 2 also fired shots. 17 persons received injuries.

Dr. H.C. Nigam (PW-4) who conducted the post mortem examination on the body of the deceased Ram Harak found the following injuries:

- \023(1) Lacerated wound 3 1/2 cm x = cm. Bone deep on the forehead 6 cm over the nose bridge. There was swelling on all four sides of this injury. Multiple firearm entry wounds in an area of 36 cm x 30 cm spread over chest and right side of abdomen and on chest and left side of abdomen.
- (2) Multiple firearm entry wounds on entero-medial aspect of right hand in an area of 7 cm x cm (sic), 7 1/2 cm above right side.
- (3) Multiple firearm entry wounds in an area of 11 cm x 8 cm towards the front side of right forearm 7 cm below the elbow.
- (4) Multiple firearm entry wounds in an area of 9 cm x 6 1/2 cm on the backside of the palm of right hand, 7 cm below from the wrist joint.\024

Dr. Gopal Swaroop (PW-5) who conducted the post mortem examination on the body of the deceased Ram Asrey found the following injuries:

\0231. Multiple punctured wound (caused by firearm) found over right side of face in an area of 8 cm x 6 cm muscle deep on which 4-5 marks of pellets were found, they were marks of black colour of shots whose margins were inverted. These wounds of entry were of varying size of < x < cm to 3 cm x > cm.

2. Multiple punctured wounds (firearm wounds) over the right side of neck in an area of 15 cm x 6 cm x muscle deep marks of 2-3 pellets in number which were towards the inner side. These were inverted wound of entry of varying size of < x < cm to 3 cm x > cm.

3. Multiple punctured wound in an area of 21 cm x 6 cm x muscle deep over the right shoulder in the upper limbs just below the shoulder joint of black colour. The wounds of entry were of varying size of < cm x < cm to > cm x > cm.

4. Multiple punctured wound (firearms) 42 cm x 26 cm x muscle deep towards the front side of right chest on which approximately mark of 50 to 60 pellets were present which were wounds of entry whose size differed from < cm x < cm to > cm x > cm.\024

The injuries on the deceased, therefore, must have been caused as a result of more than one shots fired at each of them.

Dr. P.N. Pandey (PW-6) examined Mishri Lal, Pyare and Shiv Pal. The following injuries were found on the body of the Mishri Lal:

- \023(1) Firearm wound 0.5 cm x 0.4 cm on left side neck 12 cm above left sterno clavicle joint.
(2) Lacerated wound 1 cm x 0.5 cm on left palm in between middle and lateral fingers.
(3) Abrasion 0.5 cm x 0.5 cm on joint of right side knee.\024

On the body of Pyare, the following injuries were found:

- \023(1) Abrasion 0.2 cm x 0.2 cm on left side back of chest 10 cm away from vertebral column.
(2) Abrasion 0.2 cm x 0.2 cm on inner side on left foot 6 cm beneath the knee joint.\024

The following injuries were found on the body of Shiv Pal:

- \023(1) Abrasion 0.5 cm x 0.5 cm on left side of chest 8 cm above the left nipple.
(2) Abrasion 0.5 cm x 0.5 cm on left side thigh upper part 35 cm above left knee joint.\024

As regards injuries on the body of Mishri Lal, Dr. Pandey opined:

\023\005Injury No. 1 of Mishri Lal can be caused by a pellet fired from rifle. Injury No. 2 can be caused by some blunt weapon, for instance, lathi. The remaining injuries can be caused by pellets from the rifles of the three accused.\024

As regards injuries on the persons of Pyare and Shiv Pal, Dr. Pandey opined that the injuries were caused by friction.

Participation by all the accused in causing death of two persons and injuries sustained by others is, therefore, apparent.

