Tarachand and Another

Vs

State of Haryana

Criminal Appeal No. 12 of 1971

(K. S. Hegde, A. N. Grover JJ)

21.07.1971

JUDGMENT

GROVER, J. -

1. This is an appeal from a judgment of the Punjab and Haryana High Court upholding the conviction of the appellants who are brothers under Section 302, read with Section 34 of the Indian Penal Code and confirming the sentences of death imposed on them by the learned Sessions Judge, Hissar. We have already, by a brief order, dated May 7, 1971, set aside the conviction and sentence of the appellants under Sections 302, read with Section 34 and have convicted them under Part I of Section 304, Indian Penal Code, for which a sentence of seven years has been imposed on each of the appellants. We now proceed to give the necessary details and our reasons for making the aforesaid order.

2. H. C. Sethi is a practising advocate of Hissar. His son, Subhash Chander deceased was a Major in the Indian Army. His second son, Suresh Chander, is an advocate and the principal witness in the case. In February, 1969, H. C. Sethi and his family appear to have purchased 125 acres of land in village Talwandi Rana, near Hissar. Possession had been obtained by the landlords of 80 Killas of land either by compromise with the tenants or by obtaining ejectment orders against them from the competent revenue courts. About six or seven acres of land were stated to be still under the cultivation of appellant Tarachand. The purchasers made an application in the Court of the Assistant Collector, Hissar, for his ejectment in March, 1969. Tarachand appeared on one date but he did not appear thereafter. On May 9, 1969, an ex parte order of ejectment was passed against him. According to the terms of the decree, however, he was to vacate the land in his possession only after he had been allotted some land out of certain surplus area.

3. According to the case of the prosecution the occurrence is alleged in have taken place on July 15, 1969, at about 6 p.m. in the evening on the Dhansu passage leading to the village Talwandi Rana near the house of Surja Kumar. Khasra No. 174/2 is situated at a distance of 10 or 11 feet from the place of occurrence. It may be stated that one of the main points for decision will be whether this Khasra number which admittedly was in possession of Tarachand appellant before the Killabandi in the year 1952-53 continued to remain in his physical possession even after the consolidation proceedings had started and it had been shown in the Khasra Girdawari as the property of the village Abadi deh. On behalf of the appellant it was claimed that it was in possession of Tarachand on the day of the occurrence.

4. We may now refer to the first information report which was registered without any delay. It was made by Patram who is working as a clerk to H. C. Sethi, Advocate. After giving the necessary facts

about the purchase of the land by the Sethi family he proceeded to state that the ex parte decree for ejectment which had been granted against Tarachand was passed without any compensation and for that reason he was nurshing a grudge against the deceased Subhash Chander, Suresh Chander and others. At about 3 p.m. on the day of the occurrence the two brothers, Munphul Singh a Siri and Patram (informant) went on a tractor to plough the land which was in their possession. After demarcating the area in their possession they were going back to village Talwandi Rana at about 6 p.m. on the Kutcha Dhansu passage when the harrow got detached from the tractor. After leaving the harrow and the tractor with Suresh Chander a party consisting of Subhash Chander, Patram and Manphul Singh started for village Talwandi Rana in order to bring a rod. Meanwhile Suresh Chander started attaching the harrow to the tractor. The party consisting of Subhash and others had only covered a short distance and had reached near the house of Surja Kumar when the appellants came from the opposite side armed with Jaillies. Tarachand raised a Lalkara saying that they were going to teach a lesson for obtaining an ex parte eviction decree. Both the appellants then attacked Subhash Chander with their respective Jaillies. Suresh Chander who was coming on the tractor took the licensed rifle of Subhash Chander and fired two shots in order to save his brother. Leaving Subhash Chander in an injured condition the appellants ran away to the village. Subhash Chander was taken in an unconscious state to the hospital at Hissar where he was declared dead at about 7 or 7.30 p.m. Tarachand appellant was arrested on July 16, 1969. Shri Ram the other appellant was taken into custody on July 17, 1969.

