SURENDRA AND ANR.

v.

STATE OF MAHARASHTRA

AUGUST 24, 2006

[S.B. SINHA AND DALVEER BHANDARI, JJ.]

Penal Code, 1860:

Section 304, Part I—Culpable homicide not amounting to murder—When PW-3, the son of the deceased, was going to the pan shop early in the morning, accused No. 2 allegedly came out with a stick and hurled some blows on him—PW-1, daughter of the deceased raised hue and cry—The deceased came out thereafter to rescue his son—At that time, accused No. 1 allegedly took out one ubhari (a big stick) from a bullock cart and assaulted him—It was the case of the accused persons that the deceased and his son, nurturing deep resentment against them, came armed and made attempts to assault accused No. 1 who was milking his cows in the cattle shed—Trial court convicted the accused persons under S. 302/34—High Court affirmed the conviction—Correctness of—Held: It was necessary on the part of the prosecution to explain the injuries on the person of the accused—The possibility of PW-3 and the deceased being the aggressors cannot be ruled out—Evidently, there was no pre-meditation on the part of accused No. 1—He was not armed—He took out an ubhari from his bullock cart at a later stage—It is, therefore, a case where it is likely that a sudden fight between the parties had erupted—Hence, conviction is altered to one under. S. 304, Part I and S. 324/34.

Section 96—Right of private defence—Exercise of—Principles—Held: In all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific plea of right of private defence has been raised—Right of private defence cannot be exceeded by using more force upon the deceased than was necessary.

According to the prosecution, the appellants-accused were brothers and the deceased was their uncle and there were some property disputes between them. When PW-3, the son of the deceased, was going to the pan shop early

A in the morning, appellant No. 2 allegedly came out with a stick and hurled some blows on him. PW-1, daughter of the deceased raised hue and cry. The deceased came out thereafter and made endeavours to rescue his son. At that time, appellant No. 1 allegedly took out one ubhari (a big stick) from a bullock cart and assaulted him. It was the case of the appellants that the deceased and B his son, nurturing deep resentment against them, came armed and made attempts to assault appellant No. 1 who was milking his cows in the cattle shed. On the complaint of appellant No. 1 a case under Section 324 read with Section 34 of the Penal Code, 1860 was registered against the deceased and his son. Appellant No. 1 had raised a plea of private defence and the injuries on the person of the appellants were not explained.

C

The trial court convicted the appellants-accused persons under Sections 302/34 and 324/34 IPC. The High Court affirmed the conviction. Hence the appeal.

Allowing the appeal in part, the Court

D

HELD: 1. In a case of this nature, a broad view of the entire matter was required to be taken, viz.

(a) Appellant No. 1 was not armed and he at a later stage of the quarrel took out an ubhari (a big stick) from a bullock cart.

E

(b) He had raised a contention even in his bail petition that he had exercised his right of private defence. [298-E, F]

2. In all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific F plea of right of private defence has been raised. It may be true that in the event the prosecution discharges its primary burden of proof, the onus would shift on the accused but the same would not mean that the burden can be discharged only by examining defence witnesses. [298-F, G]

3. The courts below committed a manifest error of law in opining that G the appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. The Courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case. [299-A]

State of U.P. v. *Ram Swarup*, [1974] 4 SCC 764; *Yogendra Morarji* v.

H

State of Gujarat, [1980] 2 SCC 218; *Cherlopalli Cheliminabi Saheb* v. *State of A.P.,* [2003] 2 SCC 571; *Bishna Alias Bhiswadeb Mahato* v. *State of W.B.* [2005] 12 SCC 657 and *Nagarathinam* v. *State, Rep. by Inspector of Police,* JT (2006) 4 SC 288, relied on. A

3. The defence of the appellants, therefore, could not have been wished away. In a case of this nature, it was necessary on the part of the prosecution to explain the injuries on the person of the accused. The investigation of the entire cases and particularly in regard to the fact that there were cross cases, a fair investigation was expected. The possibility of PW-3 and the deceased being the aggressors cannot be ruled out. They had been bearing a grudge against appellant No. 1. [302-G; 303-A] B C

4. Why the occurrence took place in front of the house of the appellants had not properly been explained by the prosecution witnesses. Evidently, there was no pre-meditation on the part of appellant No. 1. He was not armed. He took out an ubhari from his bullock cart at a later stage. [303-A]

D

5. The statements of the prosecution witnesses in regard to the genesis of the occurrence and the presence of the prosecution witnesses at different stages are not uniform. It is, therefore, a case where it is likely that a sudden fight between the parties had erupted which would attract Section 304 of the Penal Code, 1860 and not Section 302 thereof. It is also a case where an inference can safely be drawn that the blows were initially not hurled on the deceased by the appellants. They did so at a later stage. But, appellant No. 1 suffered minor injuries. He had not been able to show that the situation was such that he could reasonably apprehend his death. They have exceeded their right of private defence in using more force upon the deceased than was necessary. [303-B, C, D] E F

Pappu v. *State of Madhya Pradesh,* [2006] 7 SCALE 24, relied on.