15. This Court in *Mizaji and Another v. The State of U.P.* [(1959) Supp (1) SCR 940] opined that there are two parts of Section 149 of the Indian penal Code. To attract the first part, it was not necessary that there should be a pre-concert. In regard to the second part, it was stated:

\023\005Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression \021know\022 does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the

unlawful assembly clearly point to such knowledge on the part of them all\005\024

16. In Bishna Alias Bhiswadeb Mahato & Ors. v. State of West Bengal [(2005) 12 SCC 657 : 2005 (9) SCALE 204], this Court held :

\023For the purpose of attracting Section 149 and/or 34 IPC, a specific overt act on the part of the accused is not necessary. He may wait and watch. Inaction on the part of an accused may some time go a long way to hold that he shared a common object with others.\024

17. In Triloki Nath and Others v. State of U.P. [(2005) 13 SCC 323], the law has been stated in the following terms:

\023For the purpose of attracting Section 149 of the IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose.\024

18. Ms. Goswami relied upon a decision of this Court in Munna Chanda v. State of Assam [(2006) 3 SCC 752] wherein the accused persons were held to have not formed any common object keeping in view the genesis of the said occurrence which took place at three different stages. Appellants therein were involved only at the third stage. It was in the peculiar fact situation obtaining therein this Court opined:

\023The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute. At the third stage of the quarrel, they wanted to teach the deceased and others a lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Moti was assaulted by Bhuttu at the instance of Rattan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased, was being chased not only by the appellants herein but by many others. He was found dead next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those, who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Indian Penal Code is, therefore, attracted. [See Dharam Pal and Others v. State of Haryana \026 (1978) 4 SCC 440 and Shambhu Kuer v. State of Bihar \026 AIR 1982 SC 1228].\024

19. Right of self-defence is a plea which is available to the accused but the burden to prove the same would be on them.

The High Court, in our opinion, committed an error in rejecting the

plea of self-defence raised on behalf of the accused stating that the incident took place at an open space. There is no law that right of self-defence cannot be exercised in relation to a dispute over an open space. But the factual matrix obtaining in the instant case being absolutely different, we are of the opinion that right of self-defence on the part of the accused was not available. Accused persons were the aggressors. They had gone to the scene of occurrence with weapons. Phool Chand and other accused, in all probability, thought that having regard to the order passed by the Superintendent of Police asking his subordinate officers to afford them protection, they could take law in his own hands. Thus, they could raise construction by show of force.

Evidences adduced on behalf of the prosecution in no unmistakable terms point out that all the overt acts started from the side of the accused persons. They rejected the advice not to raise any construction till the dispute is determined. They started using abusive language and even when asked not to do so they continued to do so. Only when a protest was made by the villagers, Accused No. 1 Phool Chand went to the roof top of a house and started indiscriminating firing. He was in army. He was presumably a good marks man. Shots fired by him hit the deceased on vital parts of their bodies.

20. It is not the case of the appellants that the villagers intended to dispossess them. We have noticed hereinbefore that they were not armed at all. They had assembled at the place only with a view to resist the attempt on the part of the accused persons to raise constructions in respect whereof Accused No. 1 himself had given an undertaking that he would not do so. The Superintendent of Police might have issued certain directions to the Sub-Inspector but indisputably the lis was pending adjudication before a competent authority. Accused could not have taken law in their own hands only because the Superintendent of Police has asked his police officer to give protection to him.

21. It has been found by the learned Trial Judge as also the High Court that the prosecution witnesses did not enter into their house. The plea that the modesty of Smt. Shakuntala Devi was outraged has been rejected by both the courts. The accused did not lodge any First Information Report in that behalf. They, for reasons best known to them, did not go to a government doctor to get their purported injuries examined on their persons. Although the offence took place in the morning of 3.02.1978, they went to DW-1 only on the next day to get their purported injuries examined. For valid and cogent reasons, the testimonies of the DWs had not been accepted. The question as to whether in a situation of this nature the right of private defence could be exercised by the accused persons must be considered having regard to the following facts:

- (i) the prosecution witnesses were not armed;
- (ii) there is nothing to show that they attempted to dispossess Accused No. 1.
- (iii) They did not dismantle the structures.
- (iv) Accused persons themselves started abusing them.
- (v) They intended to establish their right of raising constructions for which they were fully prepared.
- (vi) Had the matter been otherwise, the villagers would have also gone to the site with arms.
- (vii) Why all the five accused persons were armed has not been explained.

