

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 20/01/2017****Judgment Delivered on 11/4/2017****CRA No. 1074 of 2004**

1. Mukesh Kumar, S/o Late Bhagwandeem Gupta, Aged 21 years,
 2. Mohan Lal S/o Late Bhagwandeem Gupta, Aged 29 years,
 3. Laxminarayan S/o Late Bhagwandeem, Aged about 32 years,
- All residents of Nandai Kunwa Chowk, Satnamipara, Rajnandgaon (C.G.) .
- Appellants

Versus

State of Chhattisgarh through the District Magistrate, Rajnandgaon (C.G.)

---- Respondent

For Appellants	Shri Hemant Gupta, Advocate
For Respondent/State	Shri Vivek Sharma, Govt. Advocate

ACQUITTAL APPEAL No. 371 of 2010

State of Chhattisgarh, Through Police Station, Basantpur, Rajnandgaon (Chhattisgarh)

---- Appellant

Vs

Jogu @ Yogendra, S/o Late Bhagwandin Gupta, Nandai Kuvan Chowk, Satnami Para, Rajnandgaon (C.G.)

---- Respondent

For Appellant/State	Shri Vivek Sharma, Govt. Advocate
For Respondent	Shri Hemant Gupta, 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. Both these appeals arise out of same judgment dated 04/12/2004 in

S.T. No. 75/98 passed by the First Additional Sessions Judge, Rajnandgaon convicting and sentencing the appellants in S.T. No.75/98 and acquitting co-accused Jogu @ Yogendra from the charges against him.

2. The appellants in Criminal Appeal No. 1074 of 2004 stand convicted under Section 302 of IPC and sentenced with life imprisonment with fine of Rs.5000/-, under Section 324 of IPC and sentenced to undergo RI of two years with fine of Rs. 500/- and under Section 307 of IPC and sentenced to undergo RI of 7 years with fine of Rs. 2000/- with default stipulations.

3. State has filed acquittal appeal challenging the acquittal of Jogu @ Yogendra in the impugned judgment.

4. The brief facts of the case are that on 22/02/1998 at about 11-00 p.m. in the night, Ramesh Kumar Gupta (PW-15) along with Durga Prasad (PW-16) were going towards the residence of deceased Munna when all of sudden appellants along with acquitted accused Jogu @ Yogendra armed with sword, club and battle Axe started assaulting them, thereby causing injuries to Ramesh Kumar Gupta (PW-15), Durga Prasad (PW-16) and deceased Munna Lal. All of them were admitted in government hospital at Rajnandgaon. One information vide Ex.P/22 was sent to Police Station, Basantpur, Rajnandgaon. On arrival of Police Officer in the hospital, un-numbered FIR Ex.P/20 was lodged by Ramesh Kumar Gupta (PW-15). On the basis of which later on a numbered FIR Ex. P/24 was recorded registering an offence under Section 307 of IPC.

5. Injured Ramesh Kumar (PW-15), Durga Prasad (PW-16) and Munna Lal (Deceased) were medically examined by Dr. Harish Kumar Joshi

(PW-6) vide Ex. P/4A, P/5A and P/6A and reported the injuries found on the persons of the injured. Injured Munna Lal expired on 27/02/1998 while undergoing treatment in the Hospital. Inquest was conducted vide Ex.P/11 and postmortem was conducted by Dr. V.K. Sao (PW-11) vide Ex. P/12A in which he opined that deceased died as a result of antemortem head injury. Further in the investigation, seizure of blood stained clothes of injured persons were made vide seizure memos Ex. P/16, Ex. P/17 and Ex. P/18. One sword was seized from the possession of co-accused Jogu vide Ex. P/13, another sword was seized from the possession of Laxmi Narayan vide Ex. P/23. Seized articles were examined by Dr. Harish Kumar Joshi (PW-6) and report submitted vide Ex. P/7A, Ex. P/8A and Ex. P/9A. Spot map Ex.P/19 was prepared by Patwari and spot map Ex.P/20 was prepared by investigating officer. Seized articles were sent for FSL Examination and FSL report (Ex.P/27) and Serological report (Ex. P-28) was obtained. Appellants and co-accused Jogu @ Yogendra were charge-sheeted for trial under Sections 307, 302/34 of IPC and Section 25 of Arms Act.

