SUPREME COURT OF INDIA

Gurudatta Mal

Vs.

State of U.P.

Crl.A.No.180 of 1961

(K. Subba Rao and J. R. Mudholkar, JJ.)

05.02.1964

JUDGEMENT

SUBBA RAO, J.:

1. This appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad setting aside the acquittal made by the Additional Sessions Judge, Kumaun, Nainital, and convicting the appellants under S. 302, read with S. 34 of the Indian Penal Code and sentencing them to imprisonment for life.

2. The prosecution case may be briefly stated. Gurucharan Lal one of the deceased had title to and was in physical possession of plot No. 57 in the village of Azadnagar. On April 10, 1960, Gurucharan Lal, accompanied by Bhagwan Swarup, Amrit Lal, Nand Singh and Mohan Prakash, left his house in Rudrapur for Azadnagar to harvest the crop standing on the said plot. Bhagwan Das also had a plot in the same village in his name and he also started to go there to harvest his crop. As they anticipated some trouble from the accused persons, appellants herein, enroute to Azadnagar they went to police station Kiccha, which was on their way, and lodged two reports therein, Exs. Ka-1 and Ka-2. It was alleged therein that there was an apprehension of breach of peace from the side of the accused. The head-constable of the said police station, in consultation with the Sub-Inspector, sent two constables, Khem Singh (P. W. 2) and Chandra Singh (P. W.8) to go along with them to the said village. Gurucharan Lal and his companions were joined on their way by Gaindal Mal, Gurucharan Lal's father, and one Kalyan, a labourer. The party reached the village at about 8 a. m. and started cutting the crop standing on plot No. 57. Half an hour thereafter, Baldeo Raj and Madan Lal, accused, reached there and told the said two constables that they were wanted by the Station Officer at the police station. At first they refused to go, but later Chandra Singh (P. W. 8), one of the two constables, accompanied by the said two accused proceeded to the police station. After going a short distance, the said two accused asked Chandra Singh to go to the police station by himself as they were returning to their houses. About half an hour later, Madan Lal (Appellant No. 4), Baldeo Raj, Gurdatta Mal (Appellant No. 1), Harbans Lal (Appellant No. 2), Pyare Lal (Appellant No. 3) and Gopal Das came to the said field. Of these persons, Gurdatta Mal, Pyare Lal and Madan Lal were armed with guns; Harbans Lal was armed with a spear; Baldeo Raj and Gopal Das were armed with lathis. When they approached the field, constable Khem Singh asked them to stop and not to proceed further. But they entered the field and fired their guns killing Gainda Mal, his son Gurucharan Lal and one Nanda Singh, a photographer brought by the complainant's party to take photographs of the accused in case they attacked them. Bhagwan Swarup was assaulted by those who had lathis and was injured. Bhagwan Das and the retraining persons then ran, away from

the field raising alarm.

3. The appellants and two others, Baldeo Raj and Gopal Das, were put up for trial before the Additional Sessions Judge, Kumaun, for committing offences under Ss. 302/149, 323/149, 147 and 140 of the Indian Penal Code. Appellants 1, 3 dud 4 were further charged for an offence under S. 19 (f) of the Arms Act.

4. It would be convenient at this stage to notice the defence version which is as follows; Plot No. 57 was in the cultivatory possession of the appellants and crops standing thereon were raised by them. On April 10, 1960, at about 8.30 a.m. they cause to know that Gurucharan Lal had gone to the said plot with 25 persons to cut the crop. In order to stop them from wrongfully cutting their crop, the appellants went to the plot armed with guns, spears and lathis, because they had come to know that the party of Gurucharan Lal comprised 25 persons armed with deadly weapons. Having come to the plot, they asked Gurucharan Lal and his men not to cut the crop. But Bhagwan Das and his party advanced to assault them. Bhagwan Das actually fired a shot towards them. Apprehending danger to their lives and property, the appellants' party fired their guns in defence on the party of Gurucharan Lal.

