

Harish Kumar and Another

Vs

State of M.P.

Criminal Appeal No. 572 of 1986

(M. M. Punchhi, Sujata V. Manohar JJ)

09.07.1996

JUDGMENT

PUNCHHI, J.-

1. This appeal under Section 379 of the Code of Criminal Procedure has been preferred by Harish Kumar. Advocate and his brother Ram Sharan, as of right, as they stand convicted for charges of murder and attempt to murder by the High Court of Madhya Pradesh vide order dated 25-8-1986, setting aside the orders of the Court of Session, whereunder the aforesaid two appellants and three others were acquitted of all the charges. Now the acquittal of those three others stands maintained whereas the two appellants have been convicted and sentenced as under:

(i) Harish Kumar under Section 302 IPC and Ram Sharan under Sections 302/34 IPC for the murder of Virendra Kumar. Both sentenced to life Imprisonment.

(ii) Both convicted under Sections 307/34 IPC for individually attempting to commit murder of Chakodi, PW 5 and sentenced to five years rigorous imprisonment.

Both sentences to run concurrently.

2. The parties involved are residents Of Village Madhogarh in the State of Madhya Pradesh. Both the courts below have found that parties have formed factions, one represented by the complainant's side and the other by the accused. It is the case of the prosecution that at a site some distance from the village, the appellant, Harish Kumar, in partnership with one Ram Gulam had taken a Contract for transportation of sand and bajri. in the vicinity thereof were agricultural lands of Jagdish Prasad, PW 7. It is alleged that on the morning of 10-1-1982 when Jagdish Prasad, PW 7 went to his fields, he found that a road had been made by cutting the boundary line of his field for using it as a passage for trucks. Incidentally, Ram Gulam and Harish Kumar were also there. Jagdish Prasad, PW 7 protested to them for the trespass on his land. At that time, both n Harish Kumar and Ram Gulam threatened PW 7 that if he ever tried to obstruct their trucks from passing on that road, he would be shot dead. It is alleged that the matter was reported at the police station.

3. It transpires that the Patwari, on orders from higher officers, made demarcation of the site on 17-1-1982. It emerged that the site where the road was made was owned by one Ramsewak, a nephew of Ram Gulam and that Jagdish Prasad's objection to the user of the road was without any basis.

4. In Village Madhogarh, there is a busy lane/road running from north to south, touching perpendicularly the highway between the towns of Satna and Rewa. Shortly before reaching the T-

junction, there stands erected a stone gate from where a lane bifurcates at a tangent, touching also the same highway. The appellants and their co-accused, who constitute a family by themselves, have their residential house in that lane, just about in the middle between the stone gate towards south and the crossing towards the north.

5. The prosecution case is that at about 4.30 p.m. on 17-1-1982, Chakodi, PW 5 of the rival faction, was passing in that lane. All the five accused were there. The father of the appellants, Narayan Prasad, acquitted co-accused, caught hold of the hands of Chakodi, PW 5, and told him that he was indulging in gundagardi (hooliganism) and that he would be set right by them. Harish Kumar, appellant, was then said to be present and armed with a rifle, and Ram Sharan, appellant too, with a 12 bore gun. Others were empty-handed. On being exhorted by Narayan Prasad to kill Chakodi, PW 5, Harish Kumar fired his rifle at him even when Narayan Prasad was holding the hands of Chakodi. Neither of the two was hurt by the fire as both had sat down instinctively. Freeing his hands from the hands of Narayan Prasad, Chakodi started running away in the lane towards the north, when Ram Sharan fired at him from his 12 bore gun. This time also the fire missed. It is alleged that some pellets of the second fire however hit Manju Soni, Surendra Kumar, Indra, PW 3 and Jagdamba Bai, PW 4 (the former two were not examined at the trial). This is stated by the prosecution to be the first incident. Before its actual happening Ganesh Prasad, PW 1 was informed by one Ganesh Prasad Garg that some quarrel was going on in front of the house of Harish Kumar, appellant. He rushed to the spot along with Narayan Prasad Tiwari, PW II and both claim to have seen the first occurrence in its entirety from the point when Chakodi's hands were caught by Narayan Prasad, accused till the end.