6. Appellant Laxmi Narayan and accused Jogu @ Yogendra were charged under Section 302/34, 307/34 of IPC and Section 25 of Arms Act. Appellant Mukesh Kumar and Mohan Lal were charged under Section 302/34 and 307/34 of IPC. The appellants and co-accused Jogu denied all the charges and demanded for trial. Prosecution examined 23 witnesses. On Examination under Section 313 of Cr.P.C. the appellants and co-accused denied all the incriminating evidence against them in the prosecution evidence, pleaded innocence and false implication. It was submitted in defence, that in the said incident, Ramesh Kumar (PW-15),

Durga Prasad (PW-16) with deceased Munna Lal have assaulted appellant Mohan Lal with sword and pipe. Remesh Kumar (PW-15) was also carrying revolver. Remaining appellants intervened to save Mohan Lal. In the meanwhile, appellants were also assaulted by Ramesh Kumar (PW-15), Durga Prasad (PW-16) and deceased Munna Lal using sword and rod, thereby causing injuries to them. On report of the accused persons they were medically examined. Defence examined three witnesses. The impugned judgment was passed in which co-accused Jogu @ Yogendra was acquitted of all the charges, whereas remaining accused persons the appellants were acquitted of charge under Section 25 1(B) of Arms Act, but convicted under the remaining charges and sentenced as mentioned in the paragraph above.

7. The grounds in appeal are these, that the evidence of Ramesh Kumar (PW-15), Durga Prasad (PW-16) and others were not trustworthy and could not have been made the basis of conviction against the appellants. The appellants as well suffered injuries in the same incident which has not been explained by the prosecution and on lodging of FIR by the appellants, the complainant and others have been tried and convicted in the counter case, which indicates that the complainant party was aggressor, who have cooked up a false story in defence. The medical evidence on record does not support the case of prosecution, thus the trial Judge has erroneously appreciated the evidence of prosecution and recorded finding of conviction against the appellants. Prayer to set-aside the impugned judgment has been made.

8. The grounds in acquittal appeal are these, that the acquittal of Jogu @ Yogendra is bad in law. The statement of prosecution witnesses has not

been appreciated in true sense, which clearly disclosed that co-accused Jogu @ Yogendra was guilty for the offence charged against him. Prayer has been made to set-aside the acquittal of co-accused Jogu @ Yogendra and pass an order of conviction and sentence against him.

9. It is submitted by counsel for the appellant in Criminal Appeal No. 1074/2004 that the statement of interested witnesses Ramesh (PW-15), Durga Prasad (PW-16), Mamta Gupta (PW-18), Dipti Gupta (PW-19), Sunita Gupta (PW-21) and Dakeshwar Kumar Sahu (PW-22) has been relied upon by the trial Court. Dakeshwar Kumar Sahu (PW-22) was the only independent witness, as per his version both the parties engaged in fighting with each other. Rest of the witnesses stated in support of their interest, for that reason the evidence of prosecution witnesses could not have been regarded as trustworthy. Defence has proved its case by production of witness and documents in support, which clearly established that the complainant party was the aggressor, who engaged in fighting and assaulting the appellants, where the appellants exercised their right of private defence. The injuries on the persons of appellants have not been explained by the prosecution. For these reasons, the appellants were entitled for acquittal.

10. Counsel for the State has opposed the grounds in appeal and the arguments submitted on behalf of the appellants. Arguing on acquittal appeal it was submitted that co-accused Jogu @ Yogendra was wrongly acquitted by the trial Court. The statement of eyewitnesses present on the spot clearly demonstrate that Jogu @ Yogendra was very much involved in the incident. The cooked up defence evidence brought in his favour was not believable. Respondents-co-accused Jogu @ Yogendra has equally

contributed in commission of offence, hence for these reasons acquittal appeal may be allowed and suitable order may be passed.