5. The post mortem examination was performed by Dr. I. K. Chaudhury on July 16, 1969. There were as many as 15 injuries on the person of Subhash Chander out of which six were perforating wounds, one lacerated wound, three incised wounds the rest being abrasions. The injuries extended from the region of the eyes and the head to the chest and the abdomen, one arm being also involved. Injury No. 3 was individually sufficient in the ordinary course of nature to cause death and the other injuries collectively combined with injury No. 3 were stated to have accelerated the death. Injury No. 3 was lacerated wound on the back of the left pinna measuring 2 1/2 x 1 inches extending to the skull on temporal region for about 1 x 1/2" bone deep. The temporal bone was badly fractured and pieces were pressing on the brain which was lacerated. The fracture extended to the base of the skull. Tarachand appellant was examined by Dr. Jagdish Chander, Medical Officer, Barwala, after he had been arrested. He had six injuries. The first two injuries on the left upper arm were due to a gunshot. The other injuries were two contusion and two abrasion marks. According to a note made by the doctor the part of the shirt worn by Tarachand appellant covering the left upper arm was stained with dry blood and it was torn at two places. In the opinion of the doctor injuries No. 1 and 2 on Tarachand were due to a gunshot.

6. It may be mentioned at this stage that according to the statement of Tarachand before the committing Magistrate he was in his fields when Subhash Chander and another person with a beared started plying the tractor in his land. They did not pay and heed to his protests. Subhash Chander came down from the tractor and fired a shot from the weapon which looked like a rifle or a gun and which hit Tarachand on his left forearm. Subhash Chander also hit him with the butt of the weapon. Tarachand then jumped forward and used his Jailli in self defence. Siri Ram appellant was not present at the time of the occurrence. Suresh Chander and Patram as also Manphul Singh were also not present at the time of the incident. Tarachand changed his version slightly in the Sessions Court. There he stated that after Subhash Chander had fired the first short from his rifle from a distance of 4 or 5 feet the rifle became defective and then Subhash Chander gave him blows with its butt-end. He gave Jailli blows in self-defence. His wife who was present might have also given some blows to the deceased. The other appellant Siri Ram pleaded an Alibi.

7. The investigation of his case proceeded, to say the least, in a most irresponsible and perfunctory manner. There were certain essential links without which the story of the prosecution was bound to suffer from serious infirmities. There were two rival versions and for the prosecution to succeed it was essential to establish that the harrow had got detached from the tractor because of a defect in the commenting rod. The position of the tractor and the harrow was also very material. No attempt whatsoever was made to take into possession either the rod which was defective or the harrow soon after the occurrence. Nor was the rifle which is described as a carbine taken into custody. No attempt was made either to look for the empty cartridges or to ask Suresh Chander to hand over those empty cartridges to the police. It is startling that it occurred to the Investigating Officer to take the harrow and the rifle in possession 11 days later on July 26, 1969. If the carbine had been taken into custody at the proper stage it could have been sent a ballistic expert who could have given a positive opinion whether it was defective and could not have been fired after the first shot. It must be remembered that apart from the injuries with the rifle shot on his arm Tarachand had other injuries which could not have been caused by a gun shot. A blunt weapon had been used and the prosecution had given no explanation for those injuries. It was necessary in these circumstances to place all the available material throwing some light on the point because according to Tarachand appellant he had not only been fired upon by the deceased but had been inflicted injuries with the butt-end of the carbine. The prosecution has completely and utterly failed to explain those injuries, except that according to the P.W. 2 Jagdish Chander, injuries 4, 5 and 6 could be self-suffered.

