

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 20/01/2017****Judgment Delivered on 11/04/2017****CRA No. 1053 of 2004**

1. Durga Prasad Gupta S/o Shri Sadh Ram Gupta, Aged 38 (32) years, R/o Nandai Kuwan Chowk, Rajnandgaon (C.G.)
2. Ramesh Kumar S/o Shri Sadh Ram Gupta, Aged 36 (30) years, R/o Nandai Kuwan Chowk, Rajnandgaon (C.G.)

---- Appellants**Versus**

State of Chhattisgarh

---- Respondent

For Appellants	Shri PKC Tiwari, Senior Advocate assisted by Shri Kripesh G. Kela, Advocate.
For Respondent/State	Shri Vivek Sharma, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice R.C.S. Samant****C A V JUDGMENT****Per R.C.S.Samant J.**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 04-12-2004 passed by First Additional Sessions Judge, Rajnandgaon in S.T. No. 91/1998, convicting the appellant No.2 for offence punishable under Section 323 of the IPC and sentencing him to undergo RI for one year and to pay fine of Rs.500/-. Further, convicting both the appellants under Section 324 of the IPC and sentencing them to undergo RI for two years and to pay fine of Rs.500/- each with default stipulation.

2. The prosecution case in brief, is that on the night of 22-02-1998 at about 11-00 p.m., Laxmi Narayan Gupta (PW-6) was present near Nandai Kunwa Chowk and the appellants with Munna (deceased) were also present near the Pan Shop. Seeing the complainant/appellant, Durga Prasad and Munna came towards him armed with swords and Ramesh was carrying a revolver. All of sudden, appellants and Munna started assaulting the complainant and others. Appellant Durga Prasad assaulted with sword causing injury on finger of right hand of Laxmi Narayan. Co-accused Munna using a sword assaulted Mukesh (PW-12) and appellant Ramesh causing injuries to them. Mohanlal (PW-13) assaulted by appellant Ramesh and Durga Prasad with swords causing injuries on his body. Appellant Ramesh tried to fire from his revolver which could not fire. Laxmi Narayan lodged un-numbered FIR (Ex. P-15), on the basis of which, Ex. P-20 was recorded in the Police Station Basantpur registering offence under Section 307 IPC against the appellants and deceased Munna .

3. Investigating the offence, spot map (Ex. P-1) was prepared by Revenue Officer. House of appellant Ramesh was searched for recovery of revolver vide Ex. P-2 but the result was nil. Similarly, search of appellant Ramesh vide Ex. P-3 also resulted in negative. Laxmi Narayan (PW-6) was examined by Dr. H.K. Joshi vide Ex. P-3-A and simple injuries were found on his body. Mukesh Kumar (PW-12) was examined by the same doctor vide Ex. P-5-A, found to have suffered one simple injury. Mohanlal Gupta (PW-13) was examined vide Ex. P-6-A and simple injuries were found on his body caused by hard and sharp object. At the instance of appellant Durga Prasad vide memorandum (Ex. P-7), a sword was recovered and seized vide Ex. P-8. Blood stained clothes of Mohanlal were seized vide Ex. P-16. Spot map (Ex. P-22) was also prepared by the

investigation officer. The seized articles were sent to FSL examination and report was obtained vide Ex. P-23. Report of Serologist Ex. P-24 was also obtained. On completion of investigation, appellants and co-accused were charge-sheeted for trial under offence of Section 307/34 of IPC and 25/27 of the Arms Act. Co-accused Munna @ Subhash expired on 27-02-1998.

4. The appellants were charged under Section 307/34 of the IPC, they denied the charges. The prosecution examined as many as 15 witnesses. On examination of Section 313 of the Cr.P.C., the appellants denied the incriminating evidence against them and pleaded innocence and false implication. It was submitted in examination that appellants along with Munna were coming towards their residence when they were assaulted by Laxmi Narayan (PW-6), Mohan (PW-13), Mukesh (PW-12), Jogu @ yogendra with swords and rods causing injuries to them. Due to the injuries caused in this incident, Munna has expired. The complainant and his brothers are habitual offenders. The impugned judgment has been passed by which the appellants have been acquitted of charge under Section 307/34 of the IPC but have been convicted under lesser offence and sentenced as mentioned herein above.

