

CASE NO.:  
Appeal (crl.) 489 of 1996

PETITIONER:  
State of M.P.

RESPONDENT:  
Mishrilal (dead) & Ors.

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DATE OF JUDGMENT: 02/04/2003

BENCH:  
Y.K. SABHARWAL & H.K. SEMA

JUDGMENT:

SEMA, J.

This appeal by special leave is preferred by the State against the judgment of the High Court whereby and whereunder the sentences and convictions imposed by the Trial Court have been set-aside by allowing the appeal, preferred by the accused.

The accused Mishrilal s/o Balmukund Jaiswal, Madhusudan s/o Mishrilal, Jamunaprasad s/o Mishrilal, Radhakishan s/o Ganpat Kalal, Vinod Kumar s/o Babulal Kalal, Hukumchand s/o Shankerlal Kalal, Jagdish s/o Shankarlal Kalal, Rajendrakumar s/o Babulal Kalal and Ashok Kumar s/o Mishrilal Kalal were tried in Session Trial No. 73 of 1987 whereby the Second Addl. Sessions Judge, Devas convicted accused Ashok under Sections 302, 307 read with Sections 149 and 148 IPC and Section 25 of Arms Act.; accused Jamunaprasad under Sections 307, 302 read with Sections 149 and 148 IPC and the remaining accused under Section 302 read with Sections 149, 307 read with section 149 and section 148 of the IPC and sentenced all the accused to pay a fine of Rs.250/- each and in default to undergo imprisonment for one month under Section 148 IPC, sentenced accused Ashok to suffer imprisonment for life under Section 302 IPC and to pay a fine of Rs.250/- and in default to suffer three months imprisonment and to suffer RI for five years under Section 307 read with Section 149 IPC and to suffer RI for three years and to pay a fine of Rs.200/- and in default to suffer one month imprisonment under Section 25 of the Arms Act, sentenced accused Jamunaprasad to suffer RI for five years under Section 307 and imprisonment for life under Section 302 read with Section 149 IPC and to pay a fine of Rs.250/- and in default to suffer three months imprisonment and sentenced remaining 7 accused to suffer imprisonment for life and to pay a fine of Rs.250/- each and in default to suffer imprisonment for three months under Section 302 read with Section 149 IPC and to undergo RI for five years under Section 307 read with Section 149 IPC.

During the pendency of this appeal, accused Mishrilal has expired and therefore, the appeal qua him stands abated.

The apple of discord, as revealed by the prosecution story, was over a trivial matter about the passing of bullock-cart. The bullock-cart of Babulal (PW-1) being driven by his servant Patiram (PW-3) was stopped by the accused in front of the house of Mishrilal (since deceased). Babulal, thereafter, reversed the bullock-cart, brought back his bullock-cart and reached his house by another route. At that time Maharaj Singh (PW-2), uncle of Babulal (PW-1), Bhavarsingh (the deceased), grand-father of Babulal and Gopal (PW-7) and others were sitting in front of the house of Babulal, who questioned as to why the bullock-cart had to be brought back by different route and at this Babulal narrated to them the story of stoppage of bullock-cart by the respondents. At this moment, accused Mishrilal armed with a Farsi, Jamunaprasad armed with a twelve bore gun, accused

