STATE OF RAJASTHAN

v.

RAM BHAROSI AND ORS.

AUGUST 12, 1998

[M.K. MUKHERJEE AND D.P. WADHWA, JJ.]

Criminal Law:

Penal Code, 1860: Sections 97, 99, 103, 441 and 300 Exception 2.

Private defence—Right of—Extending to cause death—Availability of—Dispute related to ownership and possession of agricultural land—Accused fully armed with firearms and lathis whereas complainants (deceased and his nephew) unarmed—Accused found ploughing complainant's land and when deceased questioned them he was fired upon and his nephew given lathi blows—Held: Even assuming that the accused were in possession of the land, the complainants cannot have committed trespass under S.441—Otherwise also right of private defence can extend to causing death only in case of house-breaking by night—Accused being fully armed with premeditation to cause death they had the intention of doing more harm than was necessary for the purpose of private defence—Hence, Exception 2 to S. 300 not attracted.

The respondents-accused were convicted by the Trial Court under Section 302/149 of the Penal Code, 1860 and sentenced to undergo rigorous imprisonment for life. However, the High Court acquitted the accused of the offence under Section 302 IPC and convicted them under Sections 307 and 323 IPC on the ground that the accused acted under the right of private defence.

According to the prosecution the dispute related to ownership and possession of a piece of agricultural land. On the day of the incident the accused persons were found ploughing the complainant's land. When the deceased questioned the accused as to why they were ploughing the land belonging to their family he was fired upon and his nephew was given lathi blows. The deceased and his nephew were unarmed.

Allowing the appeal, this Court

HELD : 1. The High Court was not right in overturning the finding of

A the trial court without proper consideration of evidence on record that it was the complainant party which was in possession of the land on the date of the incident and that the accused trespassed into that land fully armed with firearms and lathis with the object of killing any one who would obstruct them in their design of taking possession of the land. In such circumstances the defence put forward by the accused that they were acting under the right
B of self defence cannot be accepted. [1135-C-D]

2. Thought there would be right of private defence Section 97 of the Penal Code, 1860 when offence of criminal trespass or attempting criminal trespass is committed, under Section 103 IPC it is only in the case of house trespass that right of private defence can extend to causing death. That is
C not the case here. On the assumption that it was the accused party which was in possession of the land the complainant party could be said to have committed or attempted to have committed offence of criminal trespass under Section 441 IPC. There is nothing to show that the deceased and his nephew entered upon the land in question with the intent to commit an offence or to
D intimidate, insult or annoy the accused party. [1136-E-F; 1137-A]

3. Exception 2 to Section 300 IPC would also not apply as from the findings on record it was not a case where the accused were exercising right of private defence without premeditation, and without any intention of doing more harm than was necessary for the purpose of self-defence. The accused
E were there fully armed with premeditation to cause death and it could not be side that they did not have the intention of doing more harm than was necessary for the purpose of private defence. Clearly use of deadly force was not justified merely to expel the deceased and his nephew, the alleged trespassers. It was nowhere the case of the defence that there was no other
F way of getting them out of the land. The occasion certainly did not warrant any action of self-defence. [1137-D-E]

Rajinder v. *State of Haryana,* [1995] 5 SCC 187, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.
G 2087 of 1996 Etc.

From the Judgment and Order dated 1.5.96 of the Rajasthan High Court in D.B. Crl. A. No. 295 of 1994.

Aruneshwar Gupta and Ms. Reena Bagga for the Appellants.

H Ashok K. Mahajan for the Respondents.

The Judgment of the Court was delivered by A

D.P.WADHWA J. We condone delay in SLP (Crl.) No. 2625 of 1998 and grant leave to appeal.

We heard both the appeals together.