22. The fact that number of injuries sustained by the prosecution witnesses and the nature thereof, viz., they suffered gun shot injuries as also injuries caused by lathis, goes a long way to show that the accused persons had shared common object.

From the post mortem as also the injury report, it is evident that more than one gun was used for commission of the offence. The prosecution

witnesses also suffered injuries which could only be caused by lathis. It is, therefore, a case where all the appellants together with Phool Chand had taken part in the commission of the offence.

23. In Shambhu Nath Singh and others v. State of Bihar [AIR 1960 SC 725], this Court opined:

\0236. Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence, and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed. But "members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly."

Jahiruddin v. Queen Empress, ILR 22 Cal 306.\024

24. In Shivalingappa Kallayanappa and Others v. State of Karnataka [1994 Supp (3) SCC 235], this Court opined:

\0239. From the above discussion it is established by the prosecution that A-1 to A-5 formed into an unlawful assembly variously armed and participated in the occurrence during which two deceased persons died and P.Ws. 2 to 4 received injuries. The next question is whether the common object of the unlawful assembly was to commit the murders. Whether there was such a common object or not, depends upon various facts. A-1 and A-2, though armed with axes, did not use the sharp side but only gave one or two blows on the heads with the butt ends. A-4 and A-5 who were armed with sticks dealt blows only on the legs and or on the hands which were not serious. A-3 did not participate in the attack on any of the two deceased persons. These circumstances show that the common object of the unlawful assembly cannot be said to be to cause murders and at any rate it cannot be said that all the accused shared the same and that they had knowledge that the two deceased persons would be killed and with that knowledge

continued to be the members of the unlawful assembly. However, taking all the circumstances of the case into consideration, the common object can be held to be only to cause grievous hurt. A-1 and A-2, however, dealt blows with the butt ends of the axes on the two deceased persons and the injuries on the heads caused by them proved to be fatal. Having given our earnest consideration to this aspect of the case, we are of the view that A-1 and A-2 must be held liable for their individual acts and they would be liable to be punished under Section 302 I.P.C. and A-3 to A-5 under Sections 326/149 I.P.C. so far as the attack on the two deceased persons is concerned.\024

25. In Bunnilal Chaudhary v. State of Bihar [(2006) 10 SCC 639], this Court held:

\02313\005We may say here that it is now the settled law that under Section 149 IPC, the liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other persons knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour on or before the scene of occurrence\005\024

26. In Sunil Balkrishna Bhoir v. The State of Maharashtra [2007 (7) SCALE 184], this Court held:

\02317. Section 149 per se constitutes a substantive offence. The object of this section is to make clear that an accused person whose case falls within its terms cannot put forward the defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Unlawful assembly was formed originally to assault and something might have happened all of a sudden.\024

27. In a case of this nature, the injuries on the part of the defence witnesses need not detain us as sufferance of such injuries at the hands of the prosecution witnesses had not been believed by both the courts below. We do not see any reason to differ with the said findings.

28. If Phool Chand was armed by the purported order passed by the Superintendent of Police that he should have assistance from the police officers. We fail to see any reason as to why he could not go to the police station and lodge a First Information Report. Why the injured persons did not go to a Government Hospital for getting themselves examined on that date itself. It betrays common sense as to why they had to go to a private doctor and that too on the next date. The accused persons even did not mind setting up a false plea to the effect that modesty of Smt. Shakuntala Devi had been outraged. The testimony of Smt. Shakuntala Devi has been discarded by the courts below. No attempt even had been made before us to assail the correctness of that part of the judgment.

29. For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.