SUPREME COURT OF INDIA

Krishnan

Vs

State of Tamil Nadu

Appeal (Crl.) 631 of 2000

(G. P. Mathur and R.V. Raveendran, JJ)

14.08.2006

JUDGMENT

R V RAVEENDRAN, J.

This appeal by special leave is directed against the judgment and order dated 10.2.2000 of the Madras High Court in Criminal Appeal No.571/1989. The appellant and his son Samivel were accused 1 and 2 in Sessions Case No.139/1987 on the file of the Sessions Judge, South Arcot district. The appellant was tried for the offence of murdering his elder brother Rathina Gounder. The appellant and his son Samivel were also charged with the offence of causing hurt to Elumalai (son of the deceased). The trial court vide judgment dated 27.4.1989 convicted the appellant under section 302 Indian Penal Code, 1860, and sentenced him to undergo life imprisonment. The trial court also convicted both the appellant and his son Samivel under section 323 Indian Penal Code, 1860 and sentenced them to 3 months' rigorous imprisonment. In a separate proceeding, in SC.No.140/1987, Sekar, the juvenile son of the appellant, was also found guilty for causing hurt to Elumalai and was ordered to be detained in a juvenile home for six months.

2. Feeling aggrieved, the appellant and his first son Samivel filed Crl.A. No.571/1989 and Sekar filed a separate appeal in Crl.A. No.629/1989. Both appeals were disposed of by the High Court by a common judgment dated 10.2.2000. Criminal Appeal No.571/1989 was allowed in part. The conviction and sentence imposed on the appellant under section 302 was set aside and instead, he was convicted for the offence punishable under section 304, Part II, Indian Penal Code, 1860, and

sentenced to undergo RI for 5 years. The conviction and sentence of the appellant and his son Samivel under section 323 was not disturbed. Criminal A.No.629/1989 filed by the appellant's juvenile son Sekar was allowed and he was acquitted. Aggrieved by his conviction under section 304, Part II, the appellant has filed this appeal, contending that he ought to have been acquitted by accepting his plea of self-defence.

3. The prosecution case, in brief, was as follows:

3.1) The appellant and his elder brother Rathina Gounder were residing with their respective families in two adjoining portions, with a common open yard in front of their houses. The appellant used to tether his bullocks in the common yard. There was also an open sewage drain in the common yard. To prevent pigs coming to the drain and causing nuisance, Rathina Gounder's wife Kasiammal covered the said drain with thorn sticks on or about 5th or 6th of June, 1997. The appellant removed the thorn sticks as they came in the way of tethering his bullocks. There was a simmering discord for about 3 days about the thorn fencing of the drain between the families of the two brothers, that is, Rathina Gounder, his wife Kasiammal and his son Elumalai on the one hand, and appellant (Krishnan) and his two sons Samivel and Sekar on the other.

3.2) On 9.6.1987 at about 5 p.m., the appellant removed the thorn sticks which had been placed by Kasiammal. Elumalai (PW-1) put back the thorn sticks in place. At about 8 p.m., the appellant again removed the thorn sticks and tethered his bullocks. Rathina Gounder who saw the thorn sticks being removed, came and replaced the thorn sticks over the drain. The appellant again removed them. The action of Rathina Gounder placing the thorn sticks over the drain and the appellant removing them, went on for a while and a quarrel developed. The appellant told Rathina Gounder "You are always doing like this. I will see." and took one of the thorn sticks lying on the ground and hit Rathina Gounder on his head. When the appellant tried to hit Rathina Gounder with the thorn stick for a second time, his son Elumalai tried to intervene and received the blow causing injury to his right palm. Thereafter the appellant pushed Rathina Gounder who fell down and a protruding stone pierced near the arm-pit. The appellant again hit Elumalai on his forehead with the thorn stick. His two sons Samivel and Sekar also hit Elumalai. Thereafter, appellant and his two sons ran away. Elumalai collected the thorn stick dropped by the appellant and kept it. By then it was about 10 P.M.