B

State of Rajasthan is aggrieved by the judgment dated May 1, 1996 of the Division Bench of the Rajasthan High Court (Jaipur Bench) for two reasons: (1) acquitting Natthi, Karan Singh and Ram Bharosi of offences under Sections 302/149, 149 and 447 Indian Penal Code (IPC for short) though maintaining their conviction for offence under Section 323 IPC but reducing their sentence to the rigorous imprisonment already undergone by them; and C (2) acquitting Makhan and Gokula of charges under Sections 302, 148, 447 and 323 IPC and instead convicting each of them for offence under Section 307 IPC and sentencing them to undergo rigorous imprisonment for seven years and to a fine of Rs.2000 and in default to undergo further rigorous imprisonment for six months. Gokula and Makhan have appealed against the same very D judgment against their conviction and sentence.

Additional Sessions Judge, Bayana (Bharatpur), who tried eight persons, by judgment dated June 18, 1994 convicted Makhan and Gokula under Section 302 IPC and Natthi, Karan Singh and Ram Bharosi under Sections 302/149 IPC and sentenced all five of them to undergo rigorous imprisonment for life and E fine of Rs. 500 each and in default of payment of fine to undergo further rigorous imprisonment for six months. All the five accused were also convicted for offences under Sections 148, 447 and 323 IPC and each of them separately sentenced to undergo rigorous imprisonment respectively for one year, six months and six months. Three remaining accused, namely, Meera, Phoolan Dei and Somoti were acquitted. It was against their conviction and sentence F that the five accused filed appeals in the High Court which by impugned judgment reversed the convictions and sentences passed by the learned Additional Sessions Judge and as aforementioned. We may also note that the police had also submitted chalans for offences under Sections 3/25 Arms Act, 1959. At the end of the trial, however, it was found that no charge had been G framed against accused under these offences and consequently there could not be any conviction against any of the accused.

The incident out of which these proceedings arose occurred on August 6, 1992 around 3.00 p.m. The dispute related to the ownership and possession of a piece of agricultural land situated in village Milsuma, falling under the H

A jurisdiction of Roopwas Police Station. Deceased Shiv Ram along with his nephew Vijay Kumar alias Neta had gone towards the land on a tractor. He found that all the eight accused were ploughing their (Shiv Ram's family) millet crops which they had sown a month or so earlier. When deceased Shiv Ram questioned the accused as to why they were ploughing the field belonging to their family he was fired upon, given lathi blows and stones were hurled B at him. On August 8, 1992 at about 4.25 p.m. Shiv Ram died in the hospital on account of injuries suffered by him. Vijay Kumar in the process also suffered minor injuries. First Information Report of the incident was lodged by Narender Singh, brother of deceased Shiv Ram on August 7, 1992 at 7.00 p.m. His explanation for delay in recording FIR has been accepted by both C the Sessions Court and the High Court. It was that he had gone to Bharatpur and returned to his village during the night of August 6/7, 1992 at 2.00 a.m. when he was told about the incident and the fact that Shiv Ram, who had suffered injuries, was taken to hospital at Bharatpur. Narender Singh rushed to Bharatpur where condition of Shiv Ram was serious and on the advice of the doctors Shiv Ram was taken to the hospital in Agra where he succumbed D to his injuries. Narender Singh in his report recorded as under :-

> "My father has five Bighas of (agriculture) Patia Chock land at Milsuma under his possession and Khatedari in which we sowed millet and yesterday i.e. on 6.8.1992 at 2.00-3.00 P.M. my younger brother Shivram and my son Ajay Kumar alias Neta hereinafter E referred to as Vijay Kumar alias Neta went to see the fields where Natthi, Gokula, Karan Singh, Ram Bharosi, sons of Tunda Makhan S/ o Natthi, by caste Gaderia R/o Nagla Heas Mauza Milsama, accompanied by a girl and two women were found spoiling our field in which we had sown millet. When Shivram admonished them, Makhan F and Gokula started to shower bullets, in the result of which Shivram got hurt in various places. As his condition was serious, he was referred to Agra hospital from Bharatpur. He is still in serious condition. The women pelted stones and the rest of the people gave blows lathies. When I reached the village at 2 O'clock in the night, I came to know about this incident. On hue and cry being raised, G Murari alias Gharua, Ram Sharan S/o Munshi Thakuar of Milsama came there who saw the whole incident. Ajay Kumar has also got injured."

