

SUPREME COURT OF INDIA

Salim

Vs.

State of Haryana

Crl.A.No.....of 2008

(Dr. Arijit Pasayat and Harjit Singh Bedi JJ.)

11.08.2008

JUDGMENT

Dr.Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Punjab and Haryana High Court, disposing of two appeals i.e. Criminal appeals No.665-DB of 2004 and Criminal appeal No.376-DBA of 2005. The first was filed by the present appellant while the second was filed by the State of Haryana. Both the appeals had their factual matrix on a judgment of conviction and sentence dated 26/29.7.2004 passed by learned Additional Sessions Judge (Fast Track Court), Gurgaon. 14 persons faced trial for alleged commission of offences punishable under Sections 148, 149, 302, 307, 325 and 323 of the *Indian Penal Code, 1860* (in short `IPC') and under Section 25 of *Arms Act, 1959*, (in short `Arms Act'). The Trial Court convicted appellant Salim for offences punishable under Sections 302, 203/149, 307/149, 323/149, 325/149 IPC and Section 27 of the Arms Act, whereas other accused persons were held guilty of the offences punishable under Sections 148, 307/149, 323/149 and 325/149 IPC and various sentences were imposed. As noted above, both the accused person and the State filed the appeals.

3. Factual facts in a nutshell are as follows:

“On 25.11.2000 a medical ruqa was received from CHC Nuh regarding death of Abdul Gafar by the police and where upon SI/SHO Ram Niwas along with other police officials reached CHC Nuh and after obtaining the opinion of the doctor qua fitness, recorded statement of Alim Son of Yakub one of the injured persons. The complainant stated before the police that one killa of-land in "Dehri Wali Jungle" in the name of Zakir son of Fauj Khan was being cultivated by Rasul Khan, his cousin, for the last 3-4 months on batai. Complainant further stated before the police that at about 9.00 a.m. Hasan Mohammad son of Ibrahim and other ploughed the said field, and when they came to know about this, at about 12.30 p.m., he himself, Kalam,

Irfan, Mursalin, Abdul Gafar, Lukman, Abdul Rashid, Salim s/o Abdul Rasid reached the spot in a tractor. When the complainant alongwith said persons started ploughing the field, Issa armed with double barrel gun, Salim S/o Ummar Mohd. also having double barrel gun, Aslam armed with country made pistol, Habib armed with Pharsa, Hasan Mohd., Roshan, Liia, Iqbal, Nasim, Din Mohd., Sohrab, Hanif and Nayyum armed with lathies came there together in prosecution of their common object and immediately they gave lalkara that the persons belonging to complainant party should be killed, and in the meanwhile Salim fired from his double barrel gun which hit forehead and face of Abdul Gafar. Issa fired from his double barrel gun and the pellets hit Gafar on his right side, Aslam fired from the country made pistol which hit fore-head of Kalam. The complainant further reported that he alongwith Mursalin, Salim, Abdul Rashid, Lukman, Irfan intervened and tried to save the said persons. Habib gave a pharsa blow on his head, Lila inflicted lathi blow on his head whereas remaining accused with their lathis caused injuries on Irfan, Lukman, Abdul Rashid, Mursalin. Meanwhile Abdul Latif and Younus came to the spot, witnessed the occurrence, intervened and saved the injured persons from the hands of accused persons. The injured were taken in a jeep to Nuh hospital. Abdul Gafar died on the way due to the injuries suffered by him. On the basis of the complaint, formal FIR was recorded by ASI Ram Dayal. SI/SHO Ram Niwas completed the inquest proceedings regarding deceased Gafar. He also prepared the rough site plan and collected from the spot, one empty cartridge with one plastic giddi. These were taken into possession after converting them into sealed parcel by preparing a memo. SI/SHO Ram Niwas also collected from the spot blood stained earth from two places and prepared separate memos after converting them into separate parcels. The post mortem examination qua the dead body of Abdul Gafar was conducted by the doctors. Bijender Singh, ASI, after post mortem examination brought from the doctor two parcels duly sealed which were taken into possession by SI Ram Niwas by preparing a memo on 25.11.2000. On 27.11.2000 Osab son of Issa produced one lincenced gun with licence of his father alongwith 24 live cartridges which were taken into possession by SI/SHO Ram Niwas by preparing necessary memo. On 28.11.2000 SI/SHO Ram Niwas arrested eleven accused persons. He also took the weapon used for committing the murder. The gun was then recovered. Akhakha was prepared and then the same was sealed into a separate sealed parcel. The investigating officer also prepared the rough site plan regarding the place of recovery. On 1.12.2000 SI/SHO Ram Niwas arrested accused Hanif who too produced one lathi at that time, which was taken into possession by preparing a memo. On 29.1.2000 SI/SHO Ram, arrested Habib-accused who produced pharsa, which was taken into possession by preparing memo. Scaled site plan was got prepared. Statements of witnesses were recorded. The injured persons were examined. The FSL report was obtained. Sohrab was later on arrested whose supplementary challan was prepared by SI/SHO Ram Niwas. After completion of necessary investigation, the challan was submitted before the Court for trial of the accused.