5. The grounds in appeal are that learned trial Court has erred in passing the impugned judgment of conviction and it was erroneously held that it was a case of free fight, whereas the complainant party was aggressor and the appellants simply exercised their right of 'private defence'. The trial Court failed to appreciate this fact that on the basis of report lodged by the appellants, complainant and his brother were prosecuted in counter case for offence punishable under Section 307, 302/34 of the IPC and have been convicted after conclusion of trial. The

evidence of prosecution witnesses is not trustworthy being interested and their statements being full of contradictions and omissions making their evidence unreliable, hence, for these reasons the appellants were entitled for acquittal.

6. It is submitted by learned counsel for the appellants that complainant Laxmi Narayan (PW-6) and his brothers were assailants in this incident. This fact has been demonstrated because the brother of appellants Munna @ Subhash suffered fatal injuries and has expired, whereas the complainant and his brothers have suffered simple injuries. The conviction is based on the evidence of Laxmi Narayan (PW-6) who is the complainant. Mohanlal (PW-13) is also brother of complainant. All of them were accused and prosecuted for causing injuries to the appellants and causing intentional death of Munna @ Subhash, hence, they were highly interested witnesses, whose statements should not have been relied upon without corroboration from independent witnesses. Independent witness Dakeshwar Kumar (PW-1) has not supported the prosecution and he has not been declared hostile. The injuries caused to the complainant and others could have been self-inflicted in the interest of building defence in the case against them, hence, for these reasons the appellants were entitled for benefit of doubt and acquittal.

7. Learned State counsel has argued supporting the impugned judgment and submitted that prosecution has proved its case beyond reasonable doubt.

8. The conviction against the appellants under Sections 323 and 324 of the IPC is sustainable or not? is the question in this appeal. Perused the evidence of prosecution before the trial Court.

9. Laxmi Narayan (PW-6) has stated that he went to the spot near Pan

Shop at Nandai Kunwa Chowk and was standing there. The appellants and deceased Munna were also standing nearby. All of sudden, the appellants and deceased Munna started the assault. Appellant Ramesh was carrying a revolver and sword, appellant Durga Prasad carrying two swords and Munna carrying a rod in one hand and a sword in another hand. Appellant Ramesh tried to fire from his revolver but could not fire, then, appellant Ramesh assaulted this witness with sword which caused injury on his index finger of his right hand. Appellant Ramesh and Durga Prasad assaulted with swords causing injuries on both the hands and palm of his brother. On arrival of his brother Mukesh (PW-12), the appellants fled away from the spot. He has stated about lodging un-numbered FIR (Ex. P-15). In cross-examination, he has admitted that on account of this incident, one case under Section 307 and 302 of IPC is being prosecuted against them. He has also admitted about the previous prosecution initiated on the report of appellant Durga Prasad in which he was convicted and sentenced. He further admitted about similar prosecution against him at the instance of Durga Prasad and Munna in which the case was compromised. He could not remember the date, he lodged FIR. He has stated ignorance about the death of Munna @ Subhash subsequent to this incident. He has denied all the suggestions given in defence.

10. Mukesh Gupta (PW-12) has stated about witnessing the incident when appellants assaulted his brother Laxmi Narayan (PW-6) and Mohanlal (PW-13). His statement was not in accordance with his statement recorded by Police, hence, he was declared hostile and leading questions were put to him by the prosecutor in which he admitted that appellant Durga Prasad, Munna and Ramesh were assaulted with swords and revolver. While he was intervening, he was also assaulted by Munna

and appellant Ramesh by swords. In cross-examination, he has admitted that he is facing prosecution on charge of murder of Munna, under Sections 302 and 307 of the IPC and he has admitted about the previous case prosecuted against him and his brother on the report lodged by the appellants' party. He has denied all the adverse suggestions given in defence. Mohanlal (PW-13) has stated similarly about being assaulted by the appellants and the injuries being caused to him, his brother Laxmi Narayan and Mukesh. In cross-examination, he has admitted about the cases against him initiated on the report made by the appellants' party. He has denied all the adverse suggestions given in defence.

