ALLAHABAD HIGH COURT

Ram Saiya

Vs

Emperor

(Sankar Saran, J.)

03.09.1947

JUDGMENT

Sankar Saran, J.

1. Five persons Gobind, Ram Singh alias Ram Saiya, Buddhi, Maika and Chhutta appeal against their convictions under Section 302. I.P.C. Gobind was sentenced to death and Ram Saiya to transportation for life. Others were sentenced to different terms of imprisonment The learned Sessions Judge has made the usual reference to this Court for the confirmation of sentence on Gobind.

2. The prosecution case very briefly is set out in the first information report which was made by one of the witnesses for the prosecution Makrand Singh who happens to be the younger brother of the deceased Dwarka Singh. The incident took place on 6th October 1946, at about noon time. The first information report was made at police station Kant at 5 P.M. The distance from the scene of occurrence in village Sarthauli to the police station is 7 miles. The first report pets out the case that has been given out in Court by the witnesses for the prosecution and it would be convenient to refer to the first information report almost in extenso: I live in village Sarthauli. Today at sunrise I engaged Gobind and Bam Saiya Kaobbia, sons of Puran, as labourers to bring mud on payment of eight annas per day and brought them from their hut. Subsequently a little after sunrise I gave them sattua to eat. They went to their hut to eat the same. When they did not return for a long time, my brother Dwarka Singh went to bring triem from the hut at noon. They were not willing to return to work. Thereupon a quarrel and fight ensued between them. At this time, Chbutta Kacbhi, son of Bbola, and Buddhi Kanhhi, son of Nangu, and Maika Kachhi, son of Laltu, who belong to the family of Gobind-these five men-began to make assault on my brother, Dwarka Singh, with lathia and kasi. His cry attracted my cousin, Dban Singh, to the spot. They then began to beat him also. On hearing this hue and cry Ganesh Gadaria and Marjad Singh Thakur of my village and Subedar Singh Thakur of Bhitoli and many other persona of the village reached there. They all witnessed my brother, Dwarka Singh and Dhan Singh being

beaten. I then also reached there. I found Dwarka Singh lying dead and Dhan Singh injured. They all old me about the assault made by those five Kachhis. My brother has received many injuries. I have come leaving his dead body at the hut of Gobind...I charge the five Kachhis, named above, with killing my brother, Dwarka Singh and assaulting my cousin Dhan Singh. Dhan Singh has also received injuries caused with a kasi. The report may be recorded and investigation made.

3. At the time that this report was made there was no police Sub-inspector in the police station. The station officer and the second officer both were away and head constable Hikmat Ullah was in charge of the police station. On receipt of the report Hikmat Ullah proceeded to village Sarthauli and found the dead body of Dwarka Singh in the hut of the appellants. He also found kasi, Ex. Ml and gandasa, Ex. M2 near the dead body and noticed blood stains on them. He sent the dead body to the mortuary for postmortem examination.

4. The post mortem examination of the deceased revealed four injuries. They were all incised wounds and were on vital parts of the body. In fact they were all above the neck. The nature and exact position of the injuries were as follows:

(1) incised wound 1" x 1/4 x bone antero posterior, top of the head front part, middle line.

(2) incised wound 1 1/2" x 1/2" x bone antero posterior, 2 1/2 above middle of right eye-brow.

(3) incised wound 1 3/4" x 1/2" x bone horizontal right parietal region back part. Bone underneath is cut completely.

(4) Incised wound 1 1/2" x 1 1/2" x bone, vertical, right mastoid region lower part. Mastoid process is cut under the injury and also fractured to small pieces.

5. There was comminuted fracture of right temporal and occipital bones.

6. Dhan Singh, the cousin of the deceased Dwarka Singh, was sent for medical examination to the Sadr Hospital, and it appears from the report of Dr. S.S. Misra, the medical officer in charge of the Sadr Hospital that he bad seven injuries, two contused wounds, two contusions, two abrasions and a swelling.

7. On behalf of the prosecution a number of witnesses have been produced as eye-witnesses and if their evidence were to be believed the case against all the accused would be amply made out. We have, however, to examine their statements to see if they are witnesses of truth, the whole truth and nothing but the truth. The first information report contained the names of all the eye witnesses except one. Dhan Singh, Marjad Singh, Subedar Singh and Ganesh Gadaria are the witnesses who were named in the first information report. In Court one other witness Me. Kitka

was produced but she was not named in the first information report.

