

State of U.P.

Vs

Niyamat and Others

Criminal Appeal No. 335 of 1978

(G. L. Oza, V. Khalid JJ)

14.04.1987

JUDGMENT

OZA, J. -

1. This appeal has been preferred by the State after obtaining leave from this Court against the acquittal of the respondents recorded by the High Court of Allahabad by its judgment dated April 13, 1977 hearing an appeal against the conviction of the respondents recorded by First Additional Sessions Judge, Etah convicting all the respondents under Section 302 read with Section 149, Sections 395 and 147 and sentenced to life, 10 years and 2 years rigorous imprisonment respectively to each one of the respondents.

2. The prosecution case at the trial was that on October 27, 1974 ASI Om Prakash Sharma accompanied by two constables Gauri Shanker, PW 2 and Kanauji Lal, PW 4 went to village Nidhauri Khurd, which was at a distance of three miles from Kotwali Etah, and arrested one Laturi there at about 1.00 or 1.30 p.m. Virendra Nath, deceased, had helped them in arresting the said Laturi. The ASI and the two constables returned to the Police Station Kotwali Etah with Laturi in custody at 6.50 p.m. A few minutes later these constables, Gauri Shanker and Kanauji Lal, were given summons for service on one Girish of Village Nidhauri Khurd. So, constables Gauri Shanker and Kanauji Lal returned to the Village Nidhauri Khurd the same evening at about 7.30 p.m. to serve the summons. It is alleged that at that time the two constables were wearing police uniforms and Gauri Shanker was carrying his personal DBBL gun and a belt of cartridges.

3. While they were in the village, Virendra Nath, deceased, informed them that a bad character named Dharampuri was staying at the house of Bahori Gir, and it is alleged that the Station Officer Kotwali Etah had earlier told these constables that Dharampuri was a bad character (badmash) belonging to Agra District and that he has to be arrested. When Virendra Nath informed these constables that Dharampuri was at the house of Bahori Gir, they went to the house of Bahori Gir and arrested Dharampuri at about 8.30 p.m. and after arresting him the two constables started for Etah with Dharampuri in custody and Virendra Nath, deceased also accompanied them.

4. At about 9 p.m. when the constables accompanied by Virendra Nath, deceased and Dharampuri in custody reached near the field of one Matadin adjoining Etah-Shikohabad road, the respondents armed with spears, phersas and lathis reached there with intention to rescue Dharampuri from the custody of the constables. Seeing this constable Gauri Shanker fired a shot in the air with his private gun in order to scare away the respondents. When this shot was fired the respondents stopped and the constables proceeded further. It is alleged that thereafter the respondents also advanced and when Gauri Shanker fired a second shot, again the respondents stopped for a while and the

constables proceeded ahead. And after a short time the respondents again advanced towards the police party and asked them to release Dharampuri. It is alleged that at that time they threatened the constables and the constables refused to release Dharampuri and Gauri Shanker fired the third shot in order to deter the respondents. Hearing the noise, the witnesses and some other persons reached the place, some of whom were carrying torches and were flashing them. It is alleged that it was also a moonlit night. On this, according to the prosecution, the respondents assaulted the constables causing injuries to them and they rescued Dharampuri from the custody of the constables. They attempted to snatch the gun of the constable Gauri Shanker and it is then Virendra Nath intervened. He also told them not to snatch the gun and also physically intervened to prevent them from snatching the gun and the belt of cartridges from the constable. In this he fell down and the respondents succeeded in snatching the gun and the belt of cartridges and in this scuffle Virendra Nath was assaulted and he received large number of injuries as a result of which he died on the spot. The respondents it is alleged, thereafter made good their escape and they also took away Dharampuri, the gun of constable Gauri Shanker and the cartridges.