On the basis of the report so lodged by Narender Singh, a case was firstly registered against the accused for offence under Section 307 IPC and other H sections and after Shiv Ram expired Section 302 IPC was added in the case.

Accused were arrested on various dates and recoveries effected. After the completion of the investigation 'challan' was filed against the accused in the court and they were put on trial. Apart from the testimony of doctors, investigating officers, 'halka' patwari there were three eye witnesses, namely, Murari, Ram Sharan and Vijay Kumar whose statements were recorded. Ram Bharosi accused appeared in his defence under Section 315 of the Criminal Procedure Code. Accused Gokula, Ram Bharosi, Natthi and Karan Singh are brothers while accused Makhan is son of Natthi. Their defence was that they were in possession and cultivation of the land and complainant partly wanted to usurp their land and fabricated a false case against them. Ram Bharosi in his statement before the court said that the land was entered in the name of his father in the revenue record and after his death it was mutated in the names of his sons Natthi, Gokula, Karan Singh and Ram Bharosi. The mutation itself was attested by Kishan Singh Sarpanch, father of the deceased Shiv Ram. Ram Bharosi said that Kishan Singh had obtained a decree by playing fraud upon court of the Assistant Collector, Bayana in January 1987 which decree was challenged in a civil suit filed in the Court of Munsif, Bayana by Ram Bharosi and his brothers. Ram Bharosi produced a certified copy of the plaint in that suit wherein allegations were made that Kishan Singh in collusion with the process server obtained a forged report of service of summons and obtained ex-parte decree. After Ram Bharosi and his brothers came to know of the ex-parte decree they instituted a civil suit against Kishan Singh in July, 1987 wherein the court ordered maintenance of status quo. That order was still subsisting on the date of the incident. The order of mutation in the names of Ram Bharosi and his brothers was also filed which is dated February 23, 1975, which showed that the land was in possession of these persons. On this basis High Court concluded that Kishan Singh being Sarpanch took undue advantage of his position and was successful in making changes in revenue record and getting mutation of land in his name on account of the ex-parte decree which was under challenge and there was an order of maintenance of status quo. According to the High Court it were the accused who were in possession of the land and were ploughing the same on the date of occurrence and that the complainant party was the aggressor. High Court said the trial court erred in holding that it was the complainant party which was in possession. Judgement of the High Court does not at all refer to the evidence produced by the prosecution on the basis of which the complainant patty claimed ownership and possession. It would, therefore, appear that the appreciation of the evidence on the question of the possession was one sided. High Court was not examining the conduct of Kishan Singh. Admittedly on the basis of the ex-parte decree mutation of the land was entered in the

A name of Kishan Singh. Revenue records of Jamabandi and Khasra Girdavari showed that it was Kishan Singh who was in possession of the land and was cultivating the same. High Court has not referred to the finding of the trial court that one month before the date of the incident the complainant party had sown millet on the land which was growing at the time the accused were ploughing the field. On one hand there were documents from the revenue B records of the village filed by the prosecution which showed possession of the complainant party on the date of the incident and there was other set of revenue record filed by the accused which showed that as far back in 1975 it were the accused who were in possession of the land. We have not understood the logic of the High Court judgment in not considering the C evidence filed by the prosecution as to the possession of the land by the complainant party. On the basis of the finding that it was the complainant party which was the aggressor High Court said that the accused could not be held guilty for committing offences under Sections 148, 149 and 447 IPC and that neither they were sharing common intention nor were they members of unlawful assembly at the relevant time and, therefore, each of the accused D could be held responsible for his individual act. High Court said that there were no reliable evidence on record which proved whether the fatal injury on the neck of the deceased Shiv Ram was caused by Makhan or Gokula and that in the absence of the evidence to establish that their common intention was to cause death it would appear that they had common intention of causing E injuries which could be dangerous to life and each of them would be guilty of the offence under Section 307 IPC. Then the High Court examined the charge under Section 323 IPC against accused Natthi, Karan Singh and Ram Bharosi. It examined the statements of the eye witnesses Murari, Vijay and Ram Sharan and concluded that there was no reason to disbelieve these witnesses that Natthi, Karan Singh and Ram Bharosi did cause simple injuries F on the person of deceased Shiv Ram and Vijay Singh. High Court did accept the version of the eye witnesses and the occurrence as it took place. To that extent the prosecution's case was accepted. Finally the High Court said: "the upshot of the above discussion is that appellant Makhan and Gokula are guilty of committing offence under section 307 IPC and the appellants Natthi, G Karan Singh and Ram Bharosi are guilty of committing offence under section 323 IPC"

