SUPREME COURT OF INDIA

Dharam and Others

Vs

State of Haryana

Appeal (Crl.) 143 of 2006

(A. K. Mathur and D. K. Jain, JJ)

08.12.2006

JUDGMENT

D. K. JAIN, J.

1. The three appellants, namely, Dharam, Raj Singh and Raj Kumar, alongwith two others, Kitaba and Bijender, faced trial in Sessions case No. 135 of 1994 (Sonipat) for having committed offences under Sections 148, 302, 323 and 324/149 of the Indian Penal Code, 1860 (for short "IPC"). The Trial Court found them guilty; convicted them for offences punishable under all the aforementioned Sections and sentenced them to suffer the following punishments:

"OFFENCES PUNISHMENT 148 IPC

To undergo RI for two years and to pay a fine of Rs.5000/- each and in default thereof to undergo RI for six months.

302/149 IPC

To undergo RI for life as also to pay a fine of Rs.20, 000/- each and in default thereof to undergo RI for three years

324/149 IPC

To undergo RI for two years as also to pay a fine of Rs.5000/- each and in default thereof to undergo RI for six months

323/149 IPC

To undergo RI for six months"

All the convicts preferred common appeal to the Punjab and Haryana High Court, but were unsuccessful. This appeal by special leave is brought by the three appellants before us against the order of the High Court.

2. The appellants and the deceased are closely related. Appellant no.1, including the deceased - Partap Singh, were seven brothers, out of whom he and four others were from one mother and two from the other. The case set up by the prosecution, in brief, was that on 16.7.1999 Amarjit (PW-8) son of the deceased made a statement before the S.H.O., Police Station Gohana to the effect that Partap Singh along with his four brothers from one mother were having a joint khewat. One of the brothers, namely, Haria was unmarried and was living with his father, who also used to cultivate the share of land belonging to Haria. However, his uncle, appellant no.1 and his sons, Raj Singh and Raj Kanwal (as per High Court Judgement), appellants no.2 and 3 respectively as well as Kitaba, his uncle and Bijender s/o Kitaba were holding a grudge against his father, the deceased, for not partitioning the land belonging to Haria. A day before the incident all of them had asked his father to divide the land of Haria, failing which he would not be allowed to see the sun of the next day. On 16.7.1999 at about 6.00 a.m., he alongwith his mother and father - the deceased, his uncles Jagdish and Raghbir had gone to the fields to fetch grass; all the aforementioned five persons came to the fields belonging to the deceased and his brothers and started erecting a boundary wall; when they were stopped from doing so, all the five went towards their tube well and came back with arms, namely, Phali and Farsas; Dharam raised a Lalkara to teach a lesson to the deceased's party for not permitting the raising of boundary, upon which Bijender gave a spear blow on the head of the deceased whereas Raj Singh gave second spear blow on the head of the deceased; when he and others intervened, Bijender hit him with a spear in the right arm. Raj Kumar and Dharam (as per the Trial Court Judgment) also gave spear blows on the head of the deceased, as a result whereof he fell down and when his uncle Raghbir intervened, Kitaba inflicted a Phali blow on the left side of his chest. In the meanwhile, crowd gathered at the spot and on seeing them all the five accused fled alongwith their respective weapons. The deceased was brought to Civil Hospital, Gohana where he was declared brought dead. Dr. Rajesh Kumar, PW-12 conducted the post mortem on the dead body

of the deceased and found the following injuries on his person:

"On left parietal bone 10cmx3cmx3cm wound. Edges of the wound were well delineated. Underlying bone was fractured and fractured bone had pierced the brain matter. Posterior to this wound, there was horizontal wound 3 cm x 1 cm on scalp and just behind this wound there was 4 cm x 2 cm lacerated wound."

He also examined Dharam, appellant no.1, Raj Kumar, appellant no.3, Ranbir and Kitaba and found various injuries on their person. A major injury found on the person of Dharam was "Incised wound 2cm x 1cm x 5cm deep on left upper part of chest, just lateral to sternum" and that on Kitaba a "5 x 5 cm wound right hypochondrium. Depth of the wound could not be ascertained."

3. In support of its case, the prosecution examined as many as 13 witnesses. In their statements made under Section 313 of the Code of Criminal Procedure, 1973, the appellants, without disputing their presence or participation in the fight, took a common plea of self defence in the following terms:

"On the day of alleged occurrence, Partap Singh deceased and his son Amarjeet started the tubewell of Dharma for irrigation of their fields without his permission and when he protested and switched off the electricity, Partap armed with Farsa and Amarjeet armed with jelly attacked him. On his alarm, we reached there and tried to save him from them. They were also assaulted by the complainant side and he was given as many as six injuries by Farsa. Dharma picked up a Farsa lying by the side of Kotha of tubewell and caused only one injury to Partap deceased and Amarjeet to save himself and also to save to me and Kitaba. Partap Singh died at the spot and we took his dead body first to the police and police of police station Gohana had taken the dead body of Partap Singh to PHC, Gohana. I am innocent and falsely implicated in this case."