6. The conviction of the appellants under Section 302 read with Section 34 IPC cannot be sustained. They are held guilty for commission of an offence under Part I, Section 304 of the IPC. The conviction and sentence imposed on them under Section 324 read with Section 34 is, however, upheld. [304-A, B] G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 506 of 2005.

From the Judgment/Order dated 10.7.2002 of the High Court of Judicature H

A at Bombay, Nagpur Bench, Nagpur, in Criminal Appeal No. 285 of 1997.

Rishi Malhotra and Prem Malhotra for the Appellants.

V.N. Raghupathy and Asha G. Nair (for Ravindra Keshavrao Adsure) for the Respondent.

B

The Judgment of the Court was delivered by

S.B. SINHA, J. The Appellants herein are brothers. They were charged with commission of an offence punishable under Section 302 read with Section 34 of the Indian Penal Code for causing the death of one Devaji and for C committing an offence punishable under Section 324 read with Section 34 of the Indian Penal Code for causing hurt to Mina Yenurkr and her brother Dilip Yenurkr.

The deceased admittedly was the uncle of the Appellants. Injured Dilip and Mina are his son and daughter. He had three other sons, *viz.*, Jaywanta, D Umakant and Navin Nischal as also a daughter by the name of Hemlata. The incidence took place on 11.12.95 at about 7 a.m. Dilip was allegedly going to a Pan Shop early in the morning. When he crossed some distance, Appellant No. 2 allegedly came out with a stick and hurled some blows on him. Mina (PW-1) seeing this is said to have raised hue and cry. The deceased Devaji E came out thereafter and made endeavours to rescue him. At that time Surendra Appellant No. 1 allegedly took out one ubhari (a big stick) from a bullock cart and assaulted him. Mina went to police station and filed a complaint which was marked as Ex. P-29. However, a First Information Report was lodged on a complaint made by Navin Nischal (PW-2).

F The Appellants contend that Devaji and Dilip had been nurturing deep resentment against them and in particular against Appellant No. 1 who after his father's death had been looking after the family properties. They were determined to kill Appellant No. 1. Devaji and Dilip allegedly came armed and made attempts to assault Appellant No. 1 who was milking his cows in the cattle shed. Dilip entered into the cattle shed and hurled a blow on his G abdomen. He warded off the blows by taking them on his left hand and, thus, received injuries. Thereafter in course of scuffle between them, Dilip fell down in the courtyard and sustained an injury on his head. Devaji thereafter assaulted Appellant No. 1 with a stump of bullock cart on his right hand. He with a view to exercise his right of private defence took out an ubhari from H his bullock cart and injured Devaji. Mina also intervened in the meantime and

sustained an injury on her left hand. Allegedly, Appellant No. 1 Surendra thereafter went to police station and lodged a report pursuant whereto a First Information Report was lodged against Dilip and others for commission of an offence under Section 324 read with Section 34 of the Indian Penal Code. All the injured persons were also sent to the Hospital by the Investigating Officer. A chargesheet was also filed under Section 324 of the Indian Penal Code against some of the prosecution witnesses.

Before the learned Trial Judge the prosecution examined several witnesses out of whom PWs 1, 2 and 3 Mina, Navin and Dilip were daughter and sons of the deceased. PW-4 is said to be an independent witness.

The learned Sessions Judge as also the High Court relying on or on the basis of the evidence adduced by the prosecution, found the Appellants guilty of commission of the offence charged against them and sentenced them to undergo rigorous imprisonment for life.

Mr. Rishi Malhotra, learned counsel appearing on behalf of the Appellant submitted that the learned Sessions Judge as also the High Court failed to consider the evidences brought on record from the perspective of the defences raised by the Appellants and, thus, could have been convicted only under Part II of Section 304 of the Indian Penal Code.