5. The learned Additional Sessions Judge, Kumaun, held on the evidence that on the date of the incident the appellants were in possession of the said plot and also owned the crop standing thereon. He further held that Gurucharan Lal's party were also armed with lathis, pharsa, and sickles, which were used for cutting the crop. If Gurucharan Lal and his party, so armed, had assaulted the accused, it clearly involved a risk of the accused being grievously hurt if not actually killed; the learned Judge proceeded to hold that in the circumstances the accused had the right of defence of their body to the extent of causing the death of their assailants. He further held that in the said circumstances, the accused had also the right of private defence of their property. In that view he acquitted all the appellants of the charge of murder. But he convicted Gurdatta Mal and Madan Lal under S. 19 (f) of the Arms Act on the ground that they had no licence for the guns used by them in shooting the deceased, and sentenced them to imprisonment for two years.

6. Two appeals were filed in the High Court at Allahabad against the judgment of the Additional Sessions Judge - one appeal was by the State against that part of the order of the Additional Sessions Judge acquitting the accrued, and the other was by the accused, Gurdatta Mal and Madan Lal, against" that Part of the order convicting them under S. 19 (f) of the Arms Act. The High Court accepted the finding of the learned Additional Sessions Judge that the appellants were in cultivatory possession of plot No. 57 and that they had also raised the crop thereon, but held that the finding of the Additional Sessions Judge in regard to possession of lethal weapons by the deceased and their party was based upon conjecture and speculation. It accepted the evidence adduced by the prosecution and came to the conclusion that the only right available to the accused was to prevent the commission of theft of property by Gurucharan Lal and his party and, therefore, they had no right of private defence under S. 103 of the Indian Penal Code to cause the death of the members of Gurucharan, Lal's party. In any view, in so far as Nanda Singh, the photographer, was concerned, who was wholly unarmed, the High Court found that the appellants had neither the right of private defence of person nor of property. In regard to others, having held that they had only the right of private defence to the extent of causing harm other than death, it proceeded to hold that only such of the accused as were responsible for causing gunshot injuries and spear injuries were liable under S. 302, read with S. 34, of the Indian Penal Code. The High Court found on the evidence that Gurudattamal, Appellant 1, shot Gainda Mal to death; Madan Lal, Appellant 4, had fired on Nanda Singh killing him on the spot; Pyarelal, Appellant 3, have fired on Gurucharan Lal resulting in his

death; and that Harbans Lal, Appellant 2, attacked Gurucharan Lal the deceased, with his spear on the head, which in the opinion of the doctor was sufficient in the ordinary course of nature to cause death in that view, the High Court convicted all the said accused under S. 302 of the Indian Penal Code. The High Court maintained the acquittal of Baldeo Raj and Gopal Das. It agreed with the Additional Sessions Judge that Gurdatta Mal and Madan Lal were in possession of guns without licence and, therefore, they were liable under S. 19 (f) of the Arms Act. In the result, the State appeal was allowed in part and the appeal filed by Appellants 1 to 4 was dismissed. Hence the present appeal.

7. The arguments of Mr. Sethi, learned counsel for the appellants, may be briefly stated thus: (1) The Additional Sessions Judge, on a consideration of the entire evidence in the case, maintained the plea of private defence raised by the appellants and acquitted them and the High Court went wrong in setting aside that order, though a different view was possible on the evidence. (2) The High Court erred in holding on the facts of the case that Gurucharan Lal and his party were not committing any offence of robbery and, therefore, the appellants had no right of private defence of property under S. 103 of the Indian Penal Code extending to the voluntarily causing the death of the deceased; that apart, the High Court went wrong in ignoring one of the ingredients of robbery, namely, the fear of instant death or of instant harm. (3) The High Court, having held that only such of the accused who exceeded the right of private defence, would be liable under S. 302, read with S. 34 of the Indian Penal Code, went wrong in upsetting the finding of the learned Additional Sessions Judge, who rejected the evidence of P. Ws. 2 and 6, and holding without considering the said evidence that each of the appellants had committed a particular act against a particular deceased. (4) In any view, the High Court, having held that the accused had exceeded their right of private defence, should have held, by applying exception 2 of S. 300 of the Indian Penal Code, that they were guilty only of culpable homicide not amounting to murder. And (5) the High Court also erred in convicting Gurdatta Mal and Madan Lal under S. 19 (f) of the Arms Act, as they only used guns of their close relatives.