8. Mr. A. S. R. Chari for the appellants has strongly criticised the approach and the findings of the High Court which had practically accepted the conclusion of the Sessions Judge on most of the points. As regards the eye witnesses whose evidence was accepted it has been submitted that Patram was only a clear of both H. C. Sethi and his son Suresh Chander. He could not be expected to vice a version different from the one given by Suresh Chander. The only witness of importance is Suresh Chander himself. His evidence must be regarded as interested and there are a number of matters on which he either furnishes no explanation or his version suffers from improbabilities. According to Suresh Chander the carbine of the Major used to remain in the family house at Hissar even when he was away on duty. But he had never taken it to his land because he had been taking his D.B.B.L. gun for which he held a licence. It has not been explained why instead of taking the gun, the rifle was taken on that day. No reason has been furnished for taking a loaded carbine in the tractor when the object was to plough or demarcate the lands which were claimed to have been in the possession of the complainant party. Mr. Chari says that the High Court had made a out a special case for the complainant by referring to some tension prevailing among the landlords and tenants in respect of agricultural land. Neither Suresh Chander nor Patram has spoken to any such tension in village Talwandi Rana nor was it ever suggested by them or any other witness that any danger was apprehended from the tenants. As a matter of fact practically all the tenants of the Sethi family had peacefully surrendered possession and even the decree which had been obtained against Tarachand appellant was of such a nature that no immediate eviction was possible. It is pointed out that according to Suresh Chander when the police came and prepared the site plan on the following day he saw his tractor near the Kotha of the Sethi family in the village. As to how and in what circumstances and when the tractor had been removed and by whom is not all clear. It was of the utmost importance that the tractor, the harrow, etc., should have been allowed to remain at the place at which they originally were, according to the case of the prosecution, until a proper site plan had been prepared. The site plan prepared by the Investigating Officer Ex. PR is of a most unsatisfactory nature. In this plan all that has been shown about the tractor and the harrow is point No. 7. The explanatory note relating to point No. 7 in Hindi when translated into English reads, "It is that place where the harrow of the tractor became defective, the distance from the place of occurrence being

five Karams". Although according to the case of the prosecution (see also the statement of the Investigating Officer Ganga Ram P.W. 15) a large area of land belonging to the complainants appeared to have been ploughed the same was not shown in the site plain Ex. PR. The omissions of the essential matters are so numerous that this plan is altogether worthless. The other site plan which is more detailed was prepared by the Patwari Sundardas P.W. 5. That plan also does not contain any more details about the respective positions of the harrow and the tractor. This plan, however, was prepared much later on August 6, 1969. The Patwari stated in cross-examination that when he went to the place of occurrence he did not care to notice any harrow or tractor. The evidence of Suresh Chander was that after the harrow had got detached from the tractor he was successful in attaching it by adjusting the rod. He had gone some distance when the harrow again got detached. He proceeded with the tractor leaving the harrow on the sport. On the next day of the occurrence when he went with the police to the spot the harrow was found lying at the place where it had been left by him. Curiously enough the plan does not do anything about the actual position of the harrow nor does it show the distance between the harrow and the tractor. Ganga Ram Sub-Inspector P.W. 15 who was incharge of investigation stated in cross-examination that he had seen the harrow lying at a distance of 100 yds. towards the north of the place of the occurrence. He admitted that he did not indicate this in the site plan. He gave no explanation for the omission to do to. According to the evidence of Patram, P.W. 3 the rod of the harrow did not break into two parts but had got bent. He admitted that he did not show the bent rod to the police. All this, according to Mr. Chari, makes the testimony of Suresh Chander on the point of the episode of the harrow very weak and almost unbelievable.

9. It has next been urged that Suresh Chander made no attempt to explain or even mention the weapon by which those injuries had been caused on the person of Tarachand appellant which could not be attributed to the shot from the carbine. Although it may not be an inflexible rule that the prosecution witnesses should explain or mention the injuries sustained by the accused persons but a good deal of importance has always been attached to this matter and the approach of the High Court cannot be regarded as correct with regard to the complete absence of explanation as to the injuries which could not have been inflicted by the gunshot and which, according to Tarachand appellant, had been caused by the butt-end of the rifle. There is at least one injury which was contusion which was extensive and was located on the antero-medical aspect of the upper one-fourth of the left forearm of Tarachand which did require an explanation by the prosecution. The High Court while observing that Tarachand did not stand in need of fabricating say injuries in order to put forward a plausible defence, went on to say that it was not beyond the range of possibility that he had suffered the contusion either before or after the occurrence. There was no material or evidence on which such a view could be reasonably taken. There are other matters also in the evidence of Suresh Chander to which our attention has been invited by Mr. Chari but it is unnecessary to refer to them in detail.