Mr. V.N. Raghupathy, learned counsel appearing on behalf of the State, on the other hand, supported the impugned judgments submitting that the onus to prove valid exercise of right of private defence was on the Appellants but they failed to discharge the same.

Mina, PW-1 is one of the injured witnesses. According to her, she had gone to police station and her statement was recorded. The same was marked before the learned Sessions Judge as Ex. P-29. The report of Navin Nischal (PW-2) which was considered as the First Information Report and on the basis whereof the investigation started was marked as Ex. P-31. No explanation has been offered by the prosecution as to why the report of Mina was not treated to be a First Information Report. Mina does not appear to be wholly truthful as she in her statement before the police did not allege that both the Appellants were armed with sticks. In her statement before the police, she also did not state that Dilip was taken to the house of a neighbour for taking water although in his statement Dilip stated he had become unconscious. Mina had also not made any statement that immediately after the occurrence, the Appellants had threatened others not to intermeddle in the matter and

A if they do so they would face dire consequences. PW-2 categorically stated that Mina had gone to police station prior to him.

In the First Information Report, PW-2 categorically stated:

> "my father and sister went there to act as a mediator, so my brother Dilip ran away"

B

He also stated:

> "It is true that Mina was not present when the accused assaulted my father."

C

He admitted that there was a dispute as regards some land; possession whereof was taken over by the Appellants.

PW-3 is Dilip. Interestingly, the witness stated that after being assaulted, he felt 'somewhat like unconscious' and went to the house of neighbour and D stayed there. It may be placed on record that he categorically stated before the learned Trial Judge:

> "We had intention to kill accused Surendra."

It is not in dispute that the applicants obtained possession of some E lands from them in execution of a decree.

A suggestion was given to him that Appellant No. 1 had taken out ubhari from bullock cart to save his life which he denied. In his cross-examination, he further stated:

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> "I myself were on inimical terms with the accused. I did not ask any reason to my father about non-talking terms of the accused inimical terms from my birth. I and my father are having dispute about the agricultural land, with the accused."

PW-4 is Kawardu. He deals in sale of milk. Although, as noticed G hereinbefore, PW-3 denied that Appellant No. 1 had taken out an ubhari from his bullock cart but PW-4 categorically stated:

> "...The accused Surendra had taken Ubhari from the bullock - cart which was parked in front of his house..."

H He, however, accepted that he was the Manger of Hindustan Nagrik

Sanstha Bhandara and Dilip had been working under him as a peon. He furthermore admitted that he had good relation with Devaji for a long time. It may be noted that in his statement before the police, he had not stated that Appellant No. 1 assaulted the deceased with an ubhari. A

PW-5 Govindlal found the dead body of Devaji lying in front of the house of the accused. B

PW-8 Dr. Vijay conducted the post mortem. He found the following ante-mortem injuries on the person of the deceased:

> "(1) Lacerated wound 7" x 2", 1" depth on right partial region of head. C
>
> (2) Lacerated wound 2" x 1" skin deep right partial region 1" posterior to injury No. 1.
>
> (3) Lacerated wound 1" cm x 1½ cm. Triangular on right pinna of right ear opposite tragus. D
>
> (4) Lacerated wound 2/2" x 1" x ½" on mastoid.
>
> (5) Lacerated wound 2" x ½" right side of forehead extending right laterally to occipital region.
>
> (6) Abrasion on right shoulder. E
>
> (7) Abrasion on back 6 x ½" left side infra scapular region.
>
> (8) Abrasion on back 4" x ½" left side 2" below injury No. 7."

The injuries on the person of PW-1 were as under: F

> "(1) Contusion 1" x ½" on the doraome of left palm.
>
> (2) Contusion left elbow 1" x ½"
>
> (3) Contusion on left shoulder 1" x ½"."

Dilip is said to have suffered the following injuries: G

> "(1) Contusion 2: x ½" on forehead above left eye brow.
>
> (2) Lacerated wound 1 cm. x½ cm. Above injury No. 1"

PW-8 accepted that the injuries suffered by PW-1 and PW-3 could be H

A caused by fall on hard substance. They did not suffer any fracture. He also accepted that injuries Nos. 6, 7 and 8 on the person of the deceased being abrasions which were suffered by Devaji, could be caused due to fall.

The Investigating Officer examined himself as PW-9. He admitted that he had sent Appellant No. 1 to the Central Hospital, Bhandara because he B had injuries on his person.