11. Ramesh Kumar Gupta (PW-15) is the witness in the incident. He has stated that on the date of incident he was standing in front of Durga Pan Shop, when appellant No. 1 & 3 arrived there and asked the nearby shop owner Jogu @ Yogendra to close his shop. After that he along with Chhotu and deceased Munna were going towards their residence, then all of sudden Jogu @ Yogendra accompanied with his mother Fulu Bai and appellant came there using abusive language and threatened them. Appellant Mukesh was carrying a rod and remaining accused persons were armed with swords. All the accused persons started assaulting him and others. He got injuries on finger of his left hand, 2-3 places on head, 1-2 places on his back on head, 1-2 places on his back. Similarly Munna was also injured on his finger, left elbow and head. The injury on his head was grievous. Durga Prasad was also assaulted and injured on his fingers, left hand, head and back by use of crowbar. He and his companion tried to save themselves and run away, then accused persons left the spot. Further, he has narrated about the event that took place, later on, he and other injured persons were carried to the hospital. At his instance, un-numbered FIR Ex. P/20 was recorded in the hospital. The injured deceased Munna and Durga Prasad (PW-16) were referred to Sector-9 Hospital, Bhilai, Munnalal died after four days of his admission in the hospital. In cross-examination he has admitted about the previous incident between him and accused persons which occurred in the year 1993, later on in the year 1998, which shows the state of enmity between the complainant and the accused party. He has denied knowledge about the

injuries caused to appellant Laxmi Narayan, Mohan and Mukesh in the said incident. He admitted that appellants also arrived at the hospital. He denied that report of Laxmi Narayan was lodged at first and stated that it was his report that was lodged first. Some discrepancy, improvement, contradictions and omissions are there compared to his previous statement, but they are not material to affect his credibility. He has denied all the suggestions made in defence, though he has admitted that one report was lodged at the instance of Laxmi Narayan.

12. Durga Prasad (PW-16) has supported the version of Ramesh (PW-15) and stated that he was assaulted with a sword by appellant Laxmi Narayan on his right foot, then Mukesh struck him with crowbar in his back. Co-accused Jogu and Laxmi Narayan assaulted him with sword then he also assaulted his brother and then left the spot. In cross-examination he has admitted that for the concerning incident of the same day one case is pending against him and others in the Court. There is one admission in cross-examination that he has not recorded in the police statement that the appellants-accused persons were assaulted in return by using their weapons thereby causing injuries to them. This is an hypothetical question, he has not made any such statement in his previous statements Ex.P/11 and Ex.P/12 and neither in examination in chief, this statement in his cross-examination cannot be taken into consideration to discard his statement in examination in chief. Some omissions, contradictions and improvement is noticed but that is not material and sufficient to hold that he is making false statement before the Court.

13. Mamta Gupta (PW-18) has stated that on the date of incident between 10.30 and 11-00 p.m. deceased Munna inquired about his

brothers who had been to Pan Shop, then he left for Pan Shop to call them back. Then she witnessed the incident in which the appellant accompanied with Jogu @ Yogendra assaulted Ramesh, Durga Prasad and Munna with sword and crowbar and has given the details of the injuries caused. In cross-examination she has stated that when she came out of her house and went towards the house of Bantha she saw the incident. Omission, contradiction and improvement brought in cross-examination are not sufficient to discard her statement in examination-in-chief.

14. Dipti Gupta (PW-19) has similarly stated about witnessing the incident after she came out of the house. In cross-examination, her statement has remained unrebutted and there is no statement in her cross-examination which could be considered as rebuttal to her statement in examination in chief.

15. Sunita Gupta (PW-21) is wife of deceased, she has given statement about the witnessing the incident and supported the prosecution version. She was confronted with the previous statement Ex. P/15. There is some extra detail that she witnessed the incident from a distance of few steps. This discrepancies are of no significance. Dakeshwar Kumar Sahu (PW-22) has partly supported the prosecution version. He saw Ramesh (PW-15), Durga Prasad (PW-16) and deceased Munna in front of the other party the appellants and then he heard the clashing of weapons. He has not stated about further witnessing the incident about the confrontation of the appellant and complainant parties.

