

State of Bihar

Vs

Nathu Pandey and Others

Criminal Appeal No. 203 (N) of 1966

(S. M. Sikri, R. S. Bachawat, V. Ramswami JJ)

23.04.1969

JUDGMENT

BACHAWAT, J. -

1. The prosecution case was that Bhaiya Ramanuj Pratap Deo was the proprietor of village Phatpani and owned and possessed bakasht and gairmazura lands therein including plot No. 1311 and the mahua trees standing thereon. On April 10, 1962, at 3 p.m. his employee P.W. 33 Bindeshwari Singh was in charge of collection of mahua fruits in plot No. 1311 and the victims Ram Swarup Singh and Ramdhari Singh were supervising the collection. P.W. 1, Dhaneshwari, P.W. 2, Deokalia, P.W. 3, Dewal, P.W. 4, Rajmatia, P.W. 6, Udal Singh, P.W. 7, Border Singh, P.W. 8, Moghan Chamar, P.W. 9, Ram Dihal Kharwar, P.W. 10 Ram Terai Kharwar, P.W. 11, Manan Singh and P.W. 13, Jhagar Kharwar were collecting mahua fruits when suddenly accused Nathu Pandey, Kundal Pandey and Muneshwardhar Dubey armed with garassas, Chandradeo Pandey, Dayanand Pandey and Nasir Mian armed with bhalas and Bife Bhogta, Thegu Bhogta, Nageshwardhar Dubey and Uma Shankar Dubey armed with lathis surrounded Ramswarup and Ramdhari and assaulted them with their weapons. Dewal also was assaulted by Bife and Thegu and suffered minor injuries. Ramdhari died on the spot. Ramswarup died while preparations were being made to carry him to the hospital.

2. Bindeshwari lodged the first information report at 8 p.m. on the same date. On April 14, 1962, accused Nathu gave a report at Nagaruntari hospital. He said that on April 10, 1962, at 3 p.m. while he was returning home, he was assaulted with lathis, garassas and bhalas by the employees of the Bhaiya Saheb.

3. The following injuries were found on the dead body of Ramswarup Singh : "(1) abrasion 1 1/2" X 1 and 1/4" with ecchymosis on anterior aspect of right knee joint, (2) another abrasion 1/2" X 1/4" with ecchymosis on anterior aspect of right leg, (3) a small abrasion with ecchymosis on anterior aspect of left knee joint, (4) an incised wound 4" X 1/4" X scalp on anterior aspect of the left side of the head, (5) a lacerated wound 3 1/2" X 1/3" X scalp with ecchymosis on right side of head and (6) a penetrating wound with clean cut margins 2 1/2" X 1" X abdominal cavity placed transversely on right hypochondrium just right to midline with stomach and loop of large bowel bulging out of it". On opening the abdominal wall it was found that the peritonous was congested and the stomach was perforated on its anterior wall. Injuries 1, 2, 3 and 5 were caused by hard and blunt substance such as lathi. Injury No. 4 was caused by sharp cutting weapon such as garassa. Injury No. 6 on the abdominal cavity was caused by some sharp-pointed weapon with sharp cutting margin such as bhala. The death was due to shock and internal haemorrhage caused by the abdominal wounds.

4. The following injuries were found on the dead body of Ramdhari Singh : "(1) the helix of left ear was cut; (2) a lacerated wound 1/2" X 1/10" with ecchymosis on the outer part of the left eye brow, (3) a punctured wound with clean cut margins 2 1/2" X 1" X 1 1/2" on left thigh below its middle, (4) a punctured wound with clean cut margin 1" X 1/4" X 1" on posterior aspect of the left thigh in its middle, and (5) a penetrating wound with clean cut margins 2 1/4" X 3/4" X abdominal cavity on right side of the abdomen. The loops of intestines were bulging out of this opening. Injury No. 2 was caused by hard and blunt substance such as lathi. The other injuries were caused by a sharp pointed weapon with sharp cutting edge such as bhala. Death was due to shock and internal haemorrhage caused by injury No. 5 the abdominal wound.