6. Instead of retiring from the tension-ridden place after the first incident, Ganesh Prasad, PW 1 and Narayan Prasad Tiwari, PW 11 both members of the rival faction sat at the close by tea shop of one Ram Sajivan. Other people of the faction such as Ramesh Kumar Gautam, PW 2, Chotey Lal Garg, PW 13, Virendra Kumar Pandey (deceased) and others were also seen in the lane collected near the stone gate towards the south. Allegedly thereafter, the five accused came out from their house when Harish Kumar, appellant, as before, was having a rifle, Ram Sharan as before a .12 bore gun and the remaining three accused this time (on which there is some discrepancy) armed with kattas, i.e., country-made pistols. On the exhortation of accused Narayan Prasad, Harish Kumar, appellant, allegedly fired a rifle shot towards Virendra Kumar Pandey which hit him on the left side of his chest, whereupon he fell down. The five appellants then escaped from the place of the occurrence, This is termed to be the second incident.

7. Ganesh Prasad, PW 1 and the aforementioned persons and some others brought Virendra Kumar to the road junction, and putting him in a truck took him to Satna for medical aid. On the way however, Ganesh Prasad, PW 1 got down from the truck and lodged the first information report at Police Station Kolgawa at 6 p.m. The investigation was set in motion.

8. Virendra Kumar in an injured condition was admitted in the government hospital at Satna. Thereat Indra, Jagdamba Pal, Manju Soni and Surendra Kumar were also brought for medical aid on account of the pellet injuries received by them. Virendra Kumar was given immediate medical attention by Dr N. K. Nema, PW 14. At 6.35 p.m., when asked in writing by the police officer concerned whether Virendra Kumar was in a position to make a statement, Dr Nema replied thereon in the affirmative. That document is Exhibit P-16. Immediately thereafter, a dying declaration of the deceased Exhibit P-14 was recorded by Dr Nema on a single sheet. It is in Hindi and in a question and answer form. When translated, it reads as follows:

Q. 1 : Your name?

Ans. : Virendra.

Q. 2 : Father's name?

Ans. : Sunder Lal.

Q. 3 : Where do you come from?

Ans. : Madhogarh.

Q. 4 : How did you receive this injury?

Ans. : Nil.

Q.5 : Who hit you?

Ans. : Harish Dwivedi hit me. Narayan Secretary. (meaning Narayan Prasad accused who is also known as Narayan Secretary) Ram Sharan too.

Satish was carrying 395. (description of a firearm) Ravi Shankar.

Ram Sharan was armed with 12 (meaning type of the firearm).

Q. 6 : How did the dispute occur?

Ans. : He had come from the front and hit me.

9. Rattan Singh, Sarpanch of Village Kripalpur, PW 19 and Narayan Prasad Tiwari, PW 11 respectively signed the dying declaration as witnesses to its recording in their presence by Dr N. K. Nema, PW 14, who too signed the same being the one who had recorded it. The deceased, Virendra Kumar died at 8.45 P.m. the same day in the hospital.

10. We do not feel obliged to detail out the steps taken by the police to cover and complete the investigation. Yet it would require to be mentioned that Narayan Prasad, accused, was taken in custody by the police the following day on 18-1-1982. At that time he had some simple injuries on his person, which when examined by Dr R. B. Patel, DW 2, three days later on 21-1-1982, were found to be a bruise on the left chest, a lacerated wound on the temporal region, some tenderness on the right chest, right thigh and left leg which were opined to be more than 24 hours' old. The two appellants were however arrested about four weeks later on 11-2-1982 and were sent for medical examination. Dr B. B. Bhattacharya, DW I, found one pellet injury on the right leg and another one on the right forearm of Harish Kumar, appellant, and one pellet injury on the left leg of Ram Sharan. The stuck up pellets thereafter were removed by medical assistance provided during the investigation.

11. The appellants when put to trial had to face a swarm of evidence led by the prosecution with regard to both the incidents. When put the prosecution case, the appellants raised the plea of right of private defence of person and property suggesting that only one incident took place, that the complainant's faction had a grouse against the accused because the decision in the boundary dispute

had gone in their favour on the day of the occurrence, which was the reason for the complainant party to have come in a large number to attack the accused and members of their families and that not only was the father, Narayan Prasad hit by members of the complainant party, but kattas in their hands were used too, causing injuries to both the appellants, which compelled them to defend themselves in exercise of the right of private defence of person as well as property as it was apprehended that their house too would be put to fire.