3.3) Rathina Gounder was taken to Thirukovilur Government Hospital. Dr. Bhaskaran (PW-3) examined him and referred him for further treatment to Cuddalore Government Hospital. However, Kasiammal and others took Rathina Gounder to Jipmer Hospital, Pondicherry where Rathina Gounder succumbed to his injuries on 12.6.1987 at about 12.45 p.m.

3.4) Elumalai also got himself examined at Thirukovilur Government Hospital. When he was in the said hospital, on 10.6.1997 at about 6.00 A.M., the Sub-Inspector of Police attached to Arakandanathur Police Station came and enquired about the incident and recorded his complaint.

4. The prosecution examined 13 witnesses. Elumalai (PW-1), Thangaraj (PW-2), Pitchaimuthu (PW-4) and Kasiammal (PW-5) were the eye-witnesses. Elumalai, son of the deceased was an

injured eye- witness. Kasiammal was the widow of the deceased, Thangaraj was the nephew of both Rathina Gounder and the appellant, Thangaraj and Pitchaimuthu were neighbours. All the four eye-witnesses narrated the incident broadly in accordance with the prosecution case. They also stated that as there was a street-light nearby they could see what happened clearly. M. Subramaniam Pillai (PW-9) was the Panchayat President who had switched on the street light opposite Rathina Gounder's house, which had lit up the area when the incident took place.

Dr. Bhaskaran (PW-3) had examined the deceased and his son Elumalai for their injuries at Thirukovilur Government Hospital and issued the injury certificates (Ex. P-2 & P-3). Atul Murari (PW-6), Associate Professor of Forensic Medicine, Jipmer Hospital, Pondichery, conducted the post-mortem on the body of the deceased. Both doctors opined that death occurred on account of the head injury (lacerated wound of scalp 3cm X 1cm X bone deep over the vault. PW-6 stated that the corresponding internal injury was separation of coronal suture extending literally on the right side of temporal region, total length of the fracture being 13 cm, extra-dual haematoma in the right temporal region and generalized subsural and subarachnoid haemorrhage. PW-6 has opined that the head injury with corresponding internal injuries were sufficient in the ordinary course of nature to cause death.

Sheikh Kani (PW-12) was the Sub-Inspector of Police at Arakandanallur Police Station who recorded the statement of Elumalai and registered Crime No. 196 of 1987 and prepared the FIR, sketch of the place of occurrence (Ex.P16) and drew the Mahazar (Ex. P-13). He also seized the thorn stick of three feet length used by the appellant (MO No.1) and collected blood stained soil from the spot (MO. No.3). He also recorded the statement of Kasiammal and other witnesses. He stated that he arrested the appellant on 11.6.1986 at 6 A.M. G. Jagadeesan (PW-13) was the Investigating Officer, who took over the investigation on 13.6.1987 at 2.00 P.M. PW-7 to 11 were formal witnesses.

5. The trial court found that the evidence of the four eye-witnesses (PWs.1, 2, 4 and 5) clearly established that the appellant hit Rathina Gounder on the head with the thorn stick during his quarrel with Rathina Gounder. The trial court rejected the case of self-defence put forth by the appellant for the following reasons :

a) There was no evidence to show that the appellant was injured during the incident.

b) The appellant did not state in his statement under section 313 Indian Penal Code, 1860, that he hit Rathina Gounder in self defence, to avoid danger to his life.

c) The appellant did not establish that he gave a complaint to Arakandanallur Police Station in regard to the attack by Rathina Gounder and Elumalai, as no such complaint was recorded in the said Police Station.

The trial court further held that the appellant had acted with the intention of causing bodily injury to

Rathina Gounder and such bodily injury inflicted by him being sufficient in the ordinary course of nature to cause death, he was guilty of culpable homicide amounting to murder under section 300 (Thirdly) of Indian Penal Code, 1860

6. The High Court affirmed the finding that Rathina Gounder died as a result of the head injury caused by the Appellant, by hitting him on the head with the thorn stick. It also held that the evidence of PWs.-1, 2, 4 and 5, that the appellant suddenly picked up the thorn stick lying nearby during a quarrel and hit the deceased as also the fact that the appellant did not come to the place of occurrence with any weapon, established that there was no pre-determined or pre- meditated plan or intention on the part of the appellant to cause the death of the deceased or cause any bodily injury as is likely to cause death; and that the appellant had hit the deceased with the knowledge that his act of hitting the deceased on his head was likely to cause death. The High Court was of the view that the thorn stick used (of about three feet length) was not a dangerous weapon. Consequently, it held that the appellant had to be convicted under section 304 Part II, Indian Penal Code, 1860