8. The recent decisions of this Court have finally decided the scope of an appeal against an order of acquittal in Sanwant Singh v. State of Rajasthan, (1961) 3 SCR 120: (AIR 1961 SC 715) this Court has held that in an appeal against acquittal an appellate court has an undoubted power to review the entire evidence and to come to its own conclusion, but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified. It also accepted the principle laid down in Shea Swarup v. Emperor, AIR 1934 PC 227 (2) in regard to an appellate court's approach to a case in disposing of such an appeal. This decision was accepted by a later decision of this Court in Harbans Singh v. State of Punjab, AIR 1962 SC 439. In the present case, having heard the arguments of learned counsel at a considerable length, we do not see any justification for the comment that the High Court had not borne in mind either the principles laid down in Sheo Swarup's case, AIR 1934 PC 227 (2) or those laid down in the aforesaid two decisions. As the High Court pointed out, the learned Additional Sessions Judge based his conclusion on pure sumrises contrary to the entire evidence that the deceased were armed with deadly weapons and that the said error vitiated his conclusion that the accused had the right of private defence to kill them. The justification for the High Court's interference with the order of acquittal made by the learned Additional Sessions Judge will be made clear in the course of our judgment.

9. As the arguments of learned counsel appearing for the appellants as well as for the State turn

upon the right of private defence of property to cause death in its impact on the offence committed, read with S. 34 of the Indian Penal Code, it will be convenient to notice the scope of the relevant aspect of S. 34 of the said Code in the context at the said right of private defence. Section 34 of the Indian Penal Code reads:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is, liable for that act in the same manner as if it were done by him alone."

Under S. 96 of the Code : "Nothing is an offence which is done in the exercise of the right of private defence." Section 103 thereof reads:

"The right of private defence of property extends, under the restriction mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer. if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated..." It is well settled that S. 34 of the Indian Penal Code does not create a distinct offence: it only lays down the principle of joint criminal liability. The necessary conditions for the application of S. 34 of the Code are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence; that is to say, if two or more a persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them, would be guilty of murder. In that situation S. 96 of the Code says that nothing is an offence which is done in the exercise of the right of private defence. Though all the accused were liable for committing the murder of a person by doing an act or acts in furtherance of the common intention, they would not be liable for the said act or acts done in furtherance of common intention they would not be liable for the said act or acts done in furtherance of common intention if they had the right of private defence to voluntarily cause death of that person. Common intention, therefore, has relevance only to the offence and not to the right of private defence. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence. To illustrate, if a person was guilty of murder by doing an act in furtherance of a common intention with others to commit murder, he could sustain the plea of the right of private defence only by establishing that he had the right to cause death of that person. It is true that, in ascertaining whether a group of persons had common intention to murder, the evidence adduced by the defence that they had common intention only to cause hurt is relevant. But once it is established that the common intention was to commit murder, the question of separate individual liability in the context of private defence would be out of place. Under S. 103 of the Indian Penal Code, the right of private defence of property extends, under the restrictions mentioned in S. 99 thereof, to the voluntary causing of death, if the offence, the committing of which or attempting to commit which occasions the exercise of the right falls in one of the categories mentioned therein. That is to say, if it was not one of the offences enumerated therein, the person had no right of private defence extending to the voluntary causing of death. If in the instant case the accused were not able to establish that the offence fell in one of the categories enumerated therein, they would be liable for murder, as all of them participated in the offence pursuant to the common intention to commit murder. In most of their cases, the discussion of the evidence in compartments - one relating to the offence and the other to the right of private defence may not be possible, for almost always the evidence relating to one part will have impact on the other part, and the court in considering whether the accused are liable constructively for murder will have to consider also the evidence of the defence that their common intention was not to commit murder but only to protect their right and to cause hurt, if necessary.