10. We find a good deal of substance in the critisim of Mr. Chari with regard to the evidence of Suresh Chander which it must be remembered has to be accepted with care as he was undoubtedly an interested witness. We are also of the opinion that the High Court was not justified in the view it took about the failure on the part of the defence to get the carbine examined for any alleged defect in it. The carbine was not taken into possession immediately and even if any defect existed on the date of the occurrence it would have been pointless to get it examined after a lapse of a number of days during which period it had continued to remain in the possession of Suresh Chander who could have easily seen to it that the defect, if any, had been rectified. We are, by no means, satisfied that the version of Tarachand appellant with regard to the defect in the carbine can be accepted as correct in the absence of any evidence on the point. But in our judgment it was the duty of the prosecution in the circumstances of this case to have taken the carbine into custody together with the empty

cartridges fired from it is as also the unspent cartridges without any delay and to have obtained the opinion of a ballistic expert on material points. This not having been done no adverse inference could have been drawn from the omission on the part of the defence to get the carbine tested for any alleged defence in it. The evidence of Patram does not carry the matter further.

11. We are not impressed with the view of the High Court that a great deal of importance should be attached in the present case to the promptness with which the first information was lodged. Suresh Chander was an Advocate and Patram was his clerk. They could certainly have quickly thought out what version to give. It is true that importance of a first information report made promptly cannot be minimised. The object of Section 154, Criminal Procedure Code is to obtain early information of alleged criminal Activity, to record the circumstances before there is time for them to be embellished or forgotten. But as we shall presently indicate we are not satisfied that the version given by the prosecution as well as by the defence is correct with regard to the origin of the incident and the manner in which the occurrence took place.

12. There are certain features which present a good deal of difficulty. Firstly it is incomprehensible why both the appellants should launch a sudden and unexpected attack on the deceased Subhash Chander. It is not the case of the prosecution that he had gone there along with his party to evict the two appellants or to interfere with their possession. Indeed that was not possible because according to the decree which had been obtained by the Sethi family the eviction could only take place after the allotment out of the surplus area to Tarachand had been made. It appears highly improbable that merely because such a decree had been obtained by the family of the deceased the two appellants should decide to kill him in the presence of his own brother Suresh Chander, Patram and Manphul Singh. Secondly, even if the appellants had such a strong grievance it would naturally be against either the father or Suresh Chander who were lawyers and who must have obtained the decree from the law courts. The two appellants could possibly have no grievance of that nature against the deceased who had come home on leave only for a short time and who apparently has not been shown in have ever taken part in the court proceedings against Tarachand. On the other hand, the version of Tarachand with regard to the unprovoked shooting by the Major is equally unbelievable. If the deceased who was a trained Officer in the Army holding a fairly high rank wanted to shoot Tarachand he could have done a swift job of if with his automatic carbine. The story of Tarachand that the carbine became jammed or defective after the first shot is equally not convincing. In his statement before the committing Magistrate he never mentioned anything about his defect. The suggestion that has been made by Mr. Chari is that in all likelihood the Major had gone with an armed carbine to threaten Tarachand into surrendering possession of the land in respect of which a decree for eviction had been obtained. The Major had no intention of killing Tarachand but in the course of a heated argument he might have given Tarachand some injuries with the butt-end of the carbine and later on even fired and shot aiming at the arm which was not a vital part but then Tarachand and his brother who had Jaillies got the better of him and killed him. All this, however, leaves us in the realm of conjecture. Mr. Chari's emphasis on the evidence of Dr. Jagdish Chander, P.W. 2, with regard to the blackening near injury No. 2 on the arm of Tarachand can hardly be of much avail. On a careful perusal of his statement we are inclined to agree with learned Sessions Judge for the reasons given by him that he has made a statement to suit the version of both sides. We are unable to find that the deceased received the injuries at the hands of Tarachand and his companion in exercise of the right of private defence of the person of Tarachand.

13. We may now deal with another aspect which will have a great deal of bearing on our final decision in this case. According to the defence Khasra No. 174/2 was in the possession of Tarachand. Its distance from the place of occurrence was only 10 or 11 feet. There were tractor

marks on this Khasra number. This is borne out both by the evidence and by the site plain. The Sessions Judge and the High Court did not accept the case of the defence on the question of Tarachand's possession of Khasra No. 174/2. It appears from the evidence of the Patwari, Sunder Das, P.W. 5 as also the report made by him, Ext. PH, dated July 17, 1969, that ordinarily whole of Khasra No. 348 was in possession of Tarachand appellant. His name was entered as its occupancy tenant up to Rabi crop 1953. As a result of consolidation proceedings in 1952-53 some part of this Khasra inside the Phirni (outer village road) came to be shown in the Revenue records as the property of the village Panchayat, the purpose being extension of Abadi-deh (residential part of the village) Khasra No. 174/2 was assigned to this portion inside the Phirni. Khasra No. 174/2 is shown at point No. 4 both in the site plan, Ex. PG prepared by the Patwari and Ex. PR made out by the Investigating Officer. Ex. PG shows that Tarachand was in cultivating possession of the Khasra numbers adjoining the area within which Khasra No. 174/2 is situated.