8. The first eye witness Marjad Singh starts his deposition as if he was near the scene of occurrence and was able to see the whole incident clearly. He says I was taking a chari load from my field to the house. When I came near the mandayya of Gobind, I met Dwarka Singh and asked him as to where he was going. Dwarka Singh told me that he was going to call Ram Saiya and Gobind labourers who had come to take eat-tus at the mandayya but had not returned till then.

Then he goes on to describe how the deceased was attacked by Gobind and Ram Saiya. Yet this witness in his cross-examination says: jangal se chari lei gathri liye ata tha main ne shor suna. Main Gohind mulzim lei mandayya par gaya jo uske kchet men hai. It is apparent from this statement that he was not there from the very start of the incident as he tries to make out in his examination in chief. He comes up to the scene of the marpit when he hears the noise.

9. The next witness is Subedar Singh. He says that he heard the noise at the mandayya and went there and then he saw Gobind injuring Dwarka with a kasi and Ram Saiya with a gandasa. The deposition of this witness is almost contrary to Marjad in the sense that in the Court of the Committing Magistrate he said that he was there from the very start. His actual words were jab ham pahunche to Dwarka Singh ne Teaha Tee itni der hogai turn kampar nahin gaye aur leassi phaura bhi lakar rakh liye.

In the Court of Session, however, he said that he arrived on the scene of occurrence after he heard the noise.

10. P.W. Ganesh also tries to make out that he had seen the incident from the start, but his cross-examination is such that one would not feel disposed to accept his testimony. He says:

It is wrong to suggest that Dwarka Singh had entered the mandayya to beat Ram Saiya and Gobind and had beaten them first. When Dwarka Singh was attacked and I heard the sound of the blow given to him, I at once ran to the mandayya. It is wrong to say that I had followed Dwarka Singh when he was going to the mandayya speaking loudly. I had not stated before the Committing Magistrate that I had followed Dwarka Singh and reached the mandayya with him, but actually in the Court of the Committing Magistrate he said main bhi Dwarka Singh Ice piche chala gaya. Dwarka Singh mandayya ho pahunche aur main be sath tha.

11. We do not consider it necessary to comment upon the testimony of Mt. Kitka. She was not mentioned in the first information report and there is nothing in her evidence to show why, if she was there on the scene of occurrence, her name was omitted from the first information report. With regard to Dhan Singh, there is not the least doubt that he was in this affair. He was actually injured at about the same time and it is more than likely that he would be in a position to be

present on the scene of occurrence almost immediately after the quarrel started. He says: I heard a noise at the mandayya of Bam Sahai and Gobind and ran to the mandayya on hearing the noise. I saw Dwarka Singh being injured by Gobind and Kam Sahai accused. Gobind was causing injuries to Dwarka Singh with a kassi and Ram Sahai with a gandasa.

12. Our view with regard to these witnesses for the prosecution is that those are the men who arrived on the scene of occurrence soon after the incident, that Dhan Singh saw the striking of Dwarka Singh, that Ganesh possibly saw it and that all of them did see the beating of Dhan Singh. They have not deliberately told falsehoods as they had no-motive to do so, but they have probably imported their own presumptions regarding the origin of the incident and have so hypnotised themselves into the belief that the incident happened as they say. Further they have related that story one after another in the same sequence and in the same order. They say that they were able to see the origin of the quarrel and the manner in which Gobind and Bam Saiya attacked the deceased. Now there are these four injuries by a sharpe cutting weapon. Once the assault was made and once the kasi or the gandasa was used, it would finish in almost the twinkling of an eye for after all there are only four injuries on the deceased, all on the head. It would not take more than half a minute or a minute at the outside for the incident to conclude By the time there was noise and shouting for help the incident would be over and when the witnesses other than Dhan Singh and Ganesh arrived on the scene they just witnessed, as we have said above, the conclusion of the incident. Dhan Singh, the cousin, also was-beaten because perhaps he happened to be the-cousin of the deceased.

13. The fact, however, remains that these witnesses arrived on the scene of occurrence almost immediately after the beginning of the incident and there cannot be the slightest doubt that Dhan Singh and also Ganesh were present because both these men had injuries. Ganesh. apparently intervened during the beating on Dhan Singh and was himself injured. His injuries were, however, minor.

14. We are doubtful about Govind's part in. the incident. It does not sound very logical and. natural that he should just strike one blow with kasi and then stop. Only Dhan Singh states that he continued striking Dwarka Singh. His solitary statement is not to be accepted at its face-value. Dhan Singh had no kasi injury. Moreover Ram Saiya accused exonerates him.