10. With this background let us look at the facts of the case. Both the courts found that on April 10, 1960, the accused were in possession of the said field and also were entitled to cut the crop thereon. But it is also an admitted fact that on March 11, 1960, the Munsiff decreed the suit filed by Gurucharan Lal and held that possession of Madan Lal and Baldeo Raj over the said plot had not been established. Gurucharan Lal also obtained an order of relinquishment from J. B. Singh, Colonization Officer, in respect of the said plot on the basis of the Civil Court's decree. It is said by learned counsel for the appellants that an appeal has been filed against that decree and an interim order of stay of execution of that decree has been obtained. Be it as it may, on April 10, 1960, Gurucharan Lal had a serious claim for the possession of the said plot. On the basis of the Civil Court's decree find the relinquishment made by the Colonization Officer, Gurucharan Lal, accompanied by Bhagwan Das, Harnam Singh, Bhagwan Swarup, Nand Singh, Amrit Lal and Mohan Prakash left his house to harvest the crop standing on the said field. That they were anxious to avoid a fight with the appellants is also clear from the fact that they went to the police station Kichhe, lodged two complaints therein and brought with them to the field two constables. Further, they brought a photographer with them who was one of the victims, to the plot to take photographs of any untoward incident that, might take place, it is true that the prosecution party, including labourers were about ten, the exact number is not material. This attitude on the part of Gurucharan Lal and his party reflects the peaceful intention on their part. Would any person bring policemen with him and also a photographer if his intention was to use deadly weapons against his opponents? Would it not be more reasonable to assume that their intention was to cut the crop peacefully under the protection of the police escort? The next important circumstance is, were they in possession of deadly weapons? The learned Additional Sessions Judge held that they had; but the High Court pointed out that the conclusion was based purely on surmises. It, is true that at the scene of occurrence there were some weapons. D. P. Singh, the Sub-Inspector, as P. W. 10 said that when he reached the place of occurrence he found, among other things, two lathis, a pharsa and a spear blade lying there. The spear blade was twisted at its upper part. The learned Additional Sessions Judge posed the question as according to the prosecution none of the accused was armed with pharsa and that the accused had overpowered Gurucharan Lal's party, would they leave any weapons on the scene of occurrence, and answered the question that the two lathis and pharsa and sticks found by the Sub-Inspector belonged to Gurucharan Lal's party. It is also true that the labourers had some sickles with them for cutting the crop; but there is no evidence in his case that the prosecution party were armed with lathis, pharsa or spears. None of the prosecution witnesses deposed to that effect. The High Court pointed out further that even the accused did not say in their statements that the said weapons were left by the complainant's party while running away from the field. Learned counsel commented on the fact that the said statement was inaccurate. He referred us to the statement of Gurucharan Lal made before the Additional Sessions Judge wherein he said that the accused had taken weapons with them, because they had come to know that Gurucharan Lal and members of his party were also possessed of guns, pharsa and lathis. This statement does not mean that the complainant's party ran away from the field leaving these weapons therein. Indeed, the statement that they had guns and spears had been held to be false. The existence of the twisted spear on the plot indicates that it must have been used and it could have been used only by the accused, for there were admittedly no wounds caused on the body of any of the accused by spear or pharsa. Nor was any suggestion made in the cross-examination of the Sub-Inspector or of the police constables that Gurucharan Lal or members of his party were carrying any deadly weapons either at the time when they came to the police station or at the time they reached the field. The probabilities are also against the complainant's party carrying any deadly weapons with them. They would not have carried such weapons with them when they went to the field under police protection. Secondly, if they had deadly weapons and if they had used the spear as the twisted spear indicated, there must be

some injuries on the body of any of the accused. The fact that Gurucharan Lal and his party took a photographer with their also improbabilizes the fact that the complainant's party had deadly weapons with them, for the purpose for which the photographer was taken would be defeated if they were caught in the photograph with deadly weapons in their hands. For all these reasons, the High Court rightly set aside the finding of the learned Additional Sessions Judge that the complainant's party had deadly weapons in their hands.