5. The Trial Court convicted the accused respondents Mathu, Chandradeo, Kundal, Dayanand, Bife, Thegu, Nasir, Muneshwardhar, Nageshwardhar, Umashankardhar under Section 302 read with Section 149 of the Indian Penal Code for the murders of Ramdhari and Ramswarup and sentenced them to rigorous imprisonment for life each. Bife, Thegu, Nageshwardhar and Umashankardhar were convicted under Section 147 of the Indian Penal Code and sentenced to rigorous imprisonment for six months each. The remaining respondents were convicted under Section 148 of the Indian Penal Code and sentenced to rigorous imprisonment for one year each. Bife and Thegu were convicted under Section 323 of the Indian Penal Code for causing hurt to Dewal and sentenced to rigorous imprisonment for six months each. The sentences of each respondent were to run concurrently. The Trial Court held that (1) Bhaiya Saheb was in possession of plot No. 1311; (2) while Ramswarup and Ramdhari were collecting mahua on the plot, the respondents armed with bhalas, garassas and lathis inflicted fatal injuries on them with a view to forcibly prevent them from collecting the mahua, (3) Thegu and Bife assaulted Dewal with lathis, (4) the accused persons knew that there was likelihood of murders being committed in prosecution of the common object, and (5) the assailants inflicted the injuries on Ramswarup and Ramdhari with the intention of murdering them.

6. The respondents filed an appeal in the High Court of Patna. The High Court allowed the appeal and set aside all the convictions and sentences. The High Court found that (1) respondent Chandradeo was the thekedar of plot No. 1311 and was in possession of the mahua trees standing thereon, (2) on the date of the occurrence, the members of the prosecution party including Ramdhari and Ramswarup committed theft of the fruits of the mahua trees, and the respondents had the right of private defence of property against the theft; (3) Ramswarup carrying a tangi and Ramdhari carrying a danta caused severe injuries to respondent Nathu on his head, leg and that while doing so they were not defending themselves; Nathu became unconscious. He regained consciousness on April 14, 1962; (4) the theft of mahua fruits was committed under such circumstances as might reasonably cause apprehension that death or grievous hurt would be the consequence if the right of private defence was not exercised. Accordingly, the respondents' right of private defence of property extended under Section 103 of the Indian Penal Code to voluntarily causing death to Ramdhari and Ramswarup subject to the restrictions mentioned in Section 99; (5) the person or persons who caused the two deaths exceeded the right of private defence as they inflicted more harm than was necessary for the purpose of defence. These findings are based on adequate evidence and are not shown to be perverse. In this appeal under Article 136 of the Constitution from an order of acquittal passed by the High Court, we are not inclined to interfere with the above findings. The question is whether in these circumstances the High Court rightly acquitted the appellants.

7. The fatal wounds on the abdominal cavities of Ramdhari and Ramswarup were caused by bhalas. The prosecution case was that Chandradeo, Dayanand and Nasir were armed with bhalas. The High Court rightly held that the prosecution failed to establish that Chandradeo was armed with a bhala.

The prosecution witnesses said generally that all the respondents surrounded Ramdhari and Ramswarup and assaulted them. The prosecution case has been found to be false in material respects. It is not possible to record the finding that Chandradeo, Dayanand and Nasir were armed with bhalas. Some of the respondents were armed with bhalas but it is not possible to say which of them were so armed and which of them inflicted the fatal wounds on Ramdhari and Ramswarup. Accordingly we cannot convict any of the respondents under Section 302. The only question is whether they can be convicted under Section 302, read with either Section 149 or Section 34.