5. After the respondents went away, the brother of Virendra Nath who had also arrived on the scene got a report written out by his younger brother Satish Chandra and lodged the report at the Police Station Kotwali Etah which was at a distance of about 3 miles at 10.15 p.m. the same night. Constable Gauri Shanker was medically examined by Dr. R. R. Sharma at the District Hospital, Etah on the same night i.e. October 27, 1974 at 11 p.m., the doctor found 12 injuries on his person consisting of 5 lacerated wounds on the head, 5 contusions and two abrasions on different parts of his body. Constable Kanauji Lal was medically examined the next morning i.e. on October 28, 1974 at 10.15 a.m. and he was found to have two bruises and an abrasion.

6. Dr. R. P. Yadav performed the post-mortem examination on the body of Virendra Nath. He found two incised wounds, seven stab wounds, five lacerated wounds and sixteen contusions on various parts of his body. All the respondents pleaded not guilty. The prosecution examined 12 witnesses in support of the prosecution case, out of whom the informant Rajendra Nath, PW 1, Brahma Singh, PW 3 and the two constables Gauri Shanker, PW 2 and Kanauji Lal, PW 4 are the eye-witnesses.

7. The learned Judges of the High Court after considering the evidence of the witnesses especially the eye-witnesses, the first information report, came to the conclusion that the respondents had collected and gone to Matadin's field with the sole object to rescue Dharampuri and that they had not gone to that place with the intention of assaulting much less murdering Virendra Nath. It was further found from the recital in the FIR by the High Court that the respondents in the beginning tried simply to rescue Dharampuri from the custody and none of them assaulted either the constables or Virendra Nath and it was only when Constable Gauri Shanker fired 2 or 3 shots with his gun that he was assaulted and his gun and cartridges were snatched. The learned Judges also observed "it is obvious that at that time when it must have been dark (except for the light of torches which were being flashed and which could not have produced any steady light) the appellants (respondents in this Court) could not have seen the direction in which the shots were fired. So they may well have thought that they were being fired at and reasonably apprehended serious injuries to themselves". On reading of the FIR the learned Judges rightly came to the conclusion that the respondents assaulted the constables only when one of the constables actually fired. It was also found that none of the respondents made any attempt on the life of Virendra Nath till he himself intervened to help the constables. In view of these findings reached by the High Court, it was found that the object of the respondents when they came to the field of Matadin was only to rescue Dharampuri and it was not their object to assault or murder anyone. This conclusion was reached by the learned Judges even after considering in detail the evidence of constables Gauri Shanker and

Kanauji Lal. Consequently the finding of fact reached by the High Court is that the respondents came to the place of occurrence with the sole object of rescuing Dharampuri from the custody of Constables Gauri Shanker and Kanauji Lal. So far as these facts are concerned they are not much in dispute. The learned counsel appearing for the appellant-State contended that even if the arrest of Dharampuri was illegal the respondents had no right of private defence under Section 97 (sic to) rescue Dharampuri especially in view of Section 99 of the Indian Penal Code.

8. The learned Judges of the High Court also came to the conclusion that if arrest of Dharampuri was illegal it could not be said that the respondents when they collected with the object of rescuing him it could be said that they were members of an unlawful assembly or were committing rioting when they used force.

9. The High Court considered the provisions of Code of Criminal Procedure in respect of arrest to come to a conclusion as to whether it could be said that the arrest was lawful. For that purpose the relevant provision which has been considered is Section 41 of the Code of Criminal Procedure, 1973. Learned counsel for the appellant contended that the relevant provision in Section 41 clause (a). The constables were told by the police officer and on that basis it could be suggested that a reasonable suspicion existed that Dharampuri was concerned in some cognizable offence or that a reasonable complaint has been made.

10. The High Court came to the conclusion that the police officer who is said to have told the constables has not been examined. No material has been produced to indicate that there was any complaint of Dharampuri being involved in a cognizable offence nor any other material produced to indicate that there was material for reasonable suspicion. The High Court on the basis of the material as it was came to the conclusion that the arrest was absolutely unjustified and not legal and in this view of the matter it was held that the respondents had a right to get Dharampuri rescued from the custody. Learned counsel appearing for the appellant - State in view of the material as has appeared in evidence contended that even if it is held that the arrest was not legal he emphasized that in view of Section 99 IPC right of private defence was not available to the respondents and it was contended that the judgment of the High Court could not be sustained.