11. The prosecution in support of its case examined six eye-witnesses, P. Ws. 1 to 6, and others and they deposed supporting the prosecution version, which we have already given at the earlier stage of the judgment. Their evidence was accepted by the High Court. It brings out the following salient facts: (1) The four appellants are closely related to each other - appellants 2 to 4 are the sons of appellant 1, Gurdatta Mal. (2) There were criminal and civil proceedings pending between the accused on the one hand and Gurucharan Lal on the other in respect of Plot No. 57. (3) Three of the accused went to the field armed with guns and one of them with a spear. (4) They attempted to send away the two constables on a false pretext, but were able to send only one of them. (5) The appellants, after entering the field, proceeded close to their victims and shot them dead at point-blank range. (6) Nanda Singh had three gunshot injuries, two of them were wounds of entry and the third was a wound of exit; the three wounds were in front of the chest, middle and lower parts there was blackening and scorching around the wounds; besides the three gun-shot injuries Nand Singh had one contused wound and two bruises on his body; Gainda Mal, deceased, had 5 gunshot wounds, one being a wound of entry and the other four being wounds of exit; he had also been shot at close range in the region of the chest and the doctor found a comminuted fracture of the left scapular bone with extensive laceration of left shoulder-joint due to gunshot injury; Gurucharan Lal deceased, had 8 gunshot injuries, five of them being wounds of entry and the remaining three being wounds of exit; the wounds were close together in an area of 4" x4" on left, lumber region; there were also four punctured wounds on the dead body, one of these being on the left side of forehead, 3/4" above the eye with fracture of the frontal bone underneath; on internal examination the peritoneum was found lacerated and fractured in five places and was full of clotted blood; the abdominal cavity was also full of blood and the small intestines were perforated in two places and the large intestines were extensively lacerated: two shots were extracted from the abdominal cavity; there was also found a depressed fracture of frontal bone on the left side 3" x 1/2" and a fissured fracture 3" long in continuation of injury No. 5 which was a punctured wound on the left side of the forehead; the brain was extensively lacerated on front left side; there was a fracture of anterior fossa of the left side of the base of skull. The wounds found on the dead bodies indicate that firearms and a sharp weapon were used and that the firearms were used at a close range.

12. The Sub-Inspector recovered blood from inside the field and the dead bodies were also found lying inside it. Even the photographer was shot dead. The High Court relying upon the aforesaid evidence and the circumstances held that the appellants, with the common intention of committing murder, made all the preparations, entered the field and shot at the deceased from a close range without any resistance being offered by the deceased. Mr. Sethi, learned counsel for the appellants after taking us through the details of the plan of the suit field, argued that the line of cutting operation of crops was quite removed from the place where the dead bodies were found and that if the accused had come determined to kill the deceased, they would have fired at the sight of the victims and from some distance and in that case the bodies would have been found near the point where cutting was going on. This argument is only based on probabilities and on certain premises. There is no clear evidence where exactly the three victims were at the time the accused came to the field. We cannot presume that they were at a particular place and rushed at the accused, for that fact is contrary to the entire evidence in the case. The situation of the dead bodies, the fact that gunshots

were fired from a close range and the fact that none of the accused was injured, are more consistent with the clear evidence adduced in the case than with the hypothesis suggested by the learned counsel. We, therefore, see no justification to interfere with the finding arrived at by the High Court that the appellants, with common intention to kill the deceased, armed themselves with guns and spears and attacked the deceased from a close range immediately after coming to the field and killed them in the manner the prosecution witnesses deposed. They were certainly guilty under S. 302, read with S. 34, of the Indian Penal Code.

