

Mahabir Choudhary

Vs

State of Bihar

Criminal Appeal No. 228 of 1987

(M. M. Punchhi, K. T. Thomas JJ)

01.05.1996

JUDGEMENT

THOMAS, J.:-

1. Thirteen persons were arranged in the trial Court to face charges for offences including Section 302 read with Section 149 of IPC, out of which Sessions Court convicted only four of the persons under Section 304, Part I of IPC and Section 25 (1) of the Indian Arms Act. Others were acquitted. The convicted persons were sentenced to rigorous imprisonment for 5 years each on the first count and rigorous imprisonment for 6 months each on the second count. They filed appeal before the Patna High Court. The State of Bihar filed another appeal challenging acquittal of 9 accused as well as the order exonerating the convicted persons of the offence under Section 302, IPC. At the appellate stage there was reversal of fortune for all the arranged persons as the High Court found all of them guilty under Section 302 read with Section 149, IPC. Hence the present appeal by the accused persons by special leave.

2. We are informed that during the pendency of these appeals two of the appellant, (Sheonandan Choudhary and Ram Ishwar Choudhary) have expired. It is also reported that appellant Ganesh Choudhary has become insane and has gone out of his house and his whereabouts are not known.

3. The incident which led to the prosecution of all the 13 appellants happened during the morning hours on 15-10-1974, in which three persons (1. Daroga, 2. Kewal and 3. Hit Narain) died. All the deceased hailed from a village called Malpura which is situated a little north of Kusi Village. A water stream starting from another village (Parsar Ahar—situated south of Kusi village) flowed northwards reaching up to Kusi. Appellants are inhabitants of Kusi Village. As there was acute drought condition, people of Malpura were in need of water.

4. Prosecution case, in short, is thus : The three deceased visited Kusi Village on the eve of the occurrence and cut open a bund which blocked the water flowing further north. This act of the deceased was questioned by some of the appellants, but their protestations were not heeded to by the deceased. On the morning of 15-10-1974, situation further deteriorated with exchange of words between the two factions when those hailing from Malpura forcefully resisted the attempt of the appellants to restore the bund. All the appellants gathered up with guns, lathis, etc. The four appellants who were convicted by the trial Court used guns to fire down one or the other of the three deceased and consequently the deceased died of gun shot injuries. The remaining persons who came from Malpura Village retreated and fled from the scene.

5. Learned Sessions Judge found that the prosecution succeeded in establishing that the four convicted persons fired gun at the deceased. However, learned Sessions Judge took the view that appellants had right of private defence of property as deceased committed mischief by cutting open the bund to block the waterflow. But the trial Court further found that the four convicted persons who used firearms had exceeded their right of private defence and hence they were convicted only of the offence under Section 304, Part I of IPC.

6. The High Court in reversal of the above findings, concluded that all the 13 accused had formed themselves into an unlawful assembly with the common object of murdering the three deceased and that none had the right of private defence at the relevant time.

7. We have no reason to disturb the finding that four appellants had used guns and shot down the three deceased. So the only question for our consideration is whether the High Court was justified in denying initial right of private defence to these appellants.

8. Learned Judges of the High Court have observed :

"Even if mischief had been committed by Malpura people the same was continuing for three days preceding the occurrence and hence there was no occasion for them to take law into their own hands for attacking Malpura people."

High Court further pointed out from evidence that a cut portion of the bund was filled up by Kusi people and there was some altercation and exchange of abusive words, and when Malpura people came shouting, some of them carrying lathis, the four accused took out their guns which they had concealed in the paddy field and started firing indiscriminately. The High Court then proceeded to observe thus :

"In such a situation it is difficult to accept that the accused persons were protected by the right of private defence of person and property. So far as property is concerned mischief was caused to the property but it was not caused under such circumstances as may reasonably cause apprehension in the minds of the accused persons that death or grievous hurt will be the consequence if such right of private defence was not exercised."

The High Court further observed that simply because some person came shouting from Village Malpura was not enough to give rise to a reasonable apprehension that grievous hurt would be inflicted to the accused.

9. Section 97, IPC recognise right of a person not only to defend his own or another's body but to defend his own or another's property even against an attempt to inflict any offensive act as against the property. It is now well-settled that the rule of retreat which Common Law Courts espoused is not relevant under the Indian Penal Code. If a man's property is in imminent danger of being impaired or attacked he has the right to resort to such measures as would be reasonably necessary to thwart the attempt to protect his property. In *Jai Dev v. State of Punjab*, 1963 (1) Cri LJ 495 : AIR 1963 SC 612, this Court has observed that in India there is no rule which expects a man to run away when confronted with a situation where he can exercise his right of private defence.

10. No doubt Section 103, IPC, which deals with right of private defence as against an act which might be mischief or theft or criminal trespass, conditions that there should be reasonable apprehension that death or grievous hurt would otherwise be the consequence. But that provision

deals with the farthest extent of the right of private defence as against the above three categories of wrongs against the property. But a man pitted against such wrongs or even against attempts thereof need not wait for exercising right of private defence until the apprehension of death or grievous hurt is burgeoned in his mind. Penal Code envisages two measures of right of private defence. One is the first degree which shall not reach up to causing of death of the wrong doer. The other is the full measure which may go up to causing death. Both measures are, however, subjected to the restrictions enumerated in Section 99. Section 104, IPC contains the bridle that right of private defence shall not cross the limit of first degree as against acts which would remain as theft, mischief or criminal trespass. But Section 103 recognises extension of the said right up to the full measure, even as against the aforesaid acts but only in such acts or their attempts are capable of inculcating reasonable apprehension in the mind that death or grievous hurt would be the consequence if the right is not exercised in such full measure.

11. The emerging position is, you have the first degree of right of private defence even if the wrong committed or attempted to be committed against you is theft or mischief or criminal trespass simpliciter. This right of private defence cannot be used to kill the wrong doer unless you have reasonable cause to fear that otherwise death or grievous hurt might ensue in which case you have the full measure of right of private defence.

12. When the acts of Malpura people amounted to mischief, appellants had a right of private defence to thwart the same. In the course of exercise of such right appellants who gunned down the mischief makers have obviously acted far in excess of the right of private defence. Nonetheless the first degree of right of private defence cannot be denied to them.

13. We are, therefore, of the view that the High Court was in error in holding that appellants had no right of private defence at any stage. Trial Court was correct in its approach regarding that aspect of the matter. We, therefore, allow these appeals and set aside the judgment of the High Court. The conviction and sentence passed by the Session Court will stand. Appeal allowed.