Ashok Kumar with a desi Katta and rest of the accused-persons having lathis with them came near the house of Babulal hurling abuses, followed by heated exchange of words between both the sides. Then all of a sudden Jamunaprasad fired a gunshot at Babulal. The pellets hit him in his legs. The deceased Bhavarsingh, grandfather of Babulal tried to save him and stood in front of Babulal, when accused Ashok Kumar fired at him with the desi Katta hitting him on the chest. The deceased fell down on the ground and become unconscious. PW-2 Maharaj Singh and Karan Singh PW-4 also came to save Babulal but accused Jamunaprasad fired again hitting Maharaj Singh and Karan Singh. Accused Madhusudan assaulted Babulal by the lathi hitting him on the right shoulder. On raising hue and cry, the accused fled away. The deceased Bhavarsingh was taken to Kannaud Hospital where he was declared dead. Injured Babulal, Maharaj Singh and Karan Singh were admitted in the hospital and treated. Dr.G.D. Kashyap (PW-6), sent intimation to Police Station, Karnnod. ASI Dharamraj Singh (PW-17) reached the hospital and on being reported by Babulal (PW-1) ASI registered the FIR (Ex.P-1). The police issued the requisition form of all the injured persons marked as (Exs.P-30, P-31 and P-32). Thereafter, the police case (Ex. P-33) was registered on the basis of (Ex.P-1). The post-mortem was conducted by PW-6 embodying "the cause of death is from gunshot wound and its mode is syncope". The post-mortem report is (Ex.P-6). The injury reports in respect of Babulal, Karan Singh and Maharaj Singh are marked as (Exs.P-7, P-11 and P-12). X-ray plates with regard to injuries sustained by Babulal and Maharaj Singh are marked as (Exs.P-8 to P-10 and P-13 to P-16) respectively. The investigating officer also prepared a spot map (Ex.P-3). Accused Mishrilal also lodged the report as regards the injuries sustained by him, Madhusudan and Jamunaprasad on the same day i.e. 5.3.1987 and over the same incident. The report is marked as (Ex.D-8). The police investigated the complaint lodged by Mishrilal and challan was filed under Sections 147, 148, 149 and 324 IPC and registered a crime No.52 of 1987, which is pending before the learned Judicial Magistrate First Class for disposal. The complaint lodged by the prosecution party vide (Ex.P-1) was investigated and after completion of the investigation, the Court framed charges against the accused parties under Section 302 and in the alternative under Section 302/149, Section 307 and in the alternative under Section 307/149 and Section 148 of the Indian Penal Code. Accused Ashok Kumar was also additionally charged under Section 25 of the Arms Act. The accused pleaded not guilty to the charges and after the trial they were convicted and sentenced as noticed above.

The High Court after re-appraisal of the evidence, set-aside the order of conviction and acquitted the respondents of all the charges levelled against them.

For the sake of convenience we have devised to categorize the case under the following headings: (1) Cross cases be tried together; (2) Genesis of occurrence; (3) Presence of Accused Ashok Kumar at the place of incident; (4) Common object; (5) Right of private defence; and (6) Non-explanation of the injuries, sustained by the accused, by the prosecution.

#### CROSS CASES BE TRIED TOGETHER

Undisputedly, accused Mishrilal lodged the report to the police vide Ex.D-8 over the same incident happened on 5.3.1987, in which he had clearly stated the injuries were sustained by him and his son Madhusudan at the hands of prosecution party. It is also not disputed that on the strength of the complaint lodged by Mishriulal, investigation was also carried out and challan was filed namely crime case no.52/87 under Sections 147, 148, 149 and 324 IPC against the prosecution party which is pending for disposal before the learned Judicial Magistrate First Class. In the said challan, the prosecution party is stated to be an aggressor. This Court in Nathilal Vs. State of U.P. 1990 (Supp.) SCC 145, pointed out the procedure to be followed by the Trial Court in the event of cross cases. It was observed thus:-

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he

must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross-cases should be tried together by the same court irrespective of the nature of the offence involved. The rationale behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice.

#### GENESIS OF OCCURRENCE

As already noticed, the apple of discord is passing of the bullock-cart belonging to PW-1 Babulal, in front of the house of the accused Mishrilal. It is in the evidence on record that the bullock-cart of accused Mishrilal was parked in the gali impeding the passage of bullock-cart of Babulal PW.1. In the circumstances Babulal was asked to stop the bullock-cart which had to be reversed and taken from the other route. PW-1 naturally took it as an insult and felt bad and on being arrived at his place where Maharaj Singh, Bhavarsingh etc. were sitting and on being questioned about the change in the route, he narrated the incident of stoppage to the members of his family. In such a situation, it is expected that they have reasons to raise grievances. Whereas the accused party being succeeded in getting the bullock-cart diverted, were victorious and there was no reason to revolt by following Babulal armed with farsi, gun and desi katta and lathis as alleged by the prosecution. This allegation is clearly against the logic. It is logically improbable that the accused being able to stop and compel the bullock-cart to retreat would have still opted to follow Babulal and initiate a quarrel. It is logically improbable and unbelievable in the ordinary course of human conduct because the grievance of the accused, if any, has been redressed by preventing the bullock-cart to pass through the passage and accomplish in retreating the bullock-cart through another route, would still follow the prosecution party and assault them in front of their house. They have no reason to be annoyed or unhappy which would compel them to go to the house of the prosecution party and took up a quarrel with them. In the evidence on record it is shown that the cartridges were found in front of the house of PW-8 and blood stained earth was seized from the wall of the house of PW-8. But in spot map (Ex.P-3) the position shown is contrary and the house of PW-8 was omitted from this map. The testimony of Ramnarayan (PW-8) is inconsistent with (Ex.P-3) spot map. This apart, the learned Trial Judge made a spot inspection on 11.3.1991 under Section 310 Cr.P.C. However, the Trial Judge did not choose to record the memo of inspection. The judgment was delivered on 16.3.1991. What had prompted the learned Trial Judge to have recourse to spot inspection was not spelled out because no memorandum of inspection was prepared. But it is clearly