16. Ram Saiya, the brother of Gobind, who is described as 15 years of age but according to the Civil Surgeon is 17, has admitted his share-of responsibility. In his statement in the Court' of Committing Magistrate he gays:

I did not get Sattu. Dwarka Singh went to bring me for forced labour. Dwarka Singh dragged me andi beat me. I etruok Dwarka Singh with a kasi. Ha wanted to take me to do forced labour. On my refusal he beat me and dragged me. I then, in my defense struck him with a kasi as a result of which he died. Gobind did not strike any blow. All these accused were not there. Nobody beat

Dhan Pingh. When Dwarka Singh died, Dhan Singh came to beat me. I then atruok Dhan Singh on his head with the back side of the kasi. In the Court of Session he added to the statement by saying Makran Singh and Dwarka Singh being zamindarsgave me a severe beating and dragged; me to force me to do begar.

Then said:

It was Dwarka Singh alone who had given me many slaps and had dragged me by catching hold of my legs. I got myself released from the grip of Dwarka Singb and ran to my house. Dwarka Singh followed me to my house to beat me. At my house Dwarka Singh picked up my gandasa which was lying there and tried to assault me with the gandasa. Before Dwarkn Singh eoulit strike me, I gave him a kasi blow over his headi I gave four blows with the kasi to Dwarka Singh, as a result of which he fell down on the ground and died. Dhan Singh then came and he slapped-me and also beat me with a small stick. I then gave 2 or 3 blows to Dhan Singh with the handle of the kasi.

16. There is not the slightest doubt that this appellant is trying to minimize his share of the responsibility. At the same time ha, is doing his utmost to save the other appellants from liability. It is not possible to accept his statement in its entirety but there is not the least doubt that taken with the evidence of the witnesses for the prosecution his Statement establishes that he at any rate was responsible for the death of Dwarka Singh. It is more than doubtful whether he was also responsible for the injury on Dhan Singh because Dhan Singh was not injured by a sharp cutting weapon like kasi. His injuries are all with a blunt weapon like a lathi.

17. The result, therefore, is that so far as the offence under Section 302, Penal Code, is concerned, the charge is not brought home against the appellant Gobind beyond all reasonable doubt. He is entitled to the benefit of that doubt and must be acquitted.

18. With regard to Ram Saiya, we have said above that he was responsible for the death of Dwarka Singh. The question, however, is of what offence Ram Saiya is guilty. Normally every homicide is murder or culpable homicide not amounting to murder, unless it is governed by exceptions provided by law. The offence committed by him would be that of murder having regard to the nature of the injuries, the weapon used and the circumstances of 'the incident, unless Ram Saiya can get advantage of any gene al exception or exceptions to Section 300, Penal Code.

19. On behalf of the appellants it has been argued that this case is covered by the provisions of Section 100, Penal Code, and that, therefore, Ram Saiya committed no offence. The argument is to the effect that the intention of Dwarka Singh was to compel Gobind and Ram Saiya by force to accompany him to do his work, that his conduct amounted to an assault with the intention of abducting and that, therefore, Ram Saiya and Gobind could cause death in the exercise of the right of private defense of body. In support of the argument reliance is placed on the case in

Daroga Lahar v. Emperor ('30) 17 A.I.R. 1930 Pat. 347. This case supports the contention for the appellants in so far that in case of an assault with the intention of abduction, the person assaulted was given the right of private defense of person under Section 100, I.P.C., subject to the limitations to which such a right is restricted under Section 99, I.P.C.

20. We do not agree with the contention for the appellants.

21. The conduct of Dwarka Singh amounts to abduction as defined in Section 362, I.P.C. which is: Whoever by force compels, or by any deceitful means Induces, any person to go from any place, is said to abduct that person. But abduction without such intention or knowledge as is referred to in Sections 364, 365, 366, 366-A, 367. 368 and 369 is not punishable and is consequently not an offence in view of the definition of "offence" in Section 40, I.P.C. So far as the present case is concerned, none of these sections in applicable. Dwarka Singh deceased was not acting in a manner as to indicate that he wanted to abduct Ram Saiya and Gobind with any of the intentions or knowledge contemplated in the various aforesaid sections relating to such abduction which is punishable. The offence that he would have committed if he had succeeded in forcibly taking Ram Saiya and Gobind to do work would have been the offence of assault or of using criminal force.

22. We are of the opinion that the right of private defense of person arises against the commission of an offence and not against any mere physical act which may not be to one's liking, but is not punishable under the provisions of the Indian Penal Code.. This is clear from a mere perusal of the sections relating to the right of private defense. Section 97, I.P.C. is: Every person has a right, subject to the restrictions contained in Section 99, to defend. Firstly, his own body, 'and the body of any other, person, against any offence affecting the human body; Secondly, the property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence failing under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief Or criminal trespass.

