Jai Bhagwan

Vs

State of Haryana

Criminal Appeal No. 167 of 1999

(K. Venkataswami, S. S. Mohammed Quadir JJ)

09.02.1999

JUDGMENT

S. S. Mohammed Quadir J

1. Leave is granted limited to the question of nature of offence committed by the appellants and quantum of sentence therefor.

2. The facts giving rise to this appeal, in brief, are as follows :

> The gravamen of the charge against appellants Nos. 1 and 3, Jai Bhagwan (A-1) and Sushil (A-3), is that they caused the death, by murderous assault, of their uncle Prithvi (hereinafter referred to as `the deceased') and against appellant No. 2, Anil (A-2), is that he attempted to murder, Wazir Singh (PW-6) on January 21, 1992 at about 7.30 at about 7.30 p.m. the dispute between the accused group on one hand and the deceased and his sons on the other which resulted in this unfortunate event relates to four killas of land. The land was owned by the accused and was so declared by the decree of the civil court in Suit No. 676 of 1984 dated July 17, 1984. The deceased and his brother, Hawa Singh, challenged the validity of the said decree in Civil Suit No. 692 of 1984 which was dismissed by the learned Sub-Judge, Ist Class, Bhiwani vide judgment, Exhibit DX/4 (Decree Sheet, Exhibit DX/5). There is record (Exh. DX/6) to show that the accused were put in possession pursuant to partition of the land by the Assistant Collector and the warrant of possession, though the deceased and his sons were found to have been in possession and cultivation of the said land for the last thirty years. The High Court recorded that the occurrence took place in the land in possession of the appellants. The deceased along with his son Wazir Singh (PW06), his daughter-in-law, Smt. Krishna (PW-8) and his daughter Smt. Chander (PW-5) went to the land to irrigate the same and told A-1 that he would have the turn of water and irrigate the land and that after settlement of the dispute, A-1 could do it. this was objected to by A-1 who stated that he would settle the matter right then. A-1, then, started hurling abuses at the deceased and during the alteration, Smt. Parwari, mother of A-1, exhorted him to give a blow on the vertex to bring them to senses and under control. then A-1 who was armed with *ballam* dealt a blow with it on the head of the deceased. A-3 dealt a blow with *churra* (knife) on the face of the deceased. Thereafter, the deceased fell down. While he was lying down, A-2 dealt a blow with *gundasi* and the other caused several injuries on his body. In the process, PW-5, PW-8 and PW-6 were also injured. A-2 was responsible for injuries on PW-6. They were taken by Hawa Singh (PW-11) to hospital where they were examined by doctors and

> Prithvi (deceased) was declared dead. On considering the evidence of the eye-witnesses, PWs 5, 6 and 8, medical evidence of PWs 1, 2 and 7 and post-mortem report Exh.PA, the trial court negatived the plea of self-defence, found A-1 and A-3 guilty of offence under Section 302/34 IPC and sentenced them to undergo imprisonment for life and to pay fine of Rs. 2,000/- each, in default of payment of fine, to undergo further rigorous imprisonment of one year and convicted A-2 under Section 307 IPC and sentenced him to rigorous imprisonment for seven years and to pay fine of Rs. 2,000/-, in default of fine, he was directed to undergo rigorous imprisonment for one year. It was further directed that out of the fine amount, Rs. 1,000/- be paid to PW-6, injured witness, and the balance of the amount be paid to the widow of the deceased. The appellants preferred appeal against their conviction and sentence in the High Court of Punjab and Haryana. The High Court set aside the conviction and sentence under Section 302/34 IPC and convicted A1 and A3 under Section 304, Part-I read with Section 34, IPC and sentenced them to seven years' rigorous imprisonment and altered the conviction of A2 to one under Section 326 IPC and sentenced him to rigorous imprisonment for three years; sentence of fine was, however, confirmed by allowing their appeal on January 28, 1998. From that judgment of the High Court this appeal arose.

3. Mr. U.R. Lalit, learned senior counsel appearing for the appellants, contended that the appellants were acting in self-defence of their property so they should have been acquitted of the offences charged and that in any event A-1 and A-3 could have been convicted under Section 304 Part-II for their individual overt acts as Section 34 could have no application to this case and that A-2 could not have been convicted under Section 326 IPC. Ms. Ms. Shikha Ray Pabbi, learned counsel appearing for the State of Haryana, argued that the accused were not in possession of the land in dispute and that the deceased and his sons had been in possession for more than thirty years and the trial court recorded the finding that the accused were not in possession of the land; their plea of right of private defence was not accepted by the trial court; on the facts found they were rightly convicted by the High Court under Section 304, IPC.

4. The plea of the appellants is one of self-defence of property. Sections 103 and 104 IPC recognise the right of private defence of property. They read as under :

> "103. When the right of private defence of property extends to causing death. - The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :-
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> First - Robbery;
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> Secondly - House-breaking by night;
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> Thirdly - Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;
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> Fourthly - Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if

such right of private defence is not exercised."