To us the whole discussion in the judgment of the High Court appears to be rather inexplicable.

H About the incident as it happened and as was projected by the

prosecution have been accepted by both the Trial Court and the High Court. Deceased Shiv Ram suffered gun shot injuries in his face at the hands of Makhan and Gokula. It were these gun shot injuries to which Shiv Ram succumbed and sufficient in the ordinary course of nature to cause death. Vijay Kumar also suffered simple injuries from blunt weapon. So did Shiv Ram also suffer both simple and grievous injuries caused by lathi blows given by Natthi, Karan Singh and Ram Bharosi and allegedly by pelting of stones. As noted above, recoveries of fire arms and lathis were effected on the basis of statements recorded under Section 27 of the Evidence Act. According to the report of the Forensic Science Laboratory (FSL) firing was made from a fire arm so recovered though it was not possible to determine the time of firing.

In our view High Court was not right in over-turning the finding of the trial court without proper consideration of evidence on record that it was the complainant party which was in possession of the land on the date of the incident and that the accused trespassed into that land fully armed with fire arms and lathis with the object of killing any one who would obstruct them in their design of taking possession of the land. In such circumstances the defence put forward by the accused that they were acting under the right of self defence cannot be accepted. The accused party was full armed. When Shiv Ram and Vijay Kumar went to the land, they were unarmed. They found the accused were already ploughing the land. When Shiv Ram questioned them as to what they were doing he was fired upon by Makhan and Gokula and other accused showered lathi blows on him and on Vijay Kumar.

On the plea of right of private defence advanced by the accused we may refer to the provisions of Sections 97 and 103 IPC. Section 97 deals with right of private defence of the body and of property and Section 103 prescribes when the right of private defence of property extends to causing death. These two sections are as under :-

> "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

A which is an attempt to commit theft, robbery, mischief or criminal trespass."

"103.- When the right of private defence of property extends to causing death.- The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing
B of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:-

First.- Robbery;

C

Secondly.- House-breaking by night;

Thirdly.- Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

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Fourthly.- Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised."

E Though there would be right of private defence under Section 97 IPC when offence of criminal trespass or attempting criminal trespass is committed, under Section 103 IPC it is only in the case of house trespass that right of private defence can extend to causing death. That is not he case here. On the assumption that it was the accused party which was in possession of the land the complainant party could not have said to have committed or attempted
F to have committed offence of criminal trespass. Both Shiv Ram and Vijay Kumar were unarmed. High Court has not reached any finding on the assumption, which we are drawing, if the complainant party could be said to have committed or even attempted to have committed criminal trespass. Section 441 IPC defines criminal trespass and is as under:-

G

"441. Criminal trespass.- Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or
H with intent to commit an offence, is said to commit "criminal trespass".

There is nothing to show that Shiv Ram and Vijay Kumar entered upon the land in question with the intent to commit an offence or to intimidate, insult or annoy the accused party.