12. The Court of Session in dealing with each and every aspect of the matter in detail, keeping in view the instances of litigation pending and decided between the said factions replete in testimony, came to the conclusion that the prosecution witnesses were not trustworthy and reliable. It also viewed that the dying declaration was not a trustworthy document because firstly it was vague in content, not conveying any sense, and secondly, the doctor had nowhere written on the dying declaration itself, certifying that Virendra Kumar was in a fit position to make a statement. The statement of Dr Nema that he had done so vide Exhibit P-16 was not considered reliable. This broadly led to the acquittal of the accused persons.

13. On appeal preferred by the State of Madhya Pradesh, a different view was taken by the High Court insofar as the two appellants were concerned. The acquittal of the remaining three co-accused was however maintained. The High Court took the view that even though the prosecution witnesses belonged to one faction, their evidence could not be discarded altogether for two reasons, (i) the defence had not denied and had rather admitted the presence of the prosecution witnesses at the time of the occurrence and (ii) their version at best would require a closer scrutiny and not total discordance. Proceeding on that basis, the High Court approved of their evidence in establishing the guilt of the two appellants, taking corroboration from the dying declaration above-referred to, holding that Dr Nema, a responsible medical officer was not expected to get in league with the faction of the prosecution witnesses and that he is expected to have performed his duties in a responsible manner, having regard to the situation then existing. The High Court further took the view that insofar as Virendra Kumar was concerned, he had specifically named Harish Kumar, appellant, to be the one who had fired at him, which established the charges of murder. This is how the conviction of the appellants has come to be recorded.

14. Learned counsel for the appellants stressed before us that there was only one occurrence, cause of which was the favourable demarcation of land by the Patwari, which angered the complainant party and hence hooliganism was indulged into by them, to the point of hurting Narayan Prasad, the father of the appellants, by inflicting on him four injuries and by using their country-made pistols (kattas) in causing pellet injuries to the two appellants and an apprehension that their house would be put to fire, justifying them to employ their weapons in the right of private defence. In the alternative, it was urged that it could at best be said that the right of private defence had been exceeded.

15. We have carefully gone through the evidence led by the parties and have also taken into account the arguments addressed by respective counsels. We would, to begin with, go with the prosecution (though not positively holding so) that there were two occurrences. To recount, Ganesh Prasad Sharma, PW 1 was informed by Ganesh Prasad Garg (not examined by the prosecution) that there was some quarrel going on near the house of Harish Kumar, appellant: Then, he and Narayan Prasad Tiwari, PW II and Naresh Garg (not examined) went to the place where the quarrel was going on. Both were able to see Narayan Prasad, accused, holding both the hands of Chakodi, PW 5, leading him to some distance, telling him that he was indulging in hooliganism and that they would deal with him. At that time, Harish Kumar, appellant, was having a .315 bore gun (sometimes described

as rifle in the prosecution evidence), Ram Sharan was having a .12 bore gun and the remaining three, i.e., Narayan Prasad, Satish and Ravi Shankar were empty-handed. While, Narayan Prasad was holditli the hands of Chakodi, he exhorted his co-accused to kill Chakodi by firing. Harish Kumar, appellant, is said to have fired from his rifle at Chakodi instantaneously with the intention to kill him. At that moment, both Chakodi, PW 5 and Narayan Prasad, accused, are said to have sat down and saved themselves. It appears to us that this conduct of Harish Kumar, appellant, in abruptly firing at Chakodi, PW 5, without caring for the safety of his father is a conduct which does not stand the test of reason; all the more when no injury on Chakodi, PW 5 or Narayan Prasad was resulted. It is further alleged that having sat on the ground and thereby saving himself, he extricated himself and ran away whereafter Ram Sharan fired from his .12 bore gun towards him. This time also he was not injured. Site Plan, Exhibit P-26, prepared by the Patwari, PW 16, goes to show that the persons who were hit by the pellets of the second shot were present in the northern portion of the lane from which it could safely be inferred that Chakodi had run, if at all, towards the northern side so as to attract a fire being made in that direction. Now, when we advert to the evidence of Ramesh Kumar Gautam, PW 2, he says that on hearing of a shouting 'killed' 'killed', made by Chakodi, PW 5, the latter on the asking of the former had told him that the two appellants had fired at him in the manner above-stated. PW 2, further says that when Chakodi PW 5, ran away towards his house, then he, Virendra Kumar deceased and Chottey Lal Garg came and sat near the old stone gate wherefrom they saw the accused coming fully armed, i.e., both the appellants in the manner aforestated and the other three accused with kattas. This would mean that when Chakodi is supposed to have run away towards the north, PW 2 and his companions including the deceased had walked from the northern side down the lane and had assembled at the stone gate after passing in front of the house of the accused. In this interval, the three acquitted accused are suggested to have armed themselves with kattas. The need to arm themselves could only be felt if they were anticipating further trouble at the hands of the complainant's faction in the form of a second occurrence in a bigger way. The High Court has viewed the factum of Chakodi sitting down and escaping rifle shot injury at the hands of Harish Kumar, appellant, to be an exaggeration. Yet the High Court convicted Harish Kumar for offence under Sections 307/34 IPC. It appears to us that the High Court was wrong in convicting Harish Kumar, appellant after such finding but right in coming to that conclusion, but we would not stop at that and go further to hold that the account of the first occurrence has not been placed by the prosecution before the court in a true manner; more so on account of the statements of Indra, PW 3, Jagdamba Bai, PW 4, Chakodi, PW 5 and Sumitra Nandan PW 6, father of Indra, PW 3.