13. If that be so, the next question is whether the accused had the right of private defence extending to the voluntary causing off death. The High Court held that the accused had no right of private defence of property extending to the causing of death, for the deceased while attempted to cause instant death or instant harm to any particular accused. To put it in other words, the High Court held that the conditions laid down in S. 108 of the Indian Penal Code had not been satisfied and that the acts of deceased did not amount to robbery. Learned counsel for the appellants contends that the High Court missed one of the ingredients of the definition of robbery, namely, that theft would be robbery if the offender caused fear of instant death or of instant harm. It is further argued whether the deceased had attempted to cause instant death or injury or not, the circumstances were such that there was a reasonable apprehension of fear or instant death or instant hurt, as the deceased and their companions were more than 10 in number and some of them were armed with sickles and bent upon cutting the crop carrying it away, and the appellants must have reasonably apprehended that they would cause death to them or at any rate inflict injuries on them. This argument again has no support in the evidence. As we have pointed out earlier, the intention of the deceased was peaceful and they were cutting the crops under the protection of the police and none of the deceased was in possession of any dangerous weapons. The sickles were used only by the labourers to cut the crops. In the circumstances disclosed in the evidence we cannot hold that there was any reasonable apprehension on the part of the appellants that they would be killed or hurt by the deceased. The High Court was certainly right in holding that the facts of the case did not attract the provisions of S. 103 of the Indian Penal Code.

14. The same result will flow if we approach the question from a different standpoint. Section 103 of the Indian Penal Code is subject to S. 99 thereof. Under S. 99, there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, and the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Can it be said that in the present case the accused had no time to have recourse to the protection of public authorities and they had not caused more harm than was necessary to inflict for the purpose of private defence? The accused knew beforehand that the deceased had gone to the field to cut the crop. The police station is about two miles from the plot. They could have certainly gone to the police station to inform the proper authority of the intentions of the deceased and asked for police protection. They did not do so. When they came to the field they found two police constables. They should have told them of the real situation, asked them to see that the deceased did not carry away the crop and should have sent one of their party to the Sub-Inspector and made the necessary report. This reasonable attitude on the part of appellants would have prevented the unfortunate events that had happened. Instead, they tried to deploy the two constables on a false pretext and succeeded in doing so in respect of one. Secondly, was it necessary for the accused, in the circumstances in which they were placed, to use their guns immediately on coming to the field to shoot to kill three of the complainant's party ? The deceased had no arms, whereas the appellants were fully armed with deadly weapons. The deceased were cutting the crop under the protection of the police, indicating thereby their peaceful intentions. Shooting at close range without warning would certainly be causing more harm than was necessary, in the

circumstances of the case, to inflict for the purpose of private defence. In this view of the case also the appellants could not rely upon their right of private defence. The argument of the learned counsel that the High Court apportioned the shots fired on the deceased among the deceased without considering the evidence does not call for any discussion, for in the view we held, it does not arise for consideration. But, though the High Court in terms did not refer to the oral evidence, there is evidence of P. Ws. 2. and 6 to show who hit the deceased with what weapon. It is no doubt true that their evidence was not accepted by the learned Additional Sessions Judge, but the High Court stated in its judgment that the prosecution had established, and it was not disputed by the accused, that each of the appellant did a particular act attributed to him. Presumably because of the said admission, the High Court did not expressly reconsider the evidence of these witnesses in this regard. The finding, therefore, must be accepted.

15. Even so, learned counsel for the appellants contends that the offence would not be murder but culpable homicide not amounting to murder. Reliance is placed on S. 300, Exception 2, which reads :

"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and cause the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

On the facts found it cannot be said that the accused had shot at the deceased without premeditation and without the intention of doing more harm than was necessary for the purpose of private defence. We have already found that the accused with the common intention of killing the deceased, shot at them from a close range when the deceased were peacefully cutting the crop under the protection of the police. There was both premeditation and intention to do more harm than was necessary when the accused did the said acts. The circumstances of the present case do not attract the provisions of the said Exception.

16. Lastly, it is said that Gurdatta Mal and Madan Lal had only used the guns of their close relatives, who had licences to keep them. Once it is accepted that the said accused had no licence to have guns, their possession of the same would certainly bring them under the provisions of S. 19 (f) of the Arms Act.

17. In the result, the appeal fails and is dismissed.

Appeal dismissed.

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