

George Dominic Varkey

Vs

The State of Kerala

Criminal Appeal No. 276 of 1968

(C. A. Vaidialingam, A. N. Ray JJ)

08.04.1971

JUDGMENT

RAY, J. -

1. This is an appeal by special leave from the judgment, dated September 19, 1968, of the High Court of Kerala setting aside the order of acquittal passed by the Sessions Court of July 17, 1967 and convicting the appellant under Section 304, Part II of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for three years.
2. The appellant was charged under Section 302, Indian Penal Code for having murdered his elder brother on March 20, 1967. The prosecution case was as follows. There was exchange of words between the appellant George and his elder brother Dominic in the course of which George drew out dagger from his waist and Dominic bent down to pick up a stone. Before Dominic could rise after picking up the stone, George rushed towards Dominic and stabbed him with the knife. The stab was warded off by Dominic. George again stabbed Dominic on the left thigh causing an incised gaping wound on the upper third of the left thigh. Immediately thereafter George ran away. Dominic was taken to the Government dispensary and on the way he died.
3. There were three eye-witnesses. Of them two turned hostile. P.W. 3 Thomas Mathai and third eye-witness was the family lawyer and friend of both the brothers George and Dominic. The Trial Court found Mathai to be an independent and respectable witness. His evidence was that he had not seen George drawing out the knife. His attempt to pacify both the elder brother and the appellant was in vain. When the quarrel assumed an aggravated form Mathai intervened and separated both Dominic and George. Dominic then was removed a little towards east and George towards west. George who was behind Mathai suddenly passed him by his side with a knife and stabbed Dominic. The evidence of Mathai was that when he saw George passing by his side with the knife, Dominic was stooping down. According to Mathai these acts of George and Dominic were simultaneous.
4. The appellant George took the plea of right of self-defence. The Trial Court found that George and Dominic were on bitter inimical terms. There were property disputes. Litigations were going on between them. The Trial Court held that in view of the bitterness existing between the two brothers,, George was justified in reasonably apprehending grievous hurt or danger to his life at the hands of Dominic when he stooped down to pick up a stone of a dangerous size. The Trial Court held that it could not be conclusively held from the evidence of Mathai that Dominic bent down to pick up the stone only after seeing the appellant advancing towards him drawing out a knife. The Trial Court said that if it was Dominic who first bent down to pick up the stone George could in that situation reasonably apprehend grievous hurt or danger to his life at the hands of Dominic. The other

important piece of evidence of Mathai was that he did not see George drawing out the knife. The Trial Court held that the prosecution failed to prove beyond any reasonable doubt that George was the aggressor and that the incident happened in the manner alleged by the prosecution. The Trial Court therefore gave the benefit of reasonable doubt to the appellant George and acquitted him.

5. The High Court held that the sessions Court "quite justifiably entertained a reasonable doubt as to whether George or Dominic was the aggressor". The High Court thereafter said that the question still remained whether the accused George had exceeded the right of private defence. The High Court held that even if Dominic was the aggressor George had exceeded the right of private defence. The reasonings given were that Dominic was completely unarmed and when Dominic stooped down and took a stone George could have reasonably apprehended that Dominic would with the stone he had taken, cause minor injuries on him and thus cause him simple hurt and not that Dominic would kill him or cause grievous hurt to him.

6. The High Court having held that Dominic was the aggressor erred in holding that the appellant had exceeded the right of private defence. The other error into which the High Court fell was that the appellant could have reasonably apprehended that Dominic could have caused him simple hurt. The apprehension is in the mind of the person exercising the right of self-defence and the apprehension is to be ascertained objectively with reference to events and deeds at that crucial time and in the total situation of surrounding circumstances. Broadly stated, the right of private defence rests on three ideas; first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and, thirdly, the right does not commence until there is a reasonable apprehension. It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the 4th clause of Section 99 of the Indian Penal Code, namely, that no more harm is inflicted than is necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. Circumstances must show that the court can find that there was apprehension to life or property or of grievous hurt. If it is found that there was apprehension to life or property or of grievous hurt the right of private defence is in operation. The person exercising right of private defence is entitled to stay and overcome the threat. All the acts of George will have to be examined as to whether in overcoming the threat he exceeded the right of defence. In the present case, it is found that Dominic was the aggressor and when he was picking up a large piece of stone George had reasonable apprehension that Dominic would kill him or cause him grievous hurt. These features indicate that apprehension. Dominic was picking up a stone of a dangerous size. The two brothers had quarrelled before reaching the scene. The antecedents are that the quarrels in the past were started by Dominic and he was in aggressive attitude. Mathai who was present at the scene of occurrence said that he did not see George bringing out the knife. The finding of fact of the Trial Court is that it could not be conclusively held that Dominic bent down to pick up the stone only after seeing George advance towards Dominic drawing out a knife. There was threat to the person and of grievous hurt to George. It was real and immediate danger. In such circumstances, George would try to ward off the danger and save himself. George, the appellant was entitled to stay and defend. The circumstances indicated real apprehension to his body and life. The appellant acted in a reasonable manner of self-defence and did not exceed the right.

7. The concurrent finding of fact is that Dominic was the aggressor. The happenings show in an overwhelming manner that George the appellant acted in self-defence and the manner and the moment of the incident both indicate that he did not use more force than was necessary for mere defence against the real and imminent danger to his body and of grievous hurt. The appellant did not

inflict more harm than was necessary for the purpose of defence.

8. The Trial Court rightly acquitted the accused. The High Court was in error in convicting the accused. The appeal is accepted. The appellant is set at liberty. The bail bond is discharged.

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