16. Now, according to Indra, PW 3, she was in the lane in order to go to buy some bangles and when she got near the crossing (meaning towards the north) she heard a shot fired at Chakodi PW 5 whereafter she entered in somebody's house. She claims to have been hurt by the pellets of the second shot made by Ram Sharan, when she was peeping to see things happening. Otherwise she states she never came out of the house in which she had taken refuge. As it appears to us her statement is unnatural and does not inspire confidence, because if she had entered a house, it is difficult to conceive as to how could she have received a pellet injury on her neck while peeping, unless she had exposed that portion of her body for the pellet to hit her, which was next to impossible while peeping. Her word in that regard of having seen the appellants first is thus not reliable. Similarly, PW 4, Jagdamba Bai, could not say as to who had fired the shot. She was declared hostile. On cross-examination by the public prosecutor, she disclosed that being weak of eyesight and having become scared, she did not see the shot being fired and by whom. Her evidence too in that regard is of no use to the prosecution. Insofar as PW 5, Chakodi is concerned, when he had taken to heels after the fire of Harish Kumar which firing we view with suspicion, he has no

basis to claim that he could see Ram Sharan firing the second shot at his back. Sumitra Nandan Garg, PW 6, the father of Indra, PW 2 claims to be present in the lane when Ram Sharan appellant came before him at a distance of 10 or 15 yards with a .12 bore gun. The witness claimed that he shouted at Ram Sharan not to fire at him, but all the same Ram Sharan did fire at him. He claimed that he bent down a little to avoid the fire. While so, a boy told him that his daughter had been injured by a gunshot. Now, he would have us believe that a separate gunshot was fired at him. This is not possible otherwise we find he is connected with Chakodi, PW 5, as a brother in relationship being a collateral and thus interested. Such evidence therefore does not inspire confidence to accept the veracity of the first occurrence and to maintain conviction on such accusation against Ram Sharan, on the unreliable word of Chakodi, PW 5, Sumitra Nandan Garg, PW 6, Indrawati, PW 3 and Jagdamba Bai, PW 4. Their evidence being unacceptable and untrustworthy on the charge of murderous assault on Chakodi, would entitle Ram Sharan, appellant to acquittal for offence under Sections 307/34 IPC and sequently would Harish Kumar, appellant too deserve acquittal for offence under Sections 307/34 IPC. On recording such verdict of acquittal of both the appellants for offence under Sections 307/34 IPC, Ram Sharan appellant, also would be entitled to acquittal under Sections 302/34 IPC on account of the murder of Virendra Kumar for the same reasoning as has been adopted by the High Court to maintain the acquittal of the other three accused, since he too had not done any overt act towards committing the murder of Virendra Kumar. We therefore order acquittal of Ram Sharan of all the charges.