On the basis of police reports and other evidence on file, all the accused were charge sheeted for offences punishable under Sections 148, 302,/149, 307/149, 447/149,

323/149, 325/149 of IPC. Salim was also charge sheeted under section 27 of Arms Act. All the accused persons pleaded not guilty to the charges and claimed trial of their case.”

4. Prosecution to further the accusations examined 23 witnesses. Four witnesses were examined by the accused persons. The Trial Court found that the prosecution has established its accusations and directed conviction and imposed sentences as noted above.

5. In appeal, primary stand taken was that the accused persons were exercising right of private defence. The Trial Court found that a case right of private defence was not made out. Accordingly, the appeal was dismissed. The State's appeal was also dismissed.

6. The stand taken before the High Court was reiterated by learned counsel for the appellant. The learned counsel for the respondent-State, on the other hand, supported the judgment of the Trial Court and the High Court.

7. Only question which needs to be considered is the alleged exercise of right of private defence. 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 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*¹, *State of Gujarat v. Bai Fatima*², *State of U.P. v. Mohd. Musheer Khan*³ and *Mohinder Pal*

*Jolly v. State of Punjab*⁴). 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.*⁵, 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.

8. 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, IPC define the limit and extent of right of private defence.

9. 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, 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*⁶, 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.

10. 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*⁷. (See: *Wassan Singh v. State of Punjab*⁸, *Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N.*⁹).

11. As noted in *Butta Singh v. The State of Punjab*¹⁰, 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.

12. 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.*¹¹). 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 himself 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.

13. 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."

14. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, 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 IPC not to provide and has not devised a mechanism whereby an attack may be 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.

15. The above position was highlighted in *V. Subramani and Anr. vs. State of Tamil Nadu*¹².

16. On considering the evidence it is held that existence of the material to show that the accused were exercising the right of private defence, was not established. On the date of occurrence i.e. 25.11.2000 the land in question was lying vacant and the matter regarding possession was pending adjudication before the revenue authorities. After the order of remand passed by the Commissioner on 17.2.2000, there is no material to show who was in possession over the land in question. Leaned counsel for the appellant has brought to our notice the evidence of Patwari to show about the possession about the date of occurrence. It is true that the Patwari has taken that during the investigation he found that actual physical possession of the accused persons over the disputed property. It is also similarly stated by PW 22 SHO. The Trial Court observed that one of the parties used force to take possession of the land in question.

17. Above being the position the plea that the accused persons were exercising right of private defence cannot be accepted. Though the material on record shows that though initially the accused were exercising right of private defence, same was exceeded. In the factual background appropriate conviction of Salim would be under Section 304 Part I read with Section 149 IPC. The conviction is accordingly altered. In case of other accused persons the conviction would be under Section 304 Part I read with Section 149 IPC. The conviction and sentence imposed for the other offences remain unaltered. It is stated that accused-Salim was in custody for more than 8 years. In the background facts the sentence is fixed at the period already undergone. He shall be released forthwith unless required to be in custody in any other case. The sentence in case of others would be nine years.

18. The appeal is disposed of accordingly.

¹(AIR 1968 SC 702)

²(AIR 1975 SC 1478)

³(AIR 1977 SC 2226)

⁴(AIR 1979 SC 577)

⁵(AIR 1979 SC 391)

⁶(AIR 1963 SC 612)

⁷(AIR 1975 SC 87)

⁸(1996) 1 SCC 458

⁹(2002 (8) SCC 354)

¹⁰(AIR 1991 SC 1316)

¹¹(AIR 1971 SC 1857)

¹²(2005 (10) SCC 358)