suggestive of deficiency of evidence with regard to place of occurrence. In such a situation, it was incumbent on the part of the learned Trial Judge, to have recorded the memo of inspection for proper appreciation of the inspection. Undoubtedly, the mandatory provision has not been followed by the Trial Court.

The prosecution party and not the complainant party were the aggressors, is further made amply clear in the depositions of PWs 1 and 2. PW-1 Babulal stated in para 9 of the statement as under:-

"All of them stood in front of my cart and they did not cry lowdly and they used to tell only this that no cart will go from here and please do not take away cart via this route. All of them prevented my cart on the high way, for which I took bad."

Babulal further stated as under:

"Then I stated to my grandfather that all of these were not allowing to bring my bullock cart from this side I stated while rebuking that these mather chodon are not allowing to take out the bullock cart then Maharaj Singh and Bhawar Singh stated that we will make them understand and then they remained stand there."

PW-2 Maharaj Singh also stated as under:-

"This is correct that Babu had stated this that salone did not allow the cart to came out through the high way and due to this fact we took it ill."

From the facts and circumstances, as adumbrated above, it is amply clear that the prosecution party was the aggressor and the alleged incident did not happen in front of the house of the prosecution party, rather the prosecution party took offence to the stoppage of bullock-cart of Babulal, but the prosecution has suppressed the genesis and origin of the occurrence. We are clearly of the view, therefore, that the prosecution party was an aggressor.

#### PRESENCE OF ACCUSED ASHOK KUMAR AT THE PLACE OF OCCURRENCE

Accused Ashok Kumar was attributed of firing with desi katta at the chest of the deceased Bhavarsingh which appears to have proved fatal. In the instant case, the prosecution party went straight to the hospital from the place of incident. Ex.P-29 is the intimation to the police station by the doctor. It is silent about the authors of the injuries. It does not speak about katta, farsi or lathi. Accused Ashok Kumar, from the very beginning of the trial, took a defence that he was not present at the spot on the day of incident and he has been falsely implicated on the ground that Ashok Kumar was having some love affair with Suganbai, the sister of PW-7 Gopal. Accused Ashok Kumar sustained no injury. In this background, the plea raised by Ashok Kumar, that he has been falsely implicated on the ground of his involvement with Suganbai, the sister of PW-7 Gopal, becomes significant. PW-7 Gopal is undisputedly a member of the family of a complainant party and in this background falsely implicating Ashok Kumar as an accused cannot be ruled out. As noticed earlier, in Ex.P-29 there was no mention of an attack by a desi katta. The necessary implication is that the name of Ashok Kumar and katta were introduced only after arrival of the police (PW-17) and after deliberation. Further, in Ex.P-29 only gun was mentioned. Against Ashok Kumar one of the eyewitness account is given by PW-5 Chagan. He was unable to say as from where katta was taken out. The alleged eyewitness account of PW-5 Chagan is also not acceptable because the name of PW-5 was not mentioned in Ex. P-1. His name also appears to have been introduced after the arrival of PW-17 and after deliberation. The alleged disclosure and recovery of Ex.P-20 and seizure memo Ex.P-21 both prepared by one V.K. Silawat, Station House Officer of Police Station, was not examined in the case. PW-9 Babulal - punch witness, father of PW-5, did not prove the material recited in Ex.P-20. PW-12 Lakhanlal - another punch witness, also did not testify the material

recited in Ex.P-20. The prosecution has also failed to prove that the desi katta was in exclusive possession of the accused Ashok Kumar. This all goes to show that the facts of seizure are not free from doubt. All the more so, when the prosecution tried to suppress the genesis and the origin of the occurrence. There is no guarantee that they are speaking the truth with regard to the facts of seizure Ex.P-21. As already noticed, accused Ashok Kumar was attributed of hitting on the chest of the deceased by desi katta. Dr.G.D. Kashyap (PW-6) conducted the post-mortem. He found the following external injuries:-