17. Now coming to the second occurrence, the sole accused who caused the sole injury to the deceased was Harish Kumar, appellant. On his behalf capital was made as to the injuries on the person of his father, on himself and his brother Ram Sharan to countermand and contend that he had a right of private defence of person as well as property. The High Court has leaned sufficiently on the dying declaration as the corroborative material to the fictional nature of the prosecution evidence. We need not emphasize herein the value of a dying declaration, which is well understood and well appreciated in legal annals. Here, the deceased, according to Dr Nema, when giving the dying declaration was surrounded by very many people and police personnel. Dr Nema had asked the policemen to remove the crowd, but the policemen were unable to do so. The crowd kept present in the room when he went near the deceased to record his statement. According to him, when he was talking to the deceased, those persons kept talking to Virendra Kumar too and to each other. Dr Nema frankly admitted that earlier to the instant case he never had an opportunity to record a dying declaration of any patient. Before recording the dying declaration however, he had given to the patient sometimes earlier, a Himosil Morphia injection. The effect of the same necessarily would have brought the patient to some stupor. In spite of his delicate condition and grave surroundings, he was able to say categorically to Dr Nema that it was Harish Kumar, who had hit him fatally. The dying declaration therefore would at best fix the appellant, Harish Kumar, as the author of the fatal injury, but that by itself is not a corroborative factor to establish the murder charge, having regard to the plea taken by Harish Kumar. When the prosecution witnesses say that Harish Kumar, appellant, is responsible for the killing of the deceased and the deceased in his dying declaration states similarly, that only establishes that unless the plea of self-defence of person and property set up by the appellant gets proved on the test of probabilities, the prosecution case shall stand proved provided it stands on its own. So the dying declaration is not the tilting factor as viewed by the High Court because the same does not by itself walk over the plea of self-defence set up by the appellant, Harish Kumar. That would have to be viewed on its own merit.

18. The injuries on Narayan Prasad were simple in nature. The prosecution has not owned them. The High Court has opined that these could have been caused because of a fall or striking against a hard or pointed substance. The fact remains that these injuries were found on the person of Narayan

Prasad when arrested a day later than the occurrence. He was medically examined late though, after three days. Besides, it is contended that the pellet injuries received by the appellant as well as by Ram Sharan, co-accused, were the result of the assault mounted on them because many members of the complainant party had carried and used kattas. Our view with regard to these two suggestions on careful consideration is that the injuries on the father are superficial in nature and could not have been the result of a deliberate attack on him. The situs of a particular injury is not the sole basis to see whether a friendly hand could have caused it or not. The nature of injury too can speak prominently. If the father had received injuries at that juncture when the two appellants had also received pellet injuries, then we would have expected the appellants too to have surrendered themselves along with their father. Their pellet wounds at that time would have been fresh, and the totality of circumstances could perhaps have given a probable picture in their favour. Here, apparently, the injuries of the father were flung as a defence suggestion on the next day of the occurrence but when that did not ignite the imagination of the investigation, then the arrest of the appellants and their treatment was designedly delayed by viewing something else. Thus, on account of the presence of injuries alone on Narayan Prasad, Harish Kumar and Ram Sharan, accused, we are not prepared to probabalise their defence in these peculiar facts and circumstances.

19. That is not however the end of the road. We have recorded our views with regard to the first occurrence. We may add to those that some incident between the parties definitely happened but we stand deprived of a truthful account of the same. So figuratively there was a first occurrence which led to the second one. Some unpleasantness had occurred earlier wherefore some of the members of the complainant party had kept being there and others had started assembling in the lane in which the house of the appellants lay. As members of a faction, it is difficult to believe that they would have come there unarmed and less in number and be there for no cause, all the more knowing fully well that amongst the appellants were 2 licensed weapon- holders. It is alleged by the prosecution that it was Harish Kumar, accompanied by his companions, who first stepped forward towards the complainant party, present near the stone gate. Here then was direct confrontation. In the circumstances therefore, the possibility cannot be ruled out that Harish Kumar, becoming apprehensive of danger to himself and his family members chose to be defensive in becoming offensive, because of the first incident; without having the requisite intention to cause the murder of any particular person. He therefore fired but only once and the fire was not repeated. There was no indiscriminate firing. His act would therefore, be termed as one in exercise of the right of private defence of person entitling him to acquittal. It is so ordered.

20. As a result, the appeal of both the appellants is allowed. They are acquitted of all the charges. The judgment and order of the High Court is set aside and the order of the Court of Session is restored.