

SUPREME COURT OF INDIA

State of U.P

Vs.

Gajey Singh

Crl.A.No.1074 of 2001

(Dalveer Bhandari and Harjit Singh Bedi Jj)

24.02.2009

JUDGMENT

DALVEER BHANDARI, J.

1. This appeal is directed against the judgment dated 16.02.2001 passed by the Division Bench of the High Court of judicature at Allahabad in Criminal Appeal No.2786 of 1980.

2. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

3. Lakhi Ram deceased and his brother Jai Singh, PW1 were sitting at the residence of Sahid Akhtar PW3 at 8 a.m. on 27.1.1979. Accused Gajey Singh and his father Mehar Singh came there at that time and immediately thereafter, some quarrel took place between Lakhi Ram deceased and Mehar Singh, father of the accused persons. On the intervention of Sahid Akhtar and Virendra, the matter was settled at that time and thereafter all of them proceeded to their respective houses.

4. It is alleged that at about 9.30 a.m., on the same day, Lakhi Ram followed by Jai Singh and his father Godha Singh, PW2 were going towards their field for the 'chhol' (harvesting of sugarcane crop) and when they reached in front of the house of Mehar Singh, Gajey Singh came there and caught hold of Lakhi Ram. Jai Singh and Godha Singh reached there and separated Lakhi Ram and Gajey Singh. In the meantime, Rajpal Singh came there with the licensed gun of his father and on the orders of Gajey Singh, he fired upon Lakhi Ram as a result of which he sustained serious injury on his neck and died on the spot.

5. Godha Singh PW2 lodged a written report Ex. Ka.1 at police station Inholi on the same day at 11.35 a.m. Head Moharrir Shyam Lal, PW6 prepared chick FIR and made entry in the General Diary. Sub-Inspector Prabhat Kumar, PW8 was entrusted with the investigation. He immediately rushed to the scene of occurrence and found that ASI Ilma Singh was already present there and had completed inquest on the dead body of the deceased Lakhi Ram. The dead body was also sent for postmortem examination through constable Parmanand PW7.

6. The Investigating Officer collected sample of blood and prepared site plan Ex.Ka.10 and arrested both the respondents (accused) from their house on the same day and also took the gun which was kept in their room in his custody. The Investigating Officer then recorded statements of the witnesses and on completion of investigation challaned both the respondents through charge-sheet Ex.Ka.12. Dr. K.D. Sharma, PW5 conducted the postmortem on the dead body of Lakhi Ram on 28.1.1979 at 2.30 pm and found the following ante mortem injuries:-

1. Gunshot wound of entry 6cm x 4cm x oral cavity on the right side front of neck upper part, lower jaw and lips. Blackening and scorching present, Margin inverted.

2. Gunshot wound of exit 10cm x 8cm on left side face lips and upper part neck. Margin averted.

3. Lacerated wound 4cm x 2cm x bone right side forehead 2cm above the right eye brow. 4. Bone of lower jaw broken into many pieces.

7. On internal examination, Dr. Sharma found that 3rd and 4th cervical vertebrae were fractured. Large vessels of neck on right side were found lacerated and there was also extensive laceration of oral cavity. In the opinion of the Medical Officer, death was caused due to shock and haemorrhage as a result of ante-mortem injuries. It may also be mentioned here that in his statement before the trial court, Dr. K.D. Sharma further opined that death of Lakhi Ram was possible at about 9.30 p.m. on 27.1.1979.

8. The prosecution in support of its case produced eight witnesses of whom Jai Singh PW1, Godha Singh PW2 and Sagira PW4 were the eye witnesses. Sahid Akhtar PW3 was examined to state about the incident which had taken place before the alleged incident. Both the accused in their respective statements recorded under section 313 Cr.P.C. denied the prosecution version.