"External Injuries: (1) Gunshot (Firearm) wound. (A) wound of entry size (irregular round shape) 2"x2"x18" on the front Right chest 4" above the right (Illeg.) when a probe inserted in this wound it comes out on posterior side on wound of exit. Direction the wound is medially Back wounds and downwards (B) wound of exit Gun shot size 2 " x2"x18" situated 1" Rt. Lateral to 10th Thoracic vertebra, Direction lateraly (Illeg.) and upwords. It is continuous to the wound of entry. The edges of both wounds are irregular oral shape. But edges of entrance wound in inverted and edges of exit wound is everted. Both the wounds are antemortem wounds. From both these wounds oozing of blood is too much."

The doctor also found irregular shaped six small chharas stained with blood from the right chest of the deceased.

From the post-mortem report as noticed, PW-6 described the injuries as gunshot and not from the pistol. It is strenuously urged by Mr. Jaspal Singh, learned Senior counsel, that the pistol uses bullets and not chharas. According to him, since six chharas were found from the chest of the deceased, the shots were fired from the 12 bore gun and not from the pistol. Learned counsel for the appellants, however, contended that in desi katta 12 bore cartridges can also be fired. The prosecution has failed to obtain the opinion of ballistic expert. The prosecution also did not explain as to whether in desi katta 12 bore cartridges can also be fired. In the absence of explanation by the prosecution, it is difficult to accept that in desi katta 12 bore cartridges can be fired in the instant case. In the present case, a doubt has been created as to whether a desi katta can also fire 12 bore cartridges, which has not been explained by the prosecution. As already noticed, Ashok Kumar did not sustain any injuries on his body. In the ordinary course of human conduct, when his father Mishrilal is inflicted as many as five injuries which are stated to be dangerous to life, a son is expected to intervene in order to salvage his father and in the process he would receive injuries on his body, if he was present at the place of occurrence. The other two sons Madhusudan and Jamunaprasad who were with the father Mishrilal received simple injuries. In the FIR. (Ex.D-8) lodged by Mishrilal also, the presence of Ashok at the place of occurrence was not mentioned. It is in these circumstances, the presence of Ashok Kumar at the place of incident is not free from doubt. He must, therefore, be entitled to the benefit of doubt.

#### COMMON OBJECT

We have noticed that in Ex.P-1 accused Mishrilal, Jamunaprasad, Madhusudan and Ashok Kumar have been mentioned, but the remaining five accused Radhakishan, Vinod Kumar, Hukumchand, Jagdish and Rajendrakumar were not mentioned. It is also in the evidence on record that five accused were standing at the back and did not participate. The five accused were roped in aid of Section 149 IPC. In the Ex.P-1 itself, it is stated that others were having lathis. Who were the others and who were having lathis, has not been described in the complaint. It is in the evidence of PWs 1 and 2 that they were standing behind at a short distance. No participation of each of the accused, overt act or otherwise, has been attributed to them. They could be passive onlookers. It is difficult to accept that they were members of unlawful assembly and the offence was committed in prosecution of common object of that assembly. Their

conviction with the aid of Section 149 is, thus, clearly impermissible. Their conviction under Section 148 would also go.