16. Dr. Harish Kumar Joshi (PW-6) examined Ramesh Kumar (PW-15) vide report Ex. P/4A and stated that he had one incised wound of right side of his head, deep incised wound on wrist joint, the injuries caused were of

simple in nature. He further examined Durga Prasad (PW-16) vide his report Ex. P/5A and found injuries, one incised wound on foot, one incised wound on his arm, one incised wound on right elbow, one incised wound on right palm and little finger, one incised wound on ring finger of right hand, one incised wound on middle finger of right hand along with other incised wounds and one incised wound on right parietal region of his head. He opined that all injuries were caused by sharp weapon. The injured was admitted for treatment in the hospital and later on referred to Sector-9 Hospital, Bhilai.

17. Dr Harish Kumar Joshi (PW-6) also examined Munna Lal Gupta and found injuries of one incised wound of his occipital region of head which was bone deep, one incised wound above the right eyebrow, one incised wound on left elbow, one incised wound on left palm and little finger, one incised wound on palm of right hand and one incised wound on right side of his neck vide his report Ex. P/6A. All the injuries were caused by sharp edged weapon. The injured was referred for further treatment to Sector 9 Hospital, Bhilai. His statement about the presence of injuries on the body of injured persons has remained unrebutted. In his report Ex. P/6A concerning Munna no opinion was given about gravity of the injuries caused. During the course of treatment Munna expired on 27/02/1997.

18. Postmortem examination of deceased Munna was conducted by Dr. V. K. Sao (PW-11). In the postmortem report Ex. P/12 given, he has narrated about the injuries on the body of Munna Lal as detailed in his MLC Report vide Ex. P/6A. On the basis of finding in internal parts of the body of the deceased Munna it was opined that cause of death was due to shock which resulted from excessive bleeding from his head injury. In

cross-examination he has stated that a part of fronto parietal bone had been removed by operation during the treatment, he found fracture on parietal temporal bone but he has not given description of fracture. It was suggested in cross-examination that death of deceased may have occurred due to his surgery, which he has not admitted. This question was also put to Dr. Harish Kumar Joshi (PW-6) in cross-examination and he denied that any surgery was done while admission of Munna Lal in District Hospital, Rajnandgaon. Thus, the statement of medical witnesses supports and corroborates the witnesses of the incident in this aspect that injuries were caused to Ramesh (PW-15), Durga Prasad (PW-16) and deceased Munna by use of some hard and sharp object and the injuries caused to Munna proved to be fatal.

19. Dr. Harish Kumar Joshi (PW-6) was cross-examined again, later on with reference to the bed head ticket of treatment of Munnalal Gupta. He stated that the injury sustained on the head of Munnalal was repaired as it is mentioned in the bed head ticket. Further, he admitted that he examined appellant Mukesh Kumar Gupta as well for his injury on 22-02-1998 vide certificate (Ex. P-6) and found simple injuries on his body. Similarly, he also examined Mohanlal Gupta having 5 incised wounds on above the wrist joint of right hand, on wrist joint of left hand, on palm of right hand, on elbow of left hand and on middle finger of hand vide his report (Ex. P-7).

20. Inspector Jivan G. Bhalekar (PW-20) has admitted in his cross-examination that on lodging of a report by appellant Laxmi Narayan he had registered a counter case and stated that unnumbered FIR (Ex. D-2) was recorded by him.

21. Smt. Rekha (DW-1) and Harichand Gupta (DW-2) have deposed regarding the alibi of acquitted accused Jogu stating that he was not present in the place of incident on the alleged date. Fulubai (DW-3) has stated that on the date and time of incident she had been to spot and saw that Ramesh (PW-15), Durga Prasad (PW-16) and Munna (deceased) were assaulted by the appellant Mohanlal. Durga had a sword in one hand and a gun in another hand whereas Ramesh and Munna were having swords. She intervened to save her son Mohanlal. In cross-examination she has stated that she did not see the assault of Ramesh (PW-15), deceased Munnalal @ Subhash. She denied that she is giving statement with interest to save the appellants who are her sons. Earlier, the statement of Dr. Harish Kumar Joshi (PW-6) also has disclosed that Mohanlal suffered injuries of incised wounds which were caused by sharp object.