4. Rejecting the plea of private defence, the learned Trial Court came to the conclusion that the appellants, armed with deadly weapons, with the common intention to commit murder, had attacked the deceased as well as his other family members, including the complainant and were, thus, guilty of offences under the aforementioned Sections. Analysing the evidence, as noted above, the High Court has concluded that the conviction was justified.

5. Mr. Jaspal Singh, learned senior counsel, appearing for the appellants has assailed the conviction of the appellants mainly on the ground that the plea of self defence raised by the appellants has not been considered in its correct perspective both by the Trial Court as well as the High Court. It is argued that in fact the High Court has altogether failed to consider this aspect of the matter. It is submitted that in the incident, in which the two parties clashed and there were allegations of assaults on each other, it was the duty of the prosecution to have explained the injuries sustained by the appellants, particularly appellant no. 1, who had six serious injuries on his person. It is urged that non-explanation of the injuries sustained by the members of the accused party shows that the prosecution has not come out with the truthful version of the incident and has suppressed the genesis of the crime. Learned counsel has drawn our attention to the evidence of PW-12, who had examined appellants No. 1 and 3 and other members of their party, to buttress the argument that the nature of

injuries sustained by the appellants indicate that they had suffered injuries in exercise of right of private defence. In the alternative, learned senior counsel has contended that it being a case of sudden fight, the case falls within the ambit of sub-section (4) of Section 300 IPC and, therefore, at best offence under Section 304 part-I or II could be made out against the appellants.

6. Per contra, learned counsel appearing for the State, while supporting the impugned judgment, has contended that the appellants armed with deadly weapons and with the common intention to murder had attacked the deceased's party and, therefore, being the aggressors, the plea of self defence was not available to them.

7. Thus, the question which falls for our consideration in this appeal lies within a narrow compass. The question is whether or not the appellants had assaulted the deceased and his party in exercise of the right of private defence?

8. Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to which rule of self defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

9. The scope of right of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues (See: Jai Dev vs. State of Punjab).

10. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. Necessity must be present, real or apparent (See: Laxman Sahu vs. State of Orissa).

11. Thus, the basic principle underlying the doctrine of the right of private defence is that when an

individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

12. It is trite that the burden of establishing the plea of self defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record (See: Munshi Ram and others vs. Delhi Administration ; The State of Gujarat vs. Bai Fatima and another and Salim Zia vs. State of Uttar Pradesh).

13. In order to find out whether right of private defence is available or not, the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an abstract proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injury 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's case in all cases (See: Sekar alias Raja Sekharan vs. State represented by Inspector of Police, Tamil Nadu and V. Subramani and another vs. State of Tamil Nadu).

14. In the light of the legal position, briefly noted above, we proceed to examine as to whether it could be said that the appellants had assaulted the deceased and other members of his family in exercise of their right of private defence?

15. The plea of self defence has been rejected by the Trial Court, inter alia, observing that the danger was to the life of the deceased and his party and not to the appellants. However, the High Court has dealt with the issue more elaborately. Referring to the testimony of investigating officer S.I. Amardas (PW-7) and Rajinder Singh Patwari (PW-6) who had prepared the site plan (Exhibit-PC) after identification of place of occurrence by PW-10, the High Court has recorded a clear finding that the plea of the appellants that the occurrence took place on or near their tube-well had

been completely demolished by the prosecution. The High Court has affirmed the finding recorded by the Trial Court that the occurrence had taken place in the fields belonging to the deceased Partap and his family. Besides, the statement of the appellants recorded under Section 313 Criminal Procedure Code, 1973, extracted above, proves their presence and participation in the fight. These two factors clearly prove that the appellants went and attacked with lethal weapons the deceased and his family members in the latter's fields. We are convinced that in the light of the evidence on record they were the aggressors. Thus, being members of the aggressors' party none of the appellants can claim right of self-defence. As observed herein above, right to defend does not include a right to launch an offensive or aggression. Therefore, we have no hesitation in holding that the appellants have failed to establish that they were exercising right of private defence.

16. The other question which now remains to be considered is as to what is the exact nature of the offence committed by the appellants. The injury, which proved to be fatal, is 10cmx3cmx3cm on left parietal bone which fractured the underlying bone and pierced the brain matter. We do not propose to hold that such an injury, if caused, would not attract the provisions of Section 302 IPC. Nevertheless, the question which requires serious consideration is whether having regard to the peculiar circumstances in which the incident took place and the fact that the deceased and the appellants happened to be blood relations, this particular injury, which was found to be sufficient in the ordinary course of nature to cause death in the instant case, was an injury intended by the appellants. Having regard to the nature of the injuries sustained by both the closely related parties, we are of the view that the fatal injury was not inflicted with the intention to cause death or an injury likely to cause death of the deceased. We feel that in the very nature of things, the appellants could not have entertained any intention to cause death of their brother/uncle. We are, therefore, of the opinion that the offence committed by the appellants would fall within the ambit of Section 304 Part-II IPC.

17. Consequently, we partly allow the appeal; set aside the conviction of the appellants under Section 302 IPC and instead convict them under Section 304 Part-II IPC. Sentence of rigorous imprisonment for seven years would meet the ends of justice. Other sentences awarded to them would remain unaltered and shall run concurrently.