#### RIGHT OF PRIVATE DEFENCE.

As already noticed, Mishrilal, Madhusudan and Jamunaprasad received injuries in the incident. According to Dr. G.D. Kashyap (PW-6) the injuries sustained by Madhusudan and Jamunaprasad were simple in nature, while the injuries found on the person of Mishrilal would be dangerous to life being on the sensitive part of the body - head. Accused Mishrilal received as many as five injuries - one incised wound and one lacerated wound on vital part like head. The doctor opined that the injuries were dangerous to life. The other three accused were all the sons of Mishrilal. We have doubted the presence of accused - Ashok Kumar at the place of incident. The remaining two sons Madhusudan and Jamunaprasad received injuries on their bodies. In the ordinary course of human conduct, if the father receives as many as five injuries in the presence of sons, the sons are not expected to be moot spectators. Firing from 12 bore gun is attributed to accused Jamunaprasad, the pellets of which hit the legs of Babulal PW-1 causing injuries which were simple in nature. Since we have already held that the prosecution party was the aggressor, we do not think that accused Jamunaprasad has exceeded the right of private defence. The fact that PW-1 Babulal received the bullet injuries on his legs would clearly show that Jamunaprasad fired from 12 bore gun to free his father and themselves from the clutches of the accused. One should not forget that Mishrilal has received as many as five injuries which were dangerous to life and the accused Jamunaprasad at that time reasonably apprehending the danger to the life of his father had fired the gunshot at that point of time in self-defence, which is quite justified. It is in these circumstances that we hold that the accused did not exceed the right of private defence.

#### NON-EXPLANATION OF THE INJURIES SUSTAINED BY THE ACCUSED

The last and which appears to be fatal to the prosecution case is non-explanation of the injuries sustained by the accused. As already said, accused Mishrilal received as many as five injuries, which were dangerous to life. Madhusudan and Jamunaprasad received simple injuries. In Ex.P-1 as well as in the entire deposition of PWs, the prosecution has not explained the injuries sustained by the accused. In the background of the defence, as set up by the accused, it was incumbent on the part of the prosecution, to have explained the injuries sustained by the accused. The defence version is that on being retreated the bullock-cart of Babulal, the complainant party - Maharaj Singh, Gopal, Mathura Lal, Lakhan, Jagdish, Mulia, Kailash and Karan Singh came with lathis and farsa. Mathura Lal hit Mishrilal's head with the farsa and Babulal, Maharaj Singh and Karan Singh beat Mishrilal with lathis. Madhusudan ran to save his father Mishrilal and they also beat him. When Jamunaprasad came to save, he was also beaten up and on that Jamunaprasad ran towards the house and made two fires in the air to save his father. It is the case of defence that the bullet, which struck Bhavarsingh, came from towards the house of Babulal. In the face of defence version, which competes in probability with that of the prosecution case, it was mandatory on the part of the prosecution to have explained the injuries sustained by the accused and non-explanation of the injuries is fatal to the prosecution case. In Lakshmi Singh and others vs. State of Bihar, (1976) 4 SCC 394, referring to earlier decisions in Mohar Rai v. State of Bihar, (1968) 3 SCR 525: AIR 1968 SC 1281: 1968 Cri LJ 1479, it was held by this Court:

"where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabalise the plea taken by the appellants

in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or

in the course of altercation is a very important circumstance from which the court can draw the following inferences:

- (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
- (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

However there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

In State of Rajasthan Vs. Madho, AIR 1991 SC 1065 at page 1067 this Court held as under:

"The fact remains that both the respondents had sustained serious injuries, Kishna mainly on the skull whereas Madho on the skull as well as scapular region. If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt as it was hazardous to place implicit reliance on the testimony of the injured PW-2."

In Ex.P-1, as already noticed, there is no explanation about the injuries sustained by the three accused. None of the prosecution witnesses explained the injuries sustained by the accused. The injuries sustained by Mishrilal were dangerous to life. The prosecution witnesses consist of interested and inimical witnesses. We are, therefore, of the view that the prosecution has not presented the true version on most material part of the story. Their evidential value does not inspire confidence and it cannot be accepted on its face value and relied upon. It is in these circumstances that non-explanation of the injuries sustained by the accused proved fatal to the prosecution case.

We may also note that the learned Trial Judge has disbelieved the opinion of Dr.G.D.Kashyap (PW-6) that the injuries sustained by Mishrilal being in the sensitive part of the body head were dangerous to life, albeit without any valid reasons. To us, to say the least, the prosecution case too appears to be one sided.

For the afore-stated reasons this appeal is dismissed. The accused are

on bail. Their bail bonds stand cancelled and sureties discharged.

JUDIS