It was then submitted before us that in any case it could a case of culpable homicide and not murder falling under Section 300 IPC. Explanation (2) of Section 300 is as under:-

> "Explanation 2.- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence 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 defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

In our opinion this would not apply as form the findings on record it is clear that it was not a case where the accused were exercising right of private defence without premeditation, and without any intention of doing more harm than was necessary for the purpose of self-defence. The accused were there fully armed with premeditation to cause death and it could not be said that they did not have the intention of doing more harm than was necessary for the purpose of private defence. Clearly use of deadly force was not justified merely to expel Shiv Ram and Vijay Kumar, alleged trespassers. It was nowhere the case of the defence that there was no other way of getting them out of the land. The occasion certainly did not warrant any action of self-defence.

In the case of *Rajinder* v. *State of Haryana,* [1995] 5 SCC 187 where one of us (Mukherjee, J.) was a party this Court was considering the issue of right of private defence available to accused under the provisions of the Indian Penal Code. The Court said that the fascicle of Sections 96 to 106 IPC codify the entire law relating to right of private defence of person and property including the extent of and the limitation to exercise of such right. In that case after examining the record the Court was of the view that the only legitimate and reasonable inference that can be drawn is that the accused party had gone to the disputed land with a determination to cultivate it and, for that purpose, fully prepared to thwart any attempt made by complainant party to disturb such cultivation and meet any eventuality. After referring to the provisions of various Sections aforementioned, this Court observed as under:-

> "It is evident from the above provision that unauthorised entry

into or upon property in the possession of another or unlawfully remaining there after lawful entry can answer the definition of criminal trespass it, and only if, such entry or unlawful remaining is with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed. Needless to say, such an intention has to be gathered from the facts and circumstances of a given case. Judged in the light of the above principles it cannot be said that the complainant party committed the offence of "criminal trespass" for they had unauthorisedly entered into the disputed land, which was in possession of the accused party, only to persuade the latter to withdraw thereupon and not with any intention to commit any offence or to insult, intimidate or annoy them. Indeed there is not an iota of material on record to infer any such intention. That necessarily means that the accused party had no right of private defence to property entitling them to launch the murderous attack. On the contrary, such murderous attack not only gave the complainant party the right to strike back in self-defence but disentitled the accused to even claim the right to private defence of person.

We hasten to add, that even if we had found that the complainant party had criminally trespassed into the land entitling the accused party to exercise their right of private defence we would not have been justified in disturbing the convictions under Section 302 read with Section 149 IPC, for Section 104 IPC expressly provides that right of private defence against "criminal trespass" does not extend to the voluntary causing of death and Exception 2 to Section 300 IPC has no manner of application here as the attack by the accused party was premeditated and with an intention of doing more harm than was necessary for the purpose of private defence, which is evident from the injuries sustained by the three deceased, both regarding severity and number as compared to those received by the four accused persons. However, in that case we might have persuaded ourselves to set aside the convictions for the minor offences only, but then that would have been, needless to say, a poor solace to the appellants."

State of law is explicit. In this view of the matter the High Court was not right in its conclusion. The judgment of the High Court cannot be

sustained either in law or on the facts of the case. We, therefore, allow the Criminal Appeal filed by the State, set aside the judgment of the High Court and restore that of the trail court. The result is that Makhan and Gokula are convicted under Section 302 IPC and each of them sentenced to undergo imprisonment for life and a fine of Rs.500 and in default of payment of fine to undergo further rigorous imprisonment for six months. Natthi, Karan Singh and Ram Bharosi are convicted for offence under Sections 302/149 IPC and are sentenced to imprisonment for life and a fine of Rs.500 each and in default of payment of fine to undergo further rigorous imprisonment for six months. All the accused respondents, namely, Gokula, Makhan, Natthi, Karan Singh and Ram Bharosi are further convicted for offences under Sections 148, 447 and 323 IPC and sentenced to undergo rigorous imprisonment for one year, six months and six months respectively. The substantive sentences shall run concurrently. Bail bonds of Makhan and Gokula are cancelled. They shall be taken into custody forthwith. All the five accused-respondents shall undergo their respective sentences. The appeal, filed by Makhan and Gokula is dismissed.

V.S.S. Appeal allowed.