11. Dakeshwar Kumar (PW-1) has stated that he saw the appellants and complainant party quarrelling verbally and then violently. He heard clanking of metals. He has not given any account of the incident as to who were the assailants party. In cross-examination, he has admitted that deceased Munna and Durga Prasad were admitted in hospital for treatment and referred to Bhilai Hospital and appellant Ramesh had also suffered injury. Fulubai (PW-14) is the mother of Laxmi Narayan (PW-6). She has stated that hearing the sound of commotion she went to the spot and saw her son Mohan lying blood stained. She lay down on him to save him and went unconscious. She saw appellant Ramesh assaulting Mohan with sword and also carrying a gun. She has been partially declared hostile in which no other statement has come in support of prosecution. In cross-examination by defence, she denied knowledge about previous incident of the dispute between her sons and the appellants. She has admitted clearly in cross-examination that she has knowledge about her sons having assaulted the appellants with swords and rod. She denied knowledge about the death of Munna @ Subhash because of injuries

caused by her sons.

12. Corroboration to the statement of complainant and supporting witnesses is found in the statement of Dr. H.K. Joshi (PW-11). He examined Laxmi Narayan (PW-6) on 22-02-1998 and found one lacerated wound on the index finger of his right hand which was caused within 6 hours and simple in nature vide his report Ex. P-3-A. He also examined Mukesh Kumar (PW-12) and found him having one abrasion on his iliac crest which was caused by rough object within 6 hours and was simple in nature vide his report Ex. P-5-A. Further, he examined Mohanlal Gupta (PW-13) and found him having one incised wound on his left forearm near the wrist, one incised wound on left forearm, one incised wound in palm of right hand, one incised wound on elbow of left hand and one incised wound on middle finger of one hand. Vide Ex. P-6-A, he opined that all the injuries were caused by sharp weapon within a period of 6 hours and were simple in nature. His statement about finding of injuries on the body of Laxmi Narayan (PW-6), Mukesh Gupta (PW-12) and Fulubai (PW-14) has remained un-rebutted in his cross-examination.

13. The trial Court has held in the impugned judgment that complainant and the accused parties came with preparation to assault each other armed with weapons on the spot. Hence, it is a case of free fight in which no question of exercising the right of private defence arises.

14. [In the case of Emperor v. Bechar Anop ILR 40 Bom 105 : AIR 1915 Bom 218](#), it was held that the right of private defence cannot be successfully invoked by men who voluntarily, and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. In the case of **In re Erasi**

Subba Reddi AIR 1943 Mad 492, it was held as under:

“Where two parties were spoiling for a fight and each person began to pick up stones and throw at the other party, then the accused's party cannot plead that because the other party was also intent on beating them, every blow they gave was given in self-defence. Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self defence.”

15. In the case of **Dorik Gope & others v. Emperor**, reported in **AIR 1946 Pat 251**, it was held that where two parties come armed ready to fight with each other, the mere fact that one party strikes the other party first does not, by that reason and that reason alone, give a right of private defence of person to the members of the other party.

16. In **Gajanand And Ors. vs State Of Uttar Pradesh : AIR 1954 SC 695**, it was held that - A free fight according to Harrison J. in -- '[Ahmad Sher v. Emperor](#)', AIR 1931 Lah 513 (A), is "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". In the case of [State v. Hira Bhaga](#) 1961 CrLJ 54 (Guj.) ,it was held by the Division Bench of this Court that in a mutual determined fight between two rival factions right of private defence is not available to either side.