7. The said decision of the High Court is under challenge in this appeal. The learned counsel for the appellant submitted that the High Court did not consider the plea of self-defence though specifically raised. We find that the entire Memorandum of Appeal before the High Court concentrated and revolved upon the plea of self-defence. The grounds referred to the evidence of PW 2 Thangaraj and the several circumstances, which the appellant relied on to make out a case of self defence. The High Court ought to have considered the said plea which goes to the root of the matter.

8. A perusal of the cross-examination of PW-1, PW-2, PW-4 and PW-5 and the statement under section 313 clearly shows that the appellant had put forth the following pleas of self-defence : That Rathina Gounder and his wife and son were jealous of the appellant as he was maintaining bullocks and cultivating the land; that therefore, they were trying to obstruct the tethering of his bullocks in the common yard by putting thorn sticks in that place; that there was no drain/gutter in the common yard and therefore, the question of covering any drain by thorn sticks did not arise; that the thorns were pricking his bullocks and making it difficult for him to tether his cattle; that whenever he removed the thorns and tethered his cattle, Rathina Gounder and his son Elumalai were threatening that they will assault him and kill him; that on the date of incident, Rathina Gounder and his family had thrown thorny sticks next to the bullocks tethered by the appellant, the said thorns were pricking the cattle and made it difficult for the cattle to lie down; that, therefore, he went and removed the thorn; sticks; that at that time, Elumalai (PW-1) came and held his neck and Rathina Gounder came and held his hair-locks; that when he tried to release himself, Rathina Gounder bit him next to the right thumb and blood started oozing out; that Rathina Gounder and Elumalai also took a stick each and slashed towards his head; that he raised his hands to cover his head, and that the blows fell on both his elbows resulting in lacerated wounds. The appellant also stated that fearing for his life, he ran away and went to the Arakandanallur Police Station around 12 O'clock mid night and explained what happened and showed his wounds. The Sub-Inspector asked him to give a complaint and he got a complaint written and gave it. The Sub-Inspector took it and stated that he has to go out; that he came back around 2 A.M. in the morning; that within a short time, Rathina Gounder, Elumalai, Kasiammal and some others came to the Police Station and the Sub- Inspector took some signatures from Elumalai, and thereafter they went back; that the Sub-Inspector detained him in the police station for two days and arranged for treatment for the hand wounds through a Homeopathy Doctor; and that only on Thursday, he sent him to court. He also stated that he did not hit Rathina Gounder or Elumalai.

9. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under section 105 of the Indian Evidence Act, 1872 (read with section 96 to 106 of Indian Penal Code, 1860) to establish a plea of private defence and the burden that is cast on the prosecution under section 101 of the Indian Evidence Act, 1872 to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability (vide Partap vs. State of U.P. ; Salim Zia vs. State of UP ; and Mohinder Pal Jolly vs. State of Punjab .

In Sekar vs. State 6, this Court observed : A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it. If the same is available to be considered from the material on record.

(Emphasis supplied).

The above legal position was reiterated in Rizan v. State of Chhattisgarh After an exhaustive reference to several decisions of this Court, this Court summarized the nature of plea of private defence required to be put forth and the degree of proof in support of it, thus :

"Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets off the plea of self- defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The

question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea." [Emphasis supplied]