9. The accused gave counter version of the right of private defence. According to them, Godha Singh, Lakhi Ram, Jai Singh and Om Prakash came to their house armed with 'lathi' and 'balkati'. They started assaulting Rajpal Singh with lathi and Gajey Singh with balkati. Seeing this, their father Mehar Singh in order to save Rajpal Singh and Gajey Singh fired a shot from his gun towards the accused persons. Gajey Singh further stated that the police had arrested his father Mehar Singh and he was detained for three days at the police station. In defence, the accused persons produced four witnesses. Dr. S.C. Goel DW1 proved injury report of accused Gajey Singh and Rajpal Singh Ex.Ka.2 and Ex. Ka.3 respectively. Dr. S.C. Goel was posted as Medical Officer, P.L.S. Hospital, Meerut. He stated that he medically examined accused Gajey Singh on 27.1.1979 at 9.10 pm who was produced before him in police custody by constable Jatan Swarup of police station Inholi and found the following injuries on his person: "Incised wound 7 cm x 2cm bone deep on the right side head, 3 = cm above eye brow. Placed vertically. Margins clear. Fresh blood was coming out. X-ray advised.

10. In the opinion of Dr. Goel, the above injury was caused by a sharp edged weapon and was about half day old. On the same day at 9.30 p.m., Dr. S.C. Goel medically examined accused Rajpal Singh, who was also brought in police custody by constable Jatan Swarup. The following injury was found on the person of accused Rajpal Singh. "Lacerated wound 1cm x = cm x muscle deep on the tip of the left thumb outer side margins lacerated. Blood coming out on cleaning."

11. In the opinion of Dr. Goel, the injury was simple and caused by blunt object and was about half a day old. Before the trial court, Dr. Goel DW1 further stated that injuries on both Gajey Singh and Rajpal Singh could be caused at about 9.30 am on 27.1.1979. He further opined that injury of Gajey Singh could be the result of 'balkati' blow, while the injury of Rajpal Singh was caused by a blunt object. It is not necessary to refer to the evidence of other witnesses as they have no bearing on the incident in question.

12. Learned Sessions Judge placed reliance on the evidence led by the prosecution and found both the accused Gajey Singh and Rajpal Singh guilty of offence under section 302 read with section 34 IPC and sentenced them to imprisonment for life. It may be relevant to mention that the factum of death of Lakhi Ram by firearm injury has neither been disputed nor assailed by the counsel for the accused. According to the appellant, Lakhi Ram was killed by the accused whereas according to the accused, Lakhi Ram was killed by their father Mehar Singh when he saw his son Rajpal Singh being assaulted by lathi and Gajey Singh with 'balkati'. As per the version of the respondents, the incident occurred in front of their house and from the evidence on record it is fully established that the

respondents also sustained injuries including a bone deep injury on skull in the same incident and since these injuries have not been explained by the prosecution witnesses, it must be held that the prosecution suppressed the genesis and origin of occurrence and the prosecution gave a distorted version.

13. The learned counsel for the respondents submitted that in law, the defence simply has to show that its defence plea was probable and it was not incumbent upon the accused persons to prove their case to the hilt. Merely because the defence was also not true, that by itself cannot absolve the prosecution from discharging its bounden duty and obligation of proving its case.

