SUPREME COURT OF INDIA

Naveen Chandra

Vs

State of Uttranchal

Appeal (Crl.) 1224 of 2006 (Arising Out of Slp (Crl.) No. 3227Of 2006)

(Arijit Pasayat and L. S. Panta, JJ)

27.11.2006

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Uttaranchal High Court dismissing the appeal filed by the appellant while allowing the appeals filed by two others i.e. parents of the appellant. Appellant was convicted for offence punishable under Section 302 of the Indian Penal Code, 1860, (in short the 'Indian Penal Code, 1860') read with Section 34 of the Indian Penal Code, 1860. While the appellant was awarded death sentence, the other two were sentenced to undergo imprisonment for life. All the three accused persons were convicted for offence punishable under Section 302 read with Section 34 Indian Penal Code, 1860. In view of the award of death sentence a reference was made to the High Court for confirmation in terms of Section 366 of the Code Of Criminal Procedure, 1973 (in short the 'Code'). By the impugned judgment the High Court directed acquittal of accused Smt. Kamla Devi and accused Sh. Nanda Ballabh and the death sentence was converted to life imprisonment and the appeal filed by the present appellant was partly allowed.

The background facts in a nutshell are as follows:

All the three accused came to be tried by the Sessions Judge, Bageshwar in Session Trial No. 30 of 2001, wherein all the three accused were charged for an offence under Section 302 read with Section 34 Indian Penal Code, 1860 on the allegation that on 2.6.2001, the three accused persons in furtherance of their common intention, had committed murder of Ganesh Dutt s/o Prem Ballabh, Smt. Janki Devi w/o Ganesh Dutt and Sandeep s/o Ganesh Dutt (each of them hereinafter described as deceased by respective name). While the accused persons were the husband, wife and son, the deceased were also the husband, wife and son. Interestingly, original accused No. 1 Nanda Ballabh is the real brother of the deceased Ganesh Dutt. Relationships between the two brothers, namely, original accused No.1 Nanda Ballabh and the deceased Ganesh Dutta were strained on account of family matters. They were all residents of the Village Baira Majhara, Tehsil Kapkot, District Bageshwar and their houses are almost adjoining to each other. On the fateful day i.e. on 2.6.2001, there was an altercation between Nanda Ballabh & his family members on one hand and deceased Ganesh Dutt and his family members on the other during the day time in which deceased Ganesh Dutta received an injury to his head. Conciliation was to be arranged through a panchayat at the instance of original accused No.1 Nanda Ballabh, who had sought the intervention of Bhupal Dutta and others on the ground that his brother deceased Ganesh Dutta was continuously troubling him and continuously hurling abuses. This was at 7.00 a.m. and thereafter, there was an altercation during the day time. Bhupal Dutta, therefore, went along with some others to the house of original accused No.1 Nanda Ballabh where 7 or 8 other persons were already present. This was at about 5.00 p.m. At the instance of original accused No.1 Nanda Ballabh, Ganesh Dutt was called by Bhupal Dutt, one Bishan Dutt and Govind Ballabh. They found that Ganesh Dutt already had an injury on his head, yet he came along with them to the courtyard in between the houses of original accused No.1 Nanda Ballabh and the deceased Ganesh Dutt. On being asked as to what the dispute between the two brothers was about, deceased Ganesh Dutt allegedly lost his temper and started abusing the original accused No.1 Nanda Ballabh. Thereafter, the persons, who were there, took him back to his house. However, deceased Ganesh Dutt, again came back and held the hand of his sister in law i.e. original accused No.2. After this, there was an altercation between original accused No.1 Nanda Ballabh. In the meantime, original accused No.3 appellant-Naveen Chandra rushed and injured deceased Ganesh Dutt on his head by a weapon called "Khukri". Deceased Smt. Janki Devi w/o Ganesh Dutt, also came there praying to spare deceased Ganesh Dutt, but she was also attacked by the original accused No. appellant-Naveeen Chandra on her face and head. Though the persons present requested original accused No. 3, appellant-Naveen Chandra to spare the others, he ran up to the house of deceased Ganesh Dutt, where Ganesh Dutt's son Sandeep Dutt, namely, Manish Kumar (PW-3) took to his heels while the other son Mukesh hid himself. Deceased Ganesh Dutt died on the spot while his wife Smt. Janki Devi and son Sandeep were seriously injured. The Gram Pradhan was called and the injured were kept in the Varanda of Ganesh Dutt's house, but they also died during the same night.

