SUPREME COURT OF INDIA

Bihari Rai

Vs.

State of Bihar (Now Jharkhand)

Crl.A.No.1536 of 2008

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

26.09.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Jharkhand High Court partially allowing the appeal of the appellant, while directing acquittal of co-accused persons. The appellant was convicted for an offence punishable under Section 302 read with Section 34 of the *Indian Penal Code, 1860* (in short `IPC') by learned Vth Additional Sessions Judge, Dumka, in Sessions Case No.156 of 1980/21 of 1985. The High Court altered it to Section 304 Part I IPC, and sentence of seven years was imposed.

3. The prosecution version in a nutshell is as follows:

> "Ramfali Rai (PW.1) is the son of Badri Rai (hereinafter referred to as the `deceased'). There was a long standing dispute pending between the appellant's and the deceased's family. Proceedings were initiated under Section 145 of the *Code of Criminal Procedure, 1973* (in short `Cr.P.C.') and several suits were also filed. The dispute between the two families was pending from the year 1952 and according to the prosecution, it is said to be the motive for the unfortunate occurrence.
>
> On 28.6.1978, the deceased left for his field accompanied by his servant Mantu Rai. Ramfali Rai (PW.1) stayed at home and at about 9.00 a.m., he heard shouts, "Maro Maro" and came out of the house and started running towards the north from where the shouts were emanating. Reaching some distance, he found his father, Badri Rai, being chased by the accused-appellant Bihari Rai and the other two accused. Tulsi Rai and Ghutru Rai, were also found at that place. Accused Bihari Rai, inflicted three blows - two on the head and one on the hand of the deceased-Badri Rai, and the deceased fell down and the accused 2 and 3 also gave lathi blows and thereafter all the three accused left the place. The occurrence was witnessed by Ramfali Rai (PW.1), Horil Rai (PW.2), Kuwa Rai (PW.5), Gopi Rai (PW.6) and Jarman Rai (PW.

7). In the meantime, information was received at Jama Police Station by Sudhir Kumar Sinha, Sub-Inspector, that some occurrence had taken place in the village - Barudih. The said Sub- Inspector, after making an entry in the station diary, left for the scene of occurrence and reached there, where the fardbeyan, Ext. 5, given by PW.1, was recorded at 3.00 p.m. The said fardbeyan was registered as a complaint and the printed first information report of the said complaint is Ext.6. Ext.1 is the signature of Ramfali Rai (PW.1) in the said complaint, Ext.5. Investigation was taken up and the inquest was conducted, which stands marked as Ext.2/2, during which witnesses were examined. After the inquest, the body was sent to the hospital with a request to the Doctor to conduct autopsy. Dr. Upendra Prasaad Sinha (PW.9), Civil Assistant Surgeon, Sadar Hospital, Dumka, conducted post- mortem on the body of the deceased, Badri Rai, and he found the following injuries:

(i) Incised wound 1" x =" x 1" on outer side of left arm;

(ii) Incised wound 8" x 1" x 4" cutting the posterior left side of the scalp bone including the brain substance with a large haemorrhage (in the post mortem report the expression "haematoma" and not haemorrhage as has been deposed by the Doctor inside the brain substance;

(iii) Incised wound 6" x 1" x 31/2" cutting the posterior right side of the scalp bone including the brain substance with a large haemorrhage (here also the expression in the post mortem report is haematoma) inside the brain substance;

The doctor issued the post mortem certificate, Ext. 4, with his opinion that injuries (ii) and (iii) found on the body are sufficient in the ordinary course of nature to cause death and that death must have occurred within 36 hours.

4. After completion of investigation, the charge sheet was filed against the accused persons.

5. The Trial Court placed reliance on the evidence of the eye-witnesses PWs. 1, 2, 5, 6 and 7 and found the appellant and the co-accused persons guilty. In appeal, the High Court found that Exception 4 to Section 300 IPC applied and accordingly directed conviction of the appellant in terms of Section 304 Part-I IPC and sentenced him to undergo rigorous imprisonment for seven years. However, the co-accused persons were acquitted. In appeal before the High Court, the primary stand was that in the fardbeyan given by PW.1 the names of PWs. 2, 6 and 7 had not been given. Additionally, it was submitted that having accepted that the occurrence took place in course of sudden quarrel, the trial Court should have accepted the plea relating to right of private defence.

6. In the judgment the accused persons were described as A1, A2 and A3. The present appeal is by A1.

7. The High Court found that the evidence of PW.1 was to the effect that on hearing the cries of his father he came out of the house, ran towards the place and found the appellant

inflicting injuries on the deceased. It was therefore, possible that he could not have noticed the presence of PWs.2,6 and 7. However PW 6 has categorically stated about the presence of all the eye witnesses. So far as the plea relating to right of private defence is concerned, it is to be noted that no evidence in that regard was adduced. On the contrary, the High Court referred to the evidence of PWs. 2,6 and 7 to the effect that just before the occurrence the accused and the first deceased had quarreled and thereafter first accused inflicted blows with an axe, which he had in his hand, on the deceased. PW 1 was not present when the quarrel commenced and he came to the scene of occurrence on hearing the cries of his father and saw the appellant inflicting blows on the deceased. In that background Exception 4 to Section 300 was applied.

8. In support of the appeal, the stands taken before the High Court have been reiterated by learned counsel for the appellant. Learned counsel for the state on the other hand supported the judgment of the High Court.

9. It needs to be noted that in addition to the stand taken before the High Court learned counsel for the appellant submitted that the I.O. had not examined the present case and first information regarding the incident which was recorded in the station entry has also not been produced in the Court. It is also pleaded that since right of private defence was exercised conviction cannot be recorded.

10. So far as the stand regarding non-mention of the name of PWs 2,6 and 7 are concerned, it is to be noted that as rightly observed by the trial court and the High Court on hearing the cries of his father the deceased PW 1 was rushing towards the place of occurrence. Obviously, the focus was on what was happening to his father. In any event, inspite of incisive cross-examination nothing fragile was surfaced in his evidence.

11. It has also been established by prosecution that the station diary entry related to some vague information about disturbance in the village , that cannot take place of the FIR.

12. So far as the non-examination of one of the I.O. is concerned, it is to be noted that the officer in question had only conducted the inquest. The inquest report was exhibited without any objection and there was no challenge to the correctness of the report. That being so, non-examination of the officer in question does not in any way corrode the credibility of the prosecution version.

13. 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 creditworthy, 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*[1]]. 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.

14. 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 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*[2], 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.

15. The above position was highlighted in *Rizan and Another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur, Chhatttisgarh*[3], *and Sucha Singh and Anr. v. State of Punjab*[4].

16. Merely because there was a quarrel and some of the accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused persons has been rightly discarded.

17. The High Court has referred to the evidence of PWs. 2,6 and 7 to conclude that just before the arrival of PW 1 at the scene of occurrence there was a quarrel between the

deceased and the accused. In that view of the matter, the High Court accepted the plea that the occurrence took place in the course of sudden quarrel.

18. As rightly observed by the trial court and the High Court there was no question of exercise of right of private defence as claimed by the appellant.

19. The accused has been rightly convicted under Section 304(1) IPC. Custodial sentence, as imposed, also does not appear to be inappropriate in any manner.

20. The appeal deserves dismissal, which we direct.

[1]*(AIR 1976 SC 2263)*
[2]*(AIR 1963 SC 612)*
[3]*(2003 (2) SCC 661)*
[4]*(2003 (7) SCC 643)*