14. The High Court found sufficient weightage in the submissions of the learned counsel for the respondents.

15. Sagira PW4 stated that at the time of occurrence, he was inside his house. He came out on hearing cries and saw that Lakhi Ram deceased and Gajey Singh were grappling with each other. Gajey Singh struck a lathi on Lakhi Ram whereupon Lakhi Ram fell on the ground and then Rajpal fired from his gun upon Lakhi Ram. Sagira, PW4 admitted that Gajey Singh had sustained an injury on his head when he was thrown on the ground by Lakhi Ram deceased. He had not stated this fact before the Investigating Officer. Though he claimed that he had disclosed this fact to the investigating officer but could not provide any explanation why such an important fact was not mentioned in his statement recorded during the investigation. The Investigating Officer admitted that this witness did not state the above fact but had stated that Lakhi Ram had assaulted Gajey Singh with a brick bat. On being confronted, Sagira PW4 denied to have stated so to the investigating officer and further stated that he could not assign any reason as to why it has been so recorded. The investigating officer, however, testified that the witness had made such a statement to him. It would thus appear that up to the investigation stage no explanation of injuries of accused persons had been put forward by the witnesses excepting Sagira, PW4 who had stated that Gajey Singh had sustained injury on his head as he was assaulted by a brick bat by deceased Lakhi Ram. Faced with the difficulty that Gajey Singh had sustained an incised wound of sharp edged object in the same incident, these witnesses did not hesitate to improve upon the earlier version placed at the initial stage and perhaps under some legal advise they were made to state for the first time at the trial that when accused Gajey Singh had struck a lathi blow on the forehead of deceased Lakhi Ram, the latter caught hold of him and threw him on the ground. Neither in the first information report nor at the stage of investigation, Gajey Singh was alleged to be armed with lathi nor it was the case of the prosecution that Gajey Singh gave any assault by lathi on the person of Lakhi Ram deceased. This part of the prosecution case appears to have been improved at the trial so as to bring evidence of witnesses in consonance with the medical evidence because in the postmortem examination of deceased Lakhi Ram one lacerated wound on right side of forehead was also found. The witnesses also made to state for the first time at the trial that after receiving lathi injury on his forehead at the hands of Gajey Singh, he threw Gajey Singh on the ground. This development appears to have been made to explain the bone deep incised injury sustained by Gajey Singh in the same incident.

16. The High Court also observed that according to the statement of the investigating officer he had arrested both the respondents on the same day and found injuries on their person and for that reason they were medically examined in the police custody. By no stretch of imagination, injury of Gajey Singh could be said to be superficial or self inflicted. Dr. S.C. Goel who had medically examined Gajey Singh has denied the prosecution suggestion that the incised injury of Gajey Singh might have been caused by a fall on a piece of glass. He was recalled for further cross examination by the Deputy Government Counsel but the doctor stuck to his opinion in a firm manner. In the instant case, the margins of incised injury of Gajey Singh were clear and clean cut which in the opinion of Dr. Goel could not find any injury caused due to a fall on a piece of glass. In the impugned judgment, the High Court came to the conclusion that the prosecution has failed to explain injuries suffered by both the respondents in the same incident.

17. The High Court in the impugned judgment observed that the incident occurred in front of the house of the respondents. The High Court disbelieved the claim of the prosecution witnesses that they and deceased were going to the residence of Akhtar for 'chhol' because the house of the respondents was not situated on the way leading from their house to their field. The injuries sustained on defence side belie them as Gajey Singh sustained a bone deep incised injury caused by a sharp cutting object and Rajpal had sustained the injury by a blunt object. The High Court in the impugned judgment discarded the explanation given by the witnesses with regard to the injury of Gajey Singh that the same might have been caused on account of his being thrown on the ground. The High Court also observed that the witnesses produced at the trial were all interested as they made several vital and important improvements at the trial from the version as was put in the first information report during investigation.

18. The High Court came to the definite conclusion that the prosecution has suppressed the genesis and the origin of the occurrence and is thus guilty of not presenting the true version before the court.

19. The High Court observed that non-explanation of the injuries on the accused persons has rendered the prosecution version doubtful and makes the defence version more probable that injuries on the deceased Lakhi Ram were inflicted in exercise of right of private defence.

20. The High Court also considered the question - whether the right of private defence extended to the voluntary causing of death of deceased Lakhi Ram in the facts and circumstances of the case?