14. On behalf of Tarachand appellant in has been claimed that although a portion out of the bigger old Khasra No. 348 which was admittedly in his possession had gone to the Panchyat (this portion being numbered 174/2) for extension of the Abadi-deh he continued to remain in its physical possession as consolidation proceedings had been stayed by an order of the Punjab High Court in 1955. Reliance has also been placed on the procedure prescribed by Section 23 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, for change of possession. It is pointed out that although in his report the Patwari had stated that the ownership of Khasra No. 174/2 had been transferred to the Panchayat the necessary orders relating to change of possession were not produced.

15. We do not consider that the absence of orders relating to change of possession can have such significance. The ownership of Khasra No. 174/2 was undoubtedly of the village Panchayat and the land was shown as Gair Mumkin (unploughable or uncultivable). It is well known that even when land is shown in Revenue records as Gair Mumkin some cultivation can be done on it by a person who is in actual possession. It is difficult to believe the Patwari that he did not know if Tarachand was in possession of Khasra No. 174/2 on the date of the occurrence when he could say definitely that he was in possession of the other Khasra numbers in the immediate vicinity of Khasra No. 174/2. His answer about the sowing of certain crop (Taramira) by the wife of Tarachand in that Khasra number was equally vague and indefinite. If there was no cultivation the Patwari could have said in positive terms that he never found any part of Khasra No. 174/2 under cultivation especially when he had gone to the spot on July 17, 1969. It was obvious that he was trying to suppress giving an information on a point which was material to the defence. At any rate, it was not necessary for the defence to prove that Khasra No. 174/2 was under the cultivating possession of Tarachand. The proved facts that originally this land was in his possession as a tenant and that the consolidation proceedings had been stayed coupled with other circumstances leave no doubt in our mind that Tarachand had continued to remain in actual possession of Khasra No. 174/2 even though as a result of consolidation it had been allotted to the village Panchayat for extension of Abadi-deh. It is significant and this circumstance carries much weight that there were tractor marks in Khasra No. 174/2. The prosecution failed to furnish any explanation for the tractor having gone to that Khasra number. According to the case of the prosecution the tractor had been used only in the fields which were in the complainant's possession and which had nothing to do with the lands in the possession of Tarachand. The presence of tractor marks in Khasra No. 174/2 show that the party of the complainants took the tractor there and this lends support to the version of the defence that was done because Tarachand was working there. The learned Sessions Judge attached importance to the fact that it had not been shown that this land had been purchased by the complainants. Even if that be so, the tractor did go to Khasra No. 174/2 which was in possession of Tarachand and he and his

brother had a right of private defence of property, under Section 97 of the Indian Penal Code. That was, however, subject to the restrictions contained in Section 99. This right in no case extends to the inflicting of more harm that it was necessary to inflict for the purpose of the defence.

16. The injuries which were inflicted on the deceased even if caused for defence of property were such as could never be justified. We cannot accept in its entirety the version of Tarachand about how the Major fired the shot and also caused the injuries to him with a blunt weapon. The number and the nature of injuries which were inflicted on the deceased by means of Jaillies by the appellants clearly showed that they exceeded the right of private defence of property. It appears that even after the deceased had fallen down the appellants continued to injure him in a vindictive and revengeful spirit. The plea of Alibi set up by Siri Ram has not been accepted and rightly so. No attempt was made before us to support that plea. There can be no manner of doubt about his presence as the number of assailants was bound to be more than one; otherwise so may injuries could not have inflicted on the deceased.

17. For the reasons given above the appeal is allowed to the extent that the conviction and sentence of the appellants under Section 302 are set aside and instead they are found guilty under Part I of Section 304, Indian Penal Code, for which we consider that a sentence of 7 years' rigorous imprisonment will meet the ends of justice.

</html