22. The ground in appeal was that the appellants exercised their right of private defence. During the submissions of arguments, it was stated that complainant party was aggressor when they engaged in fighting with the appellants, the appellants exercised their right of private defence.

23. Considering the evidence of eyewitnesses, injured witnesses and other relevant evidence, it appears that place of incident was neither the property of the appellants nor the property of complainant but the said incident took place at Nandai Kunwa Chowk, which is an open road. Needless to say that both the parties, the appellant and the complainant's side engaged in assaulting each other and it appears from the evidence itself that both the parties were armed with sharp weapons. Evidence of prosecution in this case, explains the position of swords in hands of

appellants and whereas the presence of various incised wounds on the body of appellant Mohanlal explains that complainant party were also armed with some kind of sharp weapon. The evidence of Fulubai (DW-3) who is also cited as eyewitness in counter case supports this version and as per the certified copies of the challan (Ex. D-2) in counter case states that the complainant party were also armed with swords, hence these circumstances show that it was a case of free fight.

24. 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.”

25. 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.

26. In **Gajanand And Ors. vs State Of Uttar Pradesh** : AIR 1954 SC 695, it was held as under :

“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”.

27. In the case of **Shantilal Ratnaji vs State Of Gujarat** : reported in 1970 CrLJ 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.’

28. In accordance with settled view in cases of free fight, this is a case in which none of the parties can claim that they have exercised their right of private defence. On the contrary, therefore, the parties shall be considered as responsible for the consequences. After closely scrutinizing the

prosecution evidence, the grounds in appeal and arguments submitted by the appellants and the State, we are of the considered opinion that the case of prosecution is well supported by evidence and the case has been proved beyond reasonable doubt by the prosecution. The grounds in appeal has no merit in accordance with the settled view and for the reasons aforementioned hence there is no scope for interference in the appeal of the appellants.

29. In the acquittal appeal filed by the State, it is stated by Ramesh Kumar Gupta (PW-15), Durga Prasad (PW-16), Mamta Gupta (PW-18), Dipti Gupta (PW-19) and Sunita Gupta (P-21) that respondent Jogu @ Yogendra was present on the spot of incident and was actively engaged in causing injuries to deceased Munna, Ramesh (PW-15), Durga Prasad (PW-16).

30. Defence of alibi was taken by respondent Jogu. Rekha (DW-1) has stated that on the date of incident Jogu had been on visit to her house at Uslapur, P.S. Bemetara, District Durg and he stayed there till the festival of Holi. When she along with Jogu came to Rajnandgaon, Jogu was arrested. Her statement was unrebutted in cross-examination. Hari Chand Gupta (DW-2) is husband of Rekha, he has given the similar statement which is supported by the statement of Fulubai (Dw-3). This story of alibi has some substance, because on perusing the evidence of prosecution and defence, it is found that the appellants Mukesh Kumar, Mohanlal and Laxminarayan all three sustained injuries in the incident and were examined by doctor which needed explanation from the prosecution and Jogu @ Yogendra was not one of the persons injured. It is admitted that one counter case was registered and prosecuted against the complainant

party. The certified copy of charge sheet (Ex. D-1) needs perusal. Had it been so that Jogu was engaged in the incident, then he would have been cited as witness, but the list of witnesses in the counter case does not include the name of Jogu @ Yogendra. Thus this fact that Jogu did not suffer any injury and he was not cited as a witness in the counter case gives support to the defence evidence in this respect. For these reasons, the acquittal of Jogu @ Yogendra by the impugned judgment does not suffer from any infirmity, hence, we are of the considered opinion that the acquittal appeal filed by the State as well has no merit.

31. Accordingly, on the basis of the reasons aforementioned and findings given in this judgment, criminal appeal filed by the appellants and the acquittal appeal filed by the State are dismissed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.C.S. Samant)
Judge