21. Sections 96 to 99 of the Indian Penal Code read as under: "96. Things done in private defence. ___ Nothing is an offence which is done in the exercise of the right of private defence. 97. Right of private defence of the body and of property. ___ Every person has a right, subject to the restrictions contained in section 99, to defend ___ First. ___ His own body, and the body of any other person, against any offence affecting the human body; Secondly. ___ The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under

the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. 98. Right of private defence against the act of a person of unsound mind, etc. ___ When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence. 99. Acts against which there is no right of private defence. ___ There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Extent to which the right may be exercised. ___ The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

22. Section 96 of the Indian Penal Code declares that an act done in the exercise of the right of private defence is not an offence. Section 97 specified the extent of the right of private defence whereas Section 99 prescribes the limitations on the exercise of this right.

23. Section 100 of the Indian Penal Code is extracted as under: "100. When the right of private defence of the body extends to causing death. ___ The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely: ___ First. ___ Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly. ___ Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; Thirdly. ___ An assault with the intention of committing rape; Fourthly. ___ An assault with the intention of gratifying unnatural lust; Fifthly. ___ An assault with the intention of kidnapping or abducting; Sixthly. ___ An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

24. Section 100 of the Indian Penal Code justifies the killing of an assailant when apprehension of atrocious crime enumerated in several clauses of the section is shown to exist. First clause of section 100 applies to cases where there is reasonable apprehension of death while second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in a grievous hurt. In that event he can go to the extent of causing the latter's death in the exercise of the right of private defence even though the latter may not have inflicted any blow or injury on him.

25. It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

26. In the present case, the circumstances indicate that Gajey Singh was assaulted on head by a sharp edged weapon 'balkati' causing a bone deep injury. As per the defence version there were four assailants who had come well prepared to assault at the door of their own house. In such a situation accused persons could have a reasonable apprehension of death or at least of grievous hurt. It was a case of single gun shot which was not repeated. Therefore, it cannot be said that the accused persons had exceeded their right of private defence in any manner.

27. In this case, the trial court convicted both the accused and the High Court allowed the appeal filed by the accused persons and acquitted them. In the instant case, the injury caused on Rajpal Singh is neither superficial nor of minor nature. Non-explanation of the injuries on Rajpal Singh and Gajey Singh has created serious doubt about the credibility of the prosecution version.

28. It would be appropriate to recapitulate ratio of some of the relevant cases decided by this court.

29. In *State of Karnataka v. Jinappa Payappa Kudachi & Others* 1994 Supp. (1) SCC 178, this Court observed thus: "6. The effect of non-explanation by the prosecution about the injuries on the accused persons depends on the facts and circumstances of each case. Normally if there is such non-explanation, it may at the most give scope to argue that the accused had the right of private defence or in general that the prosecution evidence should be rejected as they have not come out with the whole truth particularly regarding the genesis of the occurrence..."

30. In *Rizan & Another v. State of Chhattisgarh* (2003) 2 SCC 661, this Court observed thus: "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* (1976) 4 SCC 394]. In this case, as the courts below found there was not even a single injury on the accused persons, while PW 2 sustained a 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 the 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 the right of private defence."

31. In *V. Subramani & Another v. State of T.N.* (2005) 10 SCC 358 while dealing with the right of private defence this court observed as under:- "11. ... 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...."

32. A three-Judge Bench of this Court in *Abdul Rashid Abdul Rahiman Patel & Others v. State of Maharashtra* (2007) 9 SCC 1, observed that it is well settled that if injuries on the defence are not explained by the prosecution, the same may be taken to be a ground to discard the prosecution case, in case the truthfulness of prosecution case is otherwise doubted. But, in cases like the present one, where there is consistent evidence of the injured eyewitnesses apart from evidence of independent eyewitnesses, even if it is assumed that the prosecution has failed to explain the minor and simple injuries on the defence, the same cannot be taken to be a ground to reject the testimony of such witnesses. In the instant case, the injuries were neither superficial nor minor therefore, non-explanation of serious injuries in the instant case doubts the very genesis of the prosecution version.

33. We have heard the learned counsel for the parties at length. The view which has been taken by the High Court is certainly a possible and plausible view. Therefore, we do not think it appropriate to interfere with the impugned judgment.

34. The appeal being devoid of any merit is accordingly dismissed.