"104. When such right extends to causing any harm other than death - If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong-doer of any harm other than death."

Where Section 103 is attracted, the right of private defence of property will extend to voluntary causing of death or of causing any other harm to the wrong-doer, subject to the provisions of Section 99 IPC; and the offences committing of which or the attempt to commit which will justify exercise of right of private defence of the property are as follows : (1) Robbery; (2) House-breaking by night; (3) Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property; (4) Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. On the facts of this case, stated above, there is no scope to invoke Section 103 IPC as none of the aforementioned offences were committed or attempted to be committed by the deceased and his relations.

5. Section 104, IPC will apply if the wrong-doer commits or attempts to commit any of the following offences : (1) theft, (2) mischief or trespass not of the description which is covered under Section 103, subject of course to restriction mentioned in Section 99 IPC; and in such a case the right of private defence of property would extend only to causing harm other than death to him.

6. From the facts, it is clear that the action of the deceased and his sons coming to the land in possession of the accused group was to irrigate the land which, on the facts of this case, could only amount to criminal trespass within the meaning of Section 441 IPC. The right of the accused-appellants, therefore, extended only to causing of harm other than death. Regarding A-1 and A-3 it has been noticed that A-1 gave a blow with *ballam* on the head of the deceased and A-3 gave a blow on his face with knife.

7. Dr. S.C. Agarwal (PW-1), who conducted the post-mortem on the dead body of the deceased, found the following injuries :

"1. There was a fracture of the right arm in the Middle and on dissection subcutaneous maemotoma was present.

2. There was an incised would of 2" x 1" x 1" and 0.8" deep on the right inter space of thumb and index finger with cutting of the under lying tissues.

3. There was a superficial lacerated would of size .8" x .6" on left elbow posteriorly.

4. There was bleeding from right ear.

5. There was distortion and fracture of the left little finger at the proximal phalanx. Subcutaneous maemotoma was present.

> 6. There was a purported would with laceration of the size 1" x .6" and perforating to the buckle mucosa (mouth). It was horizontally placed on the lower side of the right cheek 1/2 below and lateral to the angle of mouth. There was one more minor stabbed wound of 0.4" x 0.2" and 0.5" deep .1/2" blow to the previous cheek injury. Blood clots were present on dissection. There was fracture of the right side of the mandible and it was in almost two pieces. Teeth were intact. There was also mild appreciable defused swelling of indistinct colour and margins on the right side face cheek area extending up posterior ear area. On dissection, subcutaneous haemotoma was present and right ear was bleeding.

7. There was a big lacerated would of size 3.1/2" x 0.8" vertically placed bone deep on the right parietal region was found of the size 1.1/2" x 1" which was extending linearly to downwards upto front to parietal suture on the right side, subcutaneous harmotoma was present or dissection. On opening of the craneal cavity, there was sub-dural haemotoma on the right side on removal of brain matters, small amount of blood collection was found in middle craneal fossa with fracture of the base of the skull (petrous part of the temporal bone). All other organs were found healthy and pale. the heart was empty in all chambers. the stomach contained good amount of partially digested food material." The post-mortem certificate, Exh. PA, was proved by him. He opined that death was caused due to hemorrhage and shock as a result of injuries on the head and face and that injuries 6 and 7 could be caused by *ballam,* Exh. P6 and *Gandasi,* Exh. P7. Injury No. 7 is attributable to A-1 and injury No. 6 is attributable to A-3. Both the injuries are on vital parts of the body.

8. A-1 and A-3 on the land were armed with deadly weapons. On the exhortation given by their mother, both of them, one after the other, murderously assaulted the deceased with the weapons with which they were already armed. It was not a case of free fight and it cannot be said that they did not intend to cause the injuries inflicted by them. They intended to cause injuries and did inflict the said injuries which caused the death of Prithvi, the deceased. Therefore, they are not entitled to protection of Section 104, IPC. But for the fact that they exceeded the right of self-defence of property under Section 104 IPC, the offence committed by them would have been one under Section 302 IPC.

9. To apply Section 34, IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, section 34 cannot be invoked. In every case it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case.

10. From the above discussion, it follows that A-1 and A-3 have been rightly convicted under Part-I of Section 304/34, IPC by the High Court. However, having regard to the facts and circumstances of the case, in our view, it would meet the ends of justice if we reduce the sentence from seven years to five years and accordingly we do so.

11. So far as A-2 is concerned, he has been convicted by the High Court under Section 326 IPC. Since he is one of the co-owners and possessor of the land and the offence committed by him is causing grievous hurt by dangerous weapon he is protected as he did so in exercise of right of private defence of property under Section 104, IPC, so he cannot be found guilty of offence under Section 326 IPC. A-2 is, therefore, acquitted and is directed to be set free forthwith unless he is

required to be incarcerated in any other case.

The appeal is accordingly allowed in part.