11. The learned Judges of the High Court came to the conclusion that as the arrest was not legal it could not be held that the respondents were members of an unlawful assembly when the sole object of theirs was to rescue Dharampuri who was wrongfully arrested by the constables. They also came to the conclusion that the respondents did not use force till Constable Gauri Shanker fired not one but three shots one after another which was sufficient in the light of the circumstance of the case for a reasonable apprehension in the minds of the respondents that their lives may be in danger and it is in this view that the High Court came to the conclusion that they were acting in the right of private defence.

12. Section 97 IPC reads thus :

Every person has a right, subject to the restrictions contained in Section 99, to defend

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First. - His own body, and the body of any other person, against any offence against the human body.

Secondly - The property, whether movable or immovable, of himself or of any other

person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

The first part deals with any offence affecting the human body either on the person himself or any other person and this will include an unlawful arrest also as an unlawful arrest is an offence against human body.

13. Section 99 on which the emphasis was laid by the learned counsel, reads :

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The right of private defence in no case extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

In fact the first sentence of this section itself makes it clear that this sections is only attracted where there is no reasonable apprehension of death or grievous hurt and the emphasis laid by the High Court in its judgment on the fact that the respondents did not use force unless and until the constable shot three rounds which apparently will cause a reasonable apprehension of death or grievous hurt in the minds of the respondents. Once the circumstances justified such a reasonable apprehension the contention of the learned counsel for the appellant (State) is that in such a situation even if the arrest was illegal the respondents could have taken recourse to use lawful methods for rescuing Dharampuri rather than resorting to violence. This contention of the learned counsel could have some weight if the incident had not started after the constable fired three rounds from his gun. Realising this difficulty an attempt was made by learned counsel for the appellant - State to contend that this constable, as his evidence discloses, fired shots in air just to frighten the respondents and the learned Judges of the High Court came to the conclusion that it was night and though torches were being flashed but there will not be consistent light and when the constable fired not one but three shots one after another the respondents naturally will have a reasonable apprehension of either death or grievous injury. In order to contend that this finding reached by the High Court on facts is not justified, it was contended that it was a moon night, there were torches flashed but it is significant to see the circumstances which emerged from the evidence that the constables were moving with Dharampuri in custody and the deceased whereas the respondents were moving at some distance. Even if it is accepted that it was a moonlit night, it could safely be inferred that the light may not have been sufficient enough so that from a distance the respondents could notice the direction of the barrel of the gun when constable Gauri Shanker fired the shots.

14. It also appears from the prosecution evidence that the torches were flashed when there was a

melee and other witnesses reached hearing the shots and in such a situation the conclusion reached by the High Court that when this constable fired one after another three shots it was sufficient to cause reasonable apprehension in the minds of the respondents of death or grievous injury and therefore they were entitled to right of private defence is justified.

15. The learned Judges of the High Court also considered the other aspects of the matter that if the respondents could not be held to be members of an unlawful assembly as their object at best could only be to rescue Dharampuri from unlawful custody, then even if the right of private defence is not accepted, it is not possible on the basis of the prosecution evidence to find out what respondent caused what injury and it will not be possible to find them guilty for their individual acts. The same will be the situation even if it is held that they exceeded the right of private defence.

16. Learned counsel for the appellant-State took us through a discussion of evidence by the Sessions Judge and also by the High Court and also referred to relevant portions of the evidence of the prosecution. Having gone through, them in our opinion, it could not be concluded that the learned Judges of the High Court committed an error in coming to the conclusion that when the respondents used force it was only after 3 shots were fired and therefore they were acting in the right of private defence and in this view of the matter the conclusions reached by the High Court, in our opinion, could not be assailed. We therefore see no reason to entertain this appeal. It is therefore dismissed. The acquittal recorded of all the respondents by the High Court is therefore maintained.

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