10. We will examine the evidence, keeping in view, the said principles. Thangaraj (PW-2) is a neighbour and nephew of both the deceased and the appellant. In his examination-in-chief, he gave details of the quarrel and altercation between Rathina Gounder and the appellant in regard to removal of the thorny sticks covering the drain, and stated that during the quarrel, Krishnan took a thorn stick that was lying nearby and hit Rathina Gounder on his head; that when the appellant tried to hit Rathina Gounder the second time, Elumalai tried to prevent it and sustained injury to his right hand; and that the appellant thereafter pushed Rathina Gounder who fell down. In the cross-examination, he stated that as it was summer, water was not stagnating in the drain situated in the common yard and there was no nuisance by pigs; that because of the thorn sticks, the cattle had no place to rest; that when Rathina Gounder and the appellant were pushing each other during the quarrel regarding thorn sticks, Rathina Gounder bit appellant's hand between the right thumb and index finger; that when Rathina Gounder and Elumalai attempted to hit the appellant with a thorn stick, the appellant tried to prevent it by covering his head with his hands and the blows landed on both his elbows resulting in wounds. He has also stated that he had accompanied Rathina Gounder and others to Arakandanallur Police Station at 2 A.M. that then he saw the appellant sitting in the police station and at that time also he saw the injuries on the hands of the appellant.

The above evidence clearly and completely corroborates and supports the case of self-defence put forth by the appellant. What is significant is that the PW-2 was not subjected to any re-examination on this aspect nor was he sought to be declared hostile. In fact, the manner in which he has given evidence in examination-in-chief and in the cross- examination shows that he was not a partisan witness and was giving evidence in a natural manner. The said evidence of Thangaraj (PW-2), which fully supports the case of self-defence put forth by the appellant, has not been considered by the trial court and completely ignored by the High Court.

11. We may also refer to the evidence of the other eye-witnesses in this behalf. Elumalai (PW-1) has of course denied the suggestions that the deceased bit the right hand of the appellant, and that he and the deceased had hit the appellant and the blows had landed on Appellant's elbows when he raised his hands to cover his head. When he was asked whether he noticed the blood on the hands of appellant, he stated that he did not "notice" it. He admitted the differences and quarrels between his family and the appellant in regard to tethering of cattle by the appellant and keeping thorny sticks in the common yard. Pitchaimuthu (PW-4) in his cross-examination has stated that he did not notice whether Rathina Gounder and the appellant were pushing each other but he noticed Rathina Gounder repeatedly putting the thorn sticks and the Appellant repeatedly removing them; that there was no stagnant water in the drain, over which the thorn sticks were being placed; and that both

Rathina Gounder and the appellant, quarrelling and pushing each other came from the drain area to the road. He states that he did not see the deceased and Elumalai hitting the appellant and that he did not know whether the appellant received injuries to his hands and whether the blood was oozing from the wounds. It is evident that PW-4 was not a witness to the entire incident and that he saw only a part of it. Kasiammal (PW-5), in her cross-examination admitted that there were altercations on account of tethering of cattle and removing of thorny sticks; that between 8 & 9 P.M. on the day of the incident, both Rathina Gounder and the appellant were respectively putting and removing the thorn sticks repeatedly, and that when the appellant hit her husband with the thorn stick, her husband did not fall down. She, of course, denied that Rathina Gounder bit the appellant in his hand and also denied that Rathina Gounder and Elumalai hit the appellant with sticks.

12. Out of the four eye-witnesses, two (PWs.1 and 5) are the son and widow of the deceased. The evidence of these two witnesses establishes that there was enmity and an ongoing dispute in regard to the use of the common yard; That on the day of the incident, the entire quarrel arose because PW-5 initially placed the thorn sticks over the area where the appellant was tethering his cattle, and the deceased and PW 1 prevented the appellant when he tried to remove them; and that as a consequence there was an altercation between the deceased and the appellant when the deceased repeatedly placed the thorny sticks and the appellant repeatedly removed them. In fact the evidence of the two independent eye-witnesses- PW-2 and PW 4, clearly show that there was no stagnant water in the drain and therefore, there was no need to place any thorn sticks over that area. It is clear that the deceased, PW-1 and PW-5 were bent upon preventing the appellant from tethering his cattle in the common yard. In view of the admitted discord and disputes between the family of the deceased and the appellant, and being acting participants in the dispute which led to the incident, it is but natural that these two witnesses will highlight only the acts of the appellant and not the acts of the deceased and PW-1.

