SUPREME COURT OF INDIA

Ananta Deb Singha Mahapatra and Others

Vs

State of West Bengal

(Arijit Pasayat and D. K. Jain, JJ)

Appeal (Crl.) 828 of 2007 (Arising Out of S.L.P. (Crl.) No.1263 of 2007)

06.06.2007

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court dismissing the appeal filed by the appellants questioning their conviction for the offence punishable under Sections 304 Part II read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellants 1 to 4 before the High Court were sentenced to suffer RI for 8 years and to pay a fine of Rs.1, 000/- each with default stipulation. Appellants 1, 2 and 5 before the High Court were also convicted under Section 323 read with Section 149 and sentenced to undergo imprisonment for six months and to pay a fine of Rs.200/- each with default stipulation. Appellants 1, 2 and 5 before the High Court are appellants 1, 2 and 3 respectively in this appeal.

3. Background facts in a nutshell are as follows:

On 13.9.1990 at about 2:30 P.M. the appellants accompanied by 15 others as named in the FIR started cutting paddy from the land of the informant Niranjan Singa Mahapatra (P.W. 2) in plot no.

122/470 of mouza Dakshinbaid within P.S. Khatra. Seeing this Madhusudan Singha Mahapatra (hereinafter referred to as 'deceased') reached there and raised protest, and over this the accused persons assaulted on the head of the deceased with lathis and also cut the fingers of hand of the deceased with sharp sickle. Hearing the alarm by the deceased, P.W. 2 and his mother Monorama Singha Mahapatra (P.W. 4) reached there, but the accused persons also assaulted P.W. 2 and P.W. 4 and in their presence gave further blows on the head of the deceased Madhusudan Singha Mahapatra with sickles. Madhusudan Singha Mahapatra fell down on the land and thereafter, P.W. 2 with the help of the other villages brought his father and mother to the police station. The police officer on duty told them to go to the Khatra hospital and as instructed they came to the Khatra PHC. After primary treatment the doctor of the said PHC sent all the injured persons to the Bankura Medical College and Hospital where parents of P.W. 2 were admitted and P.W. 2 was discharged after primary treatment. P.W. 2 sent the written complaint FIR (ext. 2) through his brother in law Dwijapada Kar (P.W. 5) to the Khatra Police Station and on the basis of such written complaint Khatra P.S Case no. 40 dated 13.9.90 under sections 147/148/149/48/324/325/379 of IPC was started against the accused persons. The injured Madhusudan Singha Mahapatra succumbed to the injuries on 14.9.90, and thereafter, Section 304 of IPC was added and after completing the investigation Officer (in short I.O.) submitted charge sheet against the accused persons under section 147/148/149/48/324/325/379 and 304 IPC. The trial that followed ended in the conviction and sentence of the appellants as mentioned above.

5. Before the High Court the primary stand was that the FIR was manipulated and ante dated and it was a tampered document. Reference was made to evidence of PW-2 in this regard. It was also contended that the accused persons were seriously prejudiced because case and counter case were not tried by the same court. The plea of right of private defence was also raised.

The learned counsel for the State on the other hand submitted that the FIR was not manipulated, and the right of private defence was also not available.

6. The High Court analysed the evidence elaborately and came to hold that the trial court's conclusions were irreversible.

7. In support of the appeal learned counsel for the parties reiterated the submissions before the High Court. Learned counsel for the appellant additionally submitted that the sentence imposed by the trial Court and the High Court are expressly harsh.

8. So far as the plea relating to FIR is concerned, it can be seen that the High Court has referred to the evidence of PW-16 and PW-4 to conclude that there was no substance in the plea relating to manipulation of the FIR. The High Court noted as follows:

"The formal FIR (ext. 7) shows that the original written complaint/FIR was received on 13.9.90 at 4.05 P.M. and the police officer made an endorsement on the back of ext. 7 to the effect that the original written compliant was attached herewith. There is endorsement of the same police officer on the reverse page or the second page of the original FIR with his signature and date 13.9.90

which shows that he received the same on 13.9.90 at 4.05 P.M. and started Khatra P.S. Case No.40 dated 13.9.90 and the said endorsement on the original written complaint is ext. 2. The original written complaint was written by P.W.2 in Bengali and in it the Bengali digits '14' was changed to '13'. This overwriting concerning date in Bengali in the original complaint cannot establish that FIR was ante- dated, ante-timed and manufactured."

9. Coming to the plea relating to right of private defence the High Court noted that the Madhusan fell down in the Paddy field after receiving lathi blows and PW-2 went to a safe place to save his life and there was none to attack the appellants. In spite of this fact, the appellants went on assaulting the deceased and in that process caused more harm to the deceased than was necessary to exceed the right of private defence. Thus the appellants were guilty for the death of Madhusudan.

10. Section 96, IPC 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 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 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, 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 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 is favour of that plea on the basis of the material on record. (See Munshi Ram and Ors. v. Delhi Administration: Â : State of Gujarat v. Bai Fatima: Â : State of U.P. v. Mohd. Musheer Khan: Â : and Mohinder Pal Jolly v. State of Punjab: Â . 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. Â , 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."

11. 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.

12. 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 probabilities 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 Â . In this case, as the Courts below found there was not even a single injury on the accused persons, while PW2 sustained large number of injuries and was hospitalized for more than a month. 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 shows 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, IPC define the limit and extent of right of private defence.

13. Sections 102 and 105, IPC 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, or commit the offence, although the offence may not have been committed but not until that 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 Â , 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.

14. 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. Thus, running to house, fetching a tabli and assaulting the deceased are by no means a matter of course. These acts bear stamp of a design to kill and take the case out of the purview of private defence. Similar view was expressed by this Court in Biran Singh v. State of Bihar Â and recently in Sekar @Raja Sekharan v. State represented by Inspector of Police, Tamil Nadu Â 6.

The High Court has, therefore, rightly rejected the plea relating to exercise of right of private defence.

15. Coming to the question of sentence we find that 8 years sentence has been awarded for the offence punishable under Section 304 Part II. The incident is of the year 1990. Considering this fact and the background in which the occurrence took place, custodial sentence of 6 years would meet the ends of justice.

16. So far as appellant no.3 is concerned, the conviction is in terms of Section 323 read with Section 149 and the sentence is 6 months. It appears from the record that he has already suffered custody of nearly 5 months. Keeping this in view the sentence is reduced to the period already undergone.

17. The appeal is allowed to the aforesaid extent.