17. In the case of **Shantilal Ratnaji vs State Of Gujarat** : reported in **1970 CriLJ 97 (Guj. HC)** has held in para 10, as follows:

“10. It would appear from the aforesaid decisions that in order that a party is not entitled to claim any right of private defence, there must be a free fight suggesting clearly that both the sides had a determined intention to fight from the start voluntarily and secondly when there is no reliable and acceptable evidence to show as to how it started and as to who was the aggressor. In other words, if two persons or two

factions voluntarily and with determined intention come out to fight and in fact fight and that it is not possible to ascertain with reasonable certainty as to who was the aggression or as to how that fight started, the rule of law laid down in the various decisions, that neither side is entitled to claim any such benefit arising out of the general exceptions contemplated under [Section 96](#) read with [Section 100](#) of the Penal Code would prevail. It is then that as to who attacked first would become immaterial.'

18. Rest of the witnesses examined by the prosecution are Patwari Tulsidas Vaishnav (PW-2) who prepared the spot map (Ex. P-1), A.S.I. Amar Singh Baghel (PW-3) who sent request for MLC of the injured persons, Head Constable Ashwani Kumar Bhagel (PW-5) has proved the entries of Station House Diary which is not disputed. Videshi Ram (PW-9) is witness of seizure of blood stained cloths from Mohanlal (Ex. P-16). Dr. Y. K. Tiwari (PW-10) has stated about the medical treatment of Mohanlal (PW-13) and Laxmi Narayan (PW-6), which is not under challenge. Inspector Jivan Bhalekar (PW-15) recorded un-numbered FIR (Ex. P-15) and conducted the investigation in part, the evidence of these witnesses need no discussion in this judgment.

19. Sub Inspector P.C. Tiwari (PW-4) interrogated the appellant Durga Prasad and recorded his memorandum statement vide Ex. P-7, in which he stated for recovery of a sword kept in his place of residence. Thereafter, appellant Durga Prasad got recovered a sword which was seized vide Ex. P-8 in presence of witnesses. This statement is unrebutted in cross-examination. The independent witness Ashok Kumar Yadav (PW-7) and Santram (PW-8) have admitted their signatures on Ex. P-7 and P-8 but denied the recording of memorandum and seizure made in their presence,

both of them were declared hostile by the prosecution. There is no reason to disbelieve the statement of P.C. Tiwari (PW-4), hence the statements cannot be discarded just because the independent witnesses have turned hostile. This establishes that appellant Durga Prasad was in possession of a sword which is a sharp cutting object and this may have been used in the incident.

20. The arguments submitted on behalf of the appellants that the statements of these witnesses should be discarded just because the witnesses are interested being related to each other cannot be accepted as it is. When witnesses are related, then, only the rule of caution applies. As admitted and alleged in defence, it is clear that the appellants were engaged in the incident by assaulting the complainant party which they want to bring under the category of right of private defence. Hence, the evidence in this case itself gets support in the defence taken by the appellants. Hence, the evidence of complainant and others injured in this incident cannot be rejected outrightly and the evidence in this case has to be believed that appellants are the persons who caused injuries to Laxmi Narayan (PW-6), Mukesh (PW-12) and Mohanlal (PW-13).

21. The theory of right of private defence is not applicable for this case. It is found from the evidence in this case that appellants party were also armed with weapons and the place where the appellants and the complainant parties engaged in fight was an open place, hence, the finding of the trial Court that it was a case of free fight is a correct finding which cannot interfered with.

22. In view of the discussions and the reasons given as aforesaid, it is found that this appeal has no merit which is dismissed, accordingly.

23. The appellants are on bail. Their bail bonds are cancelled. They shall surrender immediately before the Court of Additional Sessions Judge, Rajnandgaon, for serving the remaining sentence imposed upon them. The trial Court shall take steps for their attendance for serving out the remaining sentence.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.C.S. Samant)
Judge

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