13. In regard to the evidence of PW-4, Pitchaimuthu, we find that he saw the incident from a distance. He came out of his house only after the altercation/quarrel had gone on for some time and, therefore, had seen only a part of the incident. He admits that the altercation centred around the appellant asking why the thorn sticks were put at the place where he was tethering his cattle, and the deceased asking why appellant was removing the thorny sticks. He also admits that when he first saw the incident, both were holding the thorny sticks and pulling each other. He also admits that the deceased was repeatedly placing the thorny sticks and the appellant was repeatedly removing them. He also admits that both the deceased and the appellant quarreling and pushing each other, came from the drain area to the road. Therefore, the evidence of PW-2 Thangaraj becomes crucial. He had seen the incident from the beginning and has narrated what had happened. He has clearly admitted that when the deceased and the appellant were quarreling and pulling each other, Rathina Gounder bit the appellant in his hand between the right hand thumb and the index finger, and that both the deceased and his son Elumalai attacked the appellant with sticks and to protect his head, the appellant raised his hands and got injured in the elbow. It becomes obvious that apprehending grievous hurt, he took the thorn stick lying near by and hit the deceased to protect himself. The appellant was neither armed with any weapon when he came to the spot nor bring any thing from his house after the quarrel started. He just picked up the thorn stick which was lying at the spot. This clearly probabilises a case of self-defence.

14. Another significant aspect to be noticed is that both Thangaraj (PW-2) and Pitchaimuthu (PW-4) admit that there was no stagnant water in the drain situated in the common yard. We have referred to

this fact earlier also. Therefore, the case of the prosecution that the pigs were coming and causing nuisance in the stagnant water in the drain and therefore, thorn sticks were placed by the family of the deceased to cover the drain, is proved to be false. It became clear that the deceased and his wife and son were putting thorny sticks to prevent the appellant from tethering his cattle and they started the discord.

15. The trial court considered the plea of self-defence but rejected it on the ground that the appellant did not state in his statement under section 313 Code Of Criminal Procedure, 1973. that he had hit Rathina Gounder in self-defence. Obviously, an accused cannot be expected to admit that he had inflicted the blow that killed the deceased. Where the plea of the accused, when read with the evidence of the eye witnesses, brings out a set of facts and circumstances showing that the accused acted in exercise of the right of private defence, the fact that the accused in his 313 statement only referred to the acts of the deceased and his son hitting him and did not admit that he hit back the deceased, is not a ground to reject the plea of private defence. The approach of the trial court to the plea of private defence was erroneous. The High Court did not go into this aspect at all.

16. It is true that the appellant has not examined the Doctor who treated his injuries on his elbows. There is also no FIR in regard to appellant's version of the incident. There is nothing to show that the Jail Doctor recorded the injuries. These factors would normally militate against acceptance of a plea of self defence. But the clean and uncontroverted evidence of PW-2 and the plausible explanation by the accused in his statement under Section 313 tilt the balance. The court must be objective and examine the matter on the facts and circumstances of each case to find out whether the situation was such as was likely to reasonably cause apprehension in the mind of the accused that death or grievous hurt would be caused to him if he did not act in self defence. Hs action in hitting the deceased on his head by taking a stick lying on the ground, was a reflex action to save himself from the attack by the deceased and his son. The appellant had not gone to the spot with any weapon. There was a lengthy quarrel and scuffle between the deceased and the appellant. The deceased and his wife and son were the root-cause for the quarrel as they put thorny sticks at the place where appellant was tethering his cattle. The evidence probabilises the defence version that the deceased and his son had hit the appellant with sticks on his head and the blows landed on his elbows when he raised his hands to protect his head, and that at that stage, the appellant picked up one of the thorny sticks which were lying at the spot and hit the deceased, to protect himself and not with the intention of killing him. The deceased died two days later on account of the resultant injury. The accused has also stated that he was detained in the police station on the night of 9th , but was shown to have been arrested only on 11th. It is not necessary to go into this aspect, as the preponderance of probabilities show that the act of the appellant was in all probability, in exercise of his right of private defence.

17. For the foregoing reasons, we allow this appeal, set aside the conviction under sections 302 and 323 and acquit the appellant of the charges. His bail-bonds shall stand discharged.