Taking place of the incidence is not in dispute. The Appellants had taken possession of the land from the deceased in execution of a decree. The deceased and Dilip, therefore, must be nurturing grudge against them. C Admittedly, a large number of litigations were pending between the parties.

The learned Trial Judge also in his judgment noticed that the deceased and his son had intention to kill Appellant No. 1 and the Appellants suffered injuries. Despite the admitted fact that a case under Section 324 of the Indian Penal Code was registered against Dilip and his father, the Investigating D Officer had not brought any material on records as regards the injuries suffered by them. The Appellants had called for the injury report but the same was not produced.

The Investigating Officer even did not draw up a sketch map. He did not make any investigation from the point of view of the defence. The E investigation was, thus, not fair.

In a case of this nature, in our opinion, a broad view of the entire matter was required to be taken, *viz.*,

(i) Appellant No. 1 was not armed and he at a later stage of quarrel F took out an ubhari from a bullock cart.

(ii) He had raised a contention even in his bail petition that he had exercised his right of private defence.

We are not unmindful of the fact that in all circumstances injuries on the person of the accused need not be explained but a different standard G would be applied in a case where a specific plea of right of private defence has been raised. It may be true that in the event prosecution discharges its primary burden of proof, the onus would shift on the accused but the same would not mean that the burden can be discharged only by examining defence witnesses.

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The learned courts below committed a manifest error of law in opining that the Appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. The Courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case.

In *State of U.P.* v. *Ram Swarup and Anr.,* [1974] 4 SCC 764, this Court stated the law, thus:

> "The burden which rests on the prosecution to establish its case beyond a reasonable doubt is neither neutralised nor shifted because the accused pleads the right of private defence. The prosecution must discharge its initial traditional burden to establish the complicity of the accused and not until it does so can the question arise whether the accused has acted in self-defence. This position, though often overlooked, would be easy to understand if it is appreciated that the Civil Law Rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him and by so doing the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the Court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded. For a moment, therefore, we will keep apart the plea of the accused and examine briefly by applying the well-known standard of proof whether the prosecution, as held by the Sessions Court, has proved its case."

Yet again in *Yogendra Morarji* v. *State of Gujarat,* [1980] 2 SCC 218, this Court opined:

> "Before coming to the facts of the instant case, the principles governing the burden of proof where the accused sets up a plea of private defence, may also be seen. Section 105, Evidence Act enacts an exception to the general rule whereby in a criminal trial the burden of proving everything necessary to establish the charge against the accused beyond reasonable doubt, rests on the prosecution. According to the section, the burden of proving the existence of circumstances

A bringing the case within any of the General Exceptions in the Indian Penal Code; or within any special exception or proviso contained in any other part of the Code or in any other law, shall be on the accused person, and the Court shall presume the absence of such circumstances. But this section does not neutralise or shift the general burden that lies on the prosecution to prove beyond reasonable doubt all the B ingredients of the offence with which the accused stands charged. Therefore, where the charge against the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in Section 299 of the Penal Code. It is only after C the prosecution so discharges its initial traditional burden, establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises."

In *Cherlopalli Cheliminabi Saheb and Anr.* v. *State of A.P.*, [2003] 2 D SCC 571, this Court stated the law, thus:

"...In this case, as stated above, the prosecution has come out with a particular narration of the incident in question according to which these appellants and two others stabbed the deceased but the prosecution has recovered only one weapon, therefore, it is difficult E to appreciate the prosecution case how by one single weapon all these four accused persons could have stabbed the deceased. That apart, the prosecution in its version of the incident has not explained how the accused persons suffered injuries and by whom. There is an obligation on the part of the prosecution to explain the injuries suffered F by the accused. In the instant case, the accused also came to the hospital almost at the same time as the deceased and the doctor examined them after examining the deceased, therefore, these injuries on the accused persons must have been caused in the same incident in which the deceased suffered injuries which later became fatal. Hence, in the absence of any explanation from the prosecution as to G the injuries on the appellant, we are of the opinion that the prosecution version of the incident becomes doubtful..."

The question was examined at some details in *Bishna Alias Bhiswadeb Mahato and Ors.* v. *State of W.B.*, [2005] 12 SCC 657 wherein this Court opined:

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"Private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. So far as defence of land against the trespasser is concerned, a person is entitled to use necessary and moderate force both for preventing the trespass or to eject the trespasser. For the said purposes, the use of force must be the minimum necessary or reasonably believed to be necessary. A reasonable defence would mean a proportionate defence. Ordinarily, a trespasser would be first asked to leave and if the trespasser fights back, a reasonable force can be used."