23. It dearly indicates that a person has a right to defend his own body and the body of any other person against any offence affecting the human body. The offences affecting the human body are dealt within chapter XVI of the Indian Penal Code. The chapter opens with the words "Offences affecting the human body". It includes Sections 299 to 877. The use of the words "Offences affecting the human body" both in Section 97, which gives the right of private defense, and in the beginning of chapter XVI makes it clear that the right of private defense of person arises in favor of a person in cases when any of the offences mentioned in Sections 299 to 377 is contemplated to be committed against the person who seeks to exercise that right. A similar view was expressed in *Sawal Seth v. Emperor*[1] It was observed: The right of private defense only exists against acts amounting to an offence against person or property and within the limits of Section 97 and the following sections of the Penal Code.

24. It was held in *Gouri Shanker v. Sheikh Sultan*[2]

Now there is only a right of private defense at all against acts which are offences (Section 97, Penal Code). I have already held upon the findings in the criminal case in *Gouri sanker v. Emperor*[3] that the assault upon Sheikh Ahmad was excused by the right of private defense, that is to say, that assault was not an offence, Section 96, Penal Code, consequently it could give rise to no right of private defense on the part of the accused.

25. Section 100, Penal Code, relied upon by the learned Counsel for the appellant, is:
The right of private defense 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:

> First. - Such an assault as may reasonably oause 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.

26. The extended right of private defense upto the voluntary causing of death to the assailant arises only if the offence which occasions the exercise of the right be of any of the descriptions mentioned in the section. The offences mentioned in the various clauses of this section make it clear that the intentions accompanying or the results following the assaults would make the conduct of the assailant an offence under the Penal Code. The first two clauses deal with such assaults as give rise to the apprehensions that the offence of murder or culpable homicide not amounting to murder or the offence of causing grievous hurt would be the result. The third and fourth clauses mention assaults with the intention of committing the offences of rape and of gratifying unnatural lust. The sixth clause deals with assaults with the intention of committing acts which would be offences of wrongful confinement. It is the fifth clause with which we have to deal and it refers to an assault with the intention of kidnapping or abducting. We are of opinion

that the word "abducting" used in thing clause refers to such abducting as is an offence under the Indian Penal Code and not merely to the act of abduction as defined in Section 362, I.P.C. It is the contemplated commission of the offence of abduction which gives the extended right of private defense of person. Mere abduction is not an offence and, therefore, cannot give rise to any right of private defense, what to say of the extended right of private defense to voluntarily cause death, It follows, therefore, that a comparison of Clause 5 with the other clauses tends to support our interpretation.

27. Further, it is contended for the appellants that the extended right of private defense of person is the result of the offence of assault and that intention to abduct is descriptive of the object of assault. If the only thing to be looked into for the purpose of giving the right is an assault and not the fact of the nature of the contemplated act, the word "assault" could very easily replace the word "offence" in the earlier portion of Section 100. The substitution will not make any difference in the interpretation or application of the section as suggested.

28. The interpretation of Section 100, fifth clause, as suggested for the appellants, would mean that if the assailant succeeds in abducting the victim, he would be merely guilty of a very minor offence under Section 352, I.P.C. and the commission of which offence would have given rise to the limited right of private defense of body, while when he fails in his attempt, the contemplated victim could exercise the extended right of private defense of body. We imagine no good reason for giving the extended right to the accused in the case of an assault with the intention of abduction when the abduction was not of the punishable type. We do not see anything in the words of Section 100, I.P.C., which must indicate that the abducting referred to in Clause 5 of the section is simple abducting without any reference to its being of the punishable type or not.

29. Mayne notes in his Criminal Law of India, 4th Edition, p. 218:

Clauses 5 and 6 (Section 100, I.P.C.) refer to violations of liberty. Of these, assaults with the intention of kidnapping or abducting are attempts to deprive a person of liberty with a view to the commission of ulterior crimes which themselves are generally, or probably, such as may be resisted to the last extreme.

30. This expression of opinion fits in with our view expressed above that the abduction contemplated in the 5th clause should be of the punishable type.

31. The same view seems to be implied in the observations in para. 901, p. 382, the Penal Law of British India by Sir Hari Singh Gour, 5th Edition. They are: Homicide is justifiable only upon the plea of necessity, and such necessity only arises in the prevention of forcible and atrocious crimes.