8. In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly. Under the fourth clause of Section 141 an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 to 106 dealing with the right of private defence. Under Section 96 nothing is an offence which is done in the exercise of the right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression "to enforce any right or supposed right" in the fourth clause of Section 141. In *Kapildeo Singh v. The King* (1949-50 FCR 834) the High Court had affirmed the appellant's conviction and sentence under Section 147 and Section 304, read with Section 149, without considering the question as to who was actually in possession of the plot at the time of the occurrence. The High Court observed that the question of possession was immaterial and that the appellants party were members of an unlawful assembly, "as both sides were determined to vindicate their rights by show of force or use of force". The Federal Court set aside the conviction and sentence. It held that the High Court Judge stated the law too loosely "if by the use of the word 'vindicate' he meant to include even cases in which a party is forced to maintain or defend his rights". The assembly could not be designated as an unlawful assembly if its object was to defend property by the use of force within the limits prescribed by law.

9. The charges against the respondents were that they "were members of an unlawful assembly in prosecution of the common object of which, viz., in forcibly preventing Ramdhari Singh and Ramswarup Singh from collecting mahua from Barmania field of village Phatpani and if necessary in causing the murder of the said two persons, for the purpose, "that some of them caused the murders of Ramdhari and Ramswarup and that thereby all of them committed offences under Section 302, read with Section 149". We have found that respondent Chandradeo was in possession of plot No. 1311 and the mahua trees standing thereon. The object of the respondent's party was to prevent the commission of theft of the mahua fruits in exercise of their right of private defence of property. This object was not unlawful. Nor is it possible to say that their common object was to kill Ramdhari and Ramswarup. Those who killed them exceeded the right of private defence and may be individually held responsible for the murders. But the murders were not committed in prosecution of the common object of the assembly or were such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The accused respondents cannot be made constructively responsible for the murders under Section 302, read with Section 149.

10. In *Kishori Prasad and Others v. State of Bihar* (Criminal Appeal No. 191 of 1966, decided on 5-12-1968), the High Court convicted the appellants under Section 326/149 of the Indian Penal Code though the appellant Hirdaynarain was in lawful possession of the western portion of plot No. 67 and the attempt by the prosecution party to cultivate the same was high-handed. This Court set aside the conviction and sentence. Ramaswami, J. observed :

"In a case where the accused person could invoke the right of private defence it is

manifest that no charge of rioting under Section 147 or Section 148, Indian Penal Code, can be established for the common object to commit an offence attributed in the charge under Section 147 or Section 148, Indian Penal Code, is not made out. If any accused person had exceeded the right of private defence in causing the death of Chitanu Rai or in injuring Gorakh Prasad it is open to the prosecution to prove the individual assault and the particular accused person concerned may be convicted for the individual assault either under Section 304, Indian Penal Code, or of the lesser offence under Section 326, Indian Penal Code. The difficulty in the present case is that the High Court has not analysed the evidence given by the parties and given a finding whether any or which of the appellants are guilty of causing the death of Chitanu Rai or of assaulting Gorakh Prasad. As we have already said, none of the appellants can be convicted of the charge of rioting under Section 148 or of the constrictive offence under Section 326/149, Indian Penal Code."

We accordingly hold that the respondents cannot be convicted under Section 302, read with Section 149, Indian Penal Code. Nor is it possible to convict them under Section 302, read with Section 34. The High Court rightly found that the respondents wanted to prevent the collection of mahua fruits and that a common intention of all of them to murder Ramdhari and Ramswarup was not established.

11. The case of Gurudittamal v. State of U.P. (AIR 1965 SC 257), is distinguishable. In that case the court found that (1) the accused persons who were in possession of a field had exceeded the right of private defence of property by murdering four persons who were peacefully harvesting the crops standing on the field and (2) each of the four appellants killed one member of the prosecution party and each of them individually committed an offence under Section 302 (See Paragraph 6 and end of Paragraph 14). In these circumstances, the court upheld their conviction and sentence under Section 302. The Court also found that the appellants had the common intention to kill the victims and could be convicted under Section 302, read with Section 34 (see Paragraphs 12 and 9). In the present case, none of the respondents can be convicted under Section 302. As a common intention to murder Ramdhari or Ramswarup is not established, they cannot be convicted under Section 302, read with Section 34.

In the result, the appeal is dismissed.

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