In regard to the duty of the prosecution to explain the injuries on the part of the accused, this Court observed:

"Section 105 of the Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.

In a large number of cases, this Court, however, has laid down the law that a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the 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 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. All circumstances are required to be viewed with pragmatism and any hypertechnical approach should be avoided.

To put it simply, if a defence is made out, the accused is entitled to be acquitted and if not he will be convicted of murder. But in case of use of excessive force, he would be convicted under Section 304 IPC."

The question again came up for consideration in *Nagarathinam and Ors.* v. *State, Rep. by Inspector of Police,* JT (2006) 4 SC 288 wherein this Court in an almost identical situation opined:

A "The genesis of the occurrence is, therefore, shrouded in mystery. This occurrence, admittedly, took place, but who were thus initial aggressors, i.e., the prosecution witnesses or the appellants, is difficult to say. The High Court has found that the prosecution had not been able to prove the charge of rioting. The appellants and others did not have any common object to cause death of the accused of the B prosecution witnesses. We have noticed hereinbefore the nature of injuries on the person of the appellants. The first appellant received two stab wounds and also an incised wound over the scalp at frontal region. The appellant No.2 received deep cut wound and an incised wound over the scalp left side parietal region. The appellant No.3 also C received an incised scalp wound over frontal parietal region. It is not denied and disputed that they were in the hospital as indoor patients for a few days. We have furthermore noticed hereinbefore that they were also arrested after a few days.

The High Court although saw that the injuries suffered by the D accused were on the vital parts of their bodies but without discussing the evidences, brought on record held that the same were not sustained by them while exercising their right of self-defence. It is true that it is not for the prosecution to prove injuries on the person of the accused, in each and every case irrespective of the nature thereof, but in a case of this nature the same would require serious consideration E as a plea of right of exercise of self-defence was raised. It is in that context that the apprehension of death or bodily injury in the mind of the accused persons would have to be determined having regard to the number of people assembled to take part in assaulting them, the manner in which they were assaulted, the arms used as also the situs F of injury received by them. It is now well settled that a person apprehends death or bodily injury cannot be weighed in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons."

G The defence of the Appellants, therefore, could not have been wished away. In a case of this nature, it was necessary on the part of the prosecution to explain the injuries on the part of the accused. The investigation of the entire cases and particularly in regard to the fact that there were cross cases, a fair investigation was expected. The possibility of PW-3 and the deceased being the aggressors cannot be ruled out. It would bear repetition to state H

that they had been bearing grudge against Appellant No. 1. A

Why the occurrence took place in front of the house of the Appellants had not properly been explained by the prosecution witnesses. Evidently, there was no pre-meditation on the part of Appellant No. 1. He was not armed. He took out an ubhari from his bullock cart at a later stage.

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The possibility of PW-3 and the deceased being aggressors must be judged from the admission made by PW-3 that they intended to kill Appellant No. 1. As has been noticed hereinbefore, the statements of the prosecution witnesses in regard to the genesis of occurrence and the presence of the prosecution witnesses at different stages are not uniform. It is, therefore, a case where it is likely that sudden fight between the parties erupted which would attract Section 304 of the Indian Penal Code and not Section 302 thereof. It is also a case where an inference can safely be drawn that the blows were initially not hurled on the deceased by the Appellants. They did so at a later stage. But, Appellant No. 1 suffered minor injuries. He had not been able to show that the situation was such that he could reasonably apprehend his death. They have exceeded their right of private defence in using more force upon the deceased than was necessary. C D

Recently, the question has been examined at some details in a decision of this Court in *Pappu* v. *State of Madhya Pradesh*, (2006) 7 SCALE 24 holding: E

> "...A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found...." F G H

A For the reasons aforementioned, we are of the opinion that the conviction of the Appellants under Section 302 read with Section 34 of the Indian Penal Code cannot be sustained. They are held guilty for commission of an offence under Part I, Section 304 of the Indian Penal Code. They are directed to suffer rigorous imprisonment for a period of 10 years. The conviction and sentence imposed on them under Section 324 read with Section 34 is, however, B upheld. The sentences, however, shall run concurrently. This appeal is, thus, allowed in part and to the extent mentioned hereinbefore.

V.S.S. Appeal partly allowed.