A report came to be made of this incident by Pooran Chandra who was at the relevant time, the Up-pradhan (Vice Chairman) of the Village. This report was prepared on 2.6.2001 and was handed over, in which it was suggested that the accused persons had committed the murder of three deceased persons on account of the old rivalry. On this, the usual investigation was started after the case was registered against the accused persons for offence under Section 302 Indian Penal Code, 1860. The Investigation Officer Rahim Ahmed (PW-6) who was the patwari, has the police powers and he proceeded to the spot and conducted the usual investigation by conducting Panchnamas as also by inspecting the spot. He also sent the dead bodies for post mortem. Eventually, the accused persons

came to be arrested. The Investigating Officer Rahim Ahmed also recorded the statements of number of witnesses including the eye witnesses and the charge sheet was filed against the accused persons.

Eight witnesses were examined to further the prosecution version, while accused persons who pleaded innocence, examined one witness. Bhopal Dutta (PW-2) and Manish, the child witness (PW-3) were claimed to be eye-witnesses. Though Pooran (PW-1) the informant partially resiled from his statement made during investigation he confirmed having lodged the FIR.

Accused persons pleaded grave and sudden provocation exercise of right of private defence and the occurrence having taken place during sudden quarrel, where deceased persons were the aggressors.

Placing reliance on the evidence adduced, the trial court directed conviction and imposed sentence as afore-stated. As noted above, challenge was made before the High Court. The High Court did not accept the stand of the appellant that the attack, if any made, was on account of grave and sudden provocation and/or that it took place in course of sudden quarrel and/or in exercise of right of private defence, and therefore there was no offence committed and trial court had erroneously held that Section 302 Indian Penal Code, 1860 was attracted. The High Court did not accept plea and confirmed the view expressed by the trial court. It however directed acquittal of two of the accused persons

In support of the appeal, learned counsel for the appellant reiterated the stand taken by the High Court. Learned counsel for the respondent-State on the other hand submitted that the High Court was rather liberal in altering the death sentence to life imprisonment and had rightly held that the concept of grave and sudden provocation or the occurrence taking place in course of sudden quarrel or in exercise of right of private defence, has been rightly turned down.

The Fourth Exception of Section 300, Indian Penal Code, 1860 covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, Indian Penal Code, 1860 is not defined in the Indian Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan 6 it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs come out. In view of the aforesaid factual position, Exception 4 to Section 300 I.P.C. has been rightly held to be inapplicable.

The above position was highlighted in Babulal Bhagwan Khandare and Anr. V. State of Maharashtra 3.

Considering the background facts in the backdrop of legal principles as set out above, the inevitable conclusion is that 4th Exception to Section 300 Indian Penal Code, 1860 does not apply. Only other question which needs to be considered is the alleged exercise of right of private defence. Section 96, Indian Penal Code, 1860 provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately 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. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up 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 necessarily 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. Where 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. (See Munshi Ram and Ors. v. Delhi Administration , State of Gujarat v. Bai Fatima , State of U.P. v. Mohd. Musheer Khan , and Mohinder Pal Jolly v. State of Punjab . Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. , runs as follows:

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

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.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non- explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar . 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 the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against

the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, Indian Penal Code, 1860 define the limit and extent of right of private defence.

Sections 102 and 105, Indian Penal Code, 1860 deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev. v. State of Punjab , it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

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. Similar view was expressed by this Court in Biran Singh v. State of Bihar . (See: Wassan Singh v. State of Punjab 1996 (1) SCC 458, Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N. 6.

As noted in Butta Singh v. The State of Punjab a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self- preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (See Vidhya Singh v. State of M.P. . Situations have to be judged from the

subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to him cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

In the illuminating words of Russel (Russel on Crime, 11th Edition Volume I at page 49):

"....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the Indian Penal Code, 1860, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in Indian Penal Code, 1860 not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived. (See: V. Subramani and Anr. v. The State of Tamil Nadu.

Considering the background facts as highlighted above when tested in the backdrop of the legal principles noted supra the inevitable conclusion is that though the accused person was exercising right of private defence, but had exceeded the same by continuing the attacks after the threat to live had ceased.

Therefore, this appears to be a case where Section 304 Part I would be the applicable provision. The conviction is altered accordingly. Ten years custodial sentence would meet the ends of justice.

Therefore, this appears to be a case where Section 304 Part I would be the applicable provision. The conviction is altered accordingly. Ten years custodial sentence would meet the ends of justice.

The appeal is allowed to the aforesaid extent.