32. We are, therefore, of opinion that Ram Saiya did not have the right of private defense of

person to the extent of causing the death of Dwarka Singh. In our opinion he had the right of private defense to do any harm short of death to Dwarka Singh on account of Dwarka Singh's assault. We are further of opinion that Ram Saiya exceeded the right of private defense of person.

33. We have considered exception 2 to Section 300, I.P.C. and are of opinion that this exception does not help Kam Saiya and does not reduce the gravity of his conduct by reducing the nature of the offence from murder to culpable homicide not amounting to murder. Una not in every case of exceeding the right of private defense of person that what would ordinarily have been the offence of murder would become an offence of culpable homicide not amounting to murder. This exception is: Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defense without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defense. It is necessary, for the offence of murder to be reduced to the offence of culpable homicide not amounting to murder that the person exercising the right of private defense should exceed the right given to him without any intention of doing more harm than is necessary for the purpose of such defense. It cannot be said in this case that Ram Saiya exceeded the right without any intention to exceed it. Dwarka Singh was unarmed and an attack with a gandasa or kasi, a heavy sharp-edged weapon, was unjustified. Ram Saiya does not appear to be a weakling. His age is reported to be 17 years by the Civil Surgeon. He had the courage to attack Dwarka Singh. Further he inflicted four incised wounds on Dwarka Singh. All these wounds were on the head. The post-mortem report describes by figure the comminuted fracture of the right parietal, frontal and occipital bones. We are of opinion that any of the four gandaaa blown would have brought Dwarka Singh to the ground and that the other three blows would have been inflicted after Dwarka Singh had fallen down. Even if the first blow with a gandasa may be held to be justified and not to exceed the right of private defense, it being presumed that the gandasa just carne handy to Ram Saiya at the time, Ram Saiya's striking Dwarka Singh, who had fallen down, three times with the gandasa on the head was a conduct indicating that Ram Saiya did intend to cause the death of Dwarka Singh. We cannot imagine that all the four gandasa blows would have been given to Dwarka Singh while he was in a standing position. We cannot believe that Dwarka Singh would have been in a position to resume his assault after the receipt of any single blow on the head. We are, therefore, of opinion that the offence committed by Ram Saiya in causing the death of Dwarka Singh is the offence of murder under Section 302, I.P.C.

34. It was further contended that Dwarka Singh had attacked Ram Saiya with a gandasa : and that, therefore, Ram Saiya could cause his death. We do not agree. Firstly, there is no injury ton. Ram Saiya. Secondly, the gandasa that was discovered in the mandaiya belong to Ratn Saiya, and not to the deceased. This part of the case is not worthy of belief and we reject it. Even if this defense allegation be correct, what we have said above about Ram Saiya's exceeding the right of private defense of person and about the non-application of exception 2 to Section 300, I.P.C. would equally apply and would make the conduct of Ram Saiya to amount to the commission of

murder under Section 302, I.P.C. as the right of private defense is always subject to the terms of Section 99, I.P.C., one term being that the right of private defense in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defense.

35. It is, therefore, clear that Ram Saiya alias Ram Singh is guilty of the offence under Section 302, I.P.C. He has already been awarded the lighter sentence and we cannot, therefore, interfere with the same.

36. He was convicted under Section 148, I.P.C., also. He is acquitted of that offence as we are not satisfied that he participated in beating Dhan Singh because the weapon that he possessed could not have caused the injury that has been, caused to Dhan Singh. He is, therefore, acquitted of the offence under Section 148 and also under Section 323, I.P.C.

37. With regard to the other three appellants, the evidence of the eye-witnesses that they were attacking the witness Dhan Singh is on the whole acceptable. They have tried to exaggerate no doubt/but the fact remains that they all said that on his arrival on the scene of occurrence Dhan Singh was beaten by the appellants. We, therefore, uphold the conviction of the three-appellants under Section 323, I.P.C. As we have acquitted Gobind, there is no question of the applicability of Section 147, I.P.C., and, therefore, we acquit the three appellants for an offence under Section 147, I.P.C.

38. In the result we allow Gobind's appeal and acquit him of all the offences with which he was charged. He will be set at liberty forthwith unless required for any other offence. We dismiss the appeal of Ram Singh alias Ram Saiya under Section 302, I.P.C., and maintain the sentence of transportation for life. We allow his appeal under Sections 148 and 323, I.P.C. With regard to the other appellants Buddhi, Maika and Chhutta, we acquit them of an offence under Section 147, I.P.C., but dismiss their appeal under Section 323, I.P.C. The sentence of six months' rigorous imprisonment is not excessive and we do not interfere with the same. They are on bail. They will surrender to their bail and serve out the rest of their sentences.