

GOPAL & ANR.

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v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1156 of 2007)

JANUARY 18, 2013

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[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860 – ss. 96, 97, 100, 102, 105 and s.302 r/w s. 34 – Double murder – Fight between two rival groups – Death of two persons ‘R’ and ‘P’ due to lathi blows inflicted by the appellants – Evidence of injured eye-witnesses (PW-7 and PW-8) and son of ‘P’ (PW-10) – Conviction of appellants u/ s.302 r/w s.34 IPC – Challenge to – Appellants taking plea of right of private defence – Held: ‘R’, PW-7 and PW-8 had gone to the field of the appellants and there was a fight between both the groups – Appellants fought to repel the attack and in course of the incident, both sides sustained injuries, as a result of which, ‘R’ died – In the circumstances, appellants entitled to plea of private defence insofar as death of ‘R’ was concerned, however, they had no right to invoke the right of self defence by chasing ‘P’ and causing fatal injuries on him – ‘P’ was not present at the place where ‘R’ was assaulted – After inflicting injuries on the person of ‘R’, the appellants ran towards ‘P’, who was standing 10 steps away from the place of incident – Reasonable apprehension from the side of the appellants disappeared when they noticed that ‘P’ was running away from the scene in order to escape – Appellants exceeded their limit when they chased ‘P’ at some distance, pushed him down and inflicted several blows with lathis due to which he died – Conviction of appellants u/s.302 r/w s.34 IPC and the life sentence awarded to them, thus, justified – Evidence Act, 1872 – s.105.

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The prosecution case was that grudge over a money settlement agreement resulted in a fight between two rival

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- A groups, in course of which two persons, 'R' and 'P' were beaten to death by the accused party with *lathi* blows. There were in all six accused persons including the two appellants (A-1 and A-3). In support of their claim, the prosecution heavily relied on the evidence of PW-7 and
- B PW-8 – injured eye-witnesses and PW-10 – son of 'P'. The trial Court convicted the appellants under Section 302 read with Section 34 IPC and sentenced them to rigorous imprisonment (RI) for life. In appeal, High Court confirmed the conviction and sentence imposed upon the two
- C appellants, and therefore the instant appeal.

- The appellants raised the following contentions before this Court: 1) that members of the complainant's party were the aggressors and they came to the field of the accused persons and attacked them; 2) that the
- D appellants also received injuries at the hands of the complainant's party and the prosecution had failed to explain the same and 3) that since the members of the complainant's party were the aggressors and attacked on the accused persons causing injuries to the appellants,
- E the accused had a right of private defence, consequently, they were entitled for acquittal.

Dismissing the appeal, the Court

- F HELD: 1.1 The materials placed and relied on by the prosecution show that 'R', PW-7 and PW-8 had gone to the field of the appellants and there was a fight between both the groups. It is also clear that the appellants fought to repel the attack and in the course of incident, both sides sustained injuries, as a result of which, 'R' died. In
- G such circumstances, it would be possible for this Court to accept the claim of the appellants that since they were defending themselves, they had a right of private defence. [Para 12] [393-F-H; 394-A]

- H 1.2. Under Section 105 of the Evidence Act, 1872, the

burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self defence. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea. Based on the above principles, in view of the discussion of the prosecution witnesses, viz., PWs 7, 8 and 10 coupled with the fact that the incident occurred in the field of the appellants, who also sustained injuries which is evident from the evidence of the doctor (who examined the injuries of the appellants) the stand of the appellants is to be accepted. However, as per the prosecution story, not only 'R' but in the same incident 'P' also died due to lathi blows inflicted by the appellants. [Para 13] [394-F-G; 395-B-F-H; 396-A-C]

1.3. The evidence of PWs 7, 8 and 10 clearly established that 'P' was not present at the place where 'R' was assaulted. After inflicting injuries on the person of 'R', the appellants ran towards 'P', who was standing 10 steps away from the place of incident. After seeing the

- A incident relating to the death of 'R', 'P' started running and he was chased by the accused persons and they inflicted lathi blows on his person. In such a situation, the appellants have no right to invoke the right of self defence by chasing 'P' and causing fatal injuries on him.
- B Reasonable apprehension had disappeared when they noticed that 'P' was running away from the scene in order to escape, in such circumstances though the appellants were entitled to the plea of private defence insofar as the death of 'R' is concerned, they were not justified in availing the same for the cause of death of 'P'. On the
- C other hand, they exceeded their limit and the materials placed by the prosecution clearly show that they chased 'P' at some distance, pushed him down and inflicted several blows with *lathis* due to which he died. In such
- D circumstances, the trial Court was justified in convicting the appellants under Section 302 read with Section 34 of IPC and sentencing them to suffer RI for life. Taking note of all these aspects, it is clear that the High Court was fully justified in confirming the order of conviction and sentence insofar as the appellants. [Para 14] [396-D-H;
- E 397-A-B]

V. Subramani & Anr. v. State of T.N. (2005) 10 SCC 358: 2005 (2) SCR 536 – relied on.

F **Case Law Reference:**

2005 (2) SCR 536 relied on Para 13

CRIMINAL APPELLATE JURISDICTION:: Criminal Appeal No. 1156 of 2007.

- G From the Judgment & Order dated 15.04.2006 of the High Court of Rajasthan, bench at Jaipur in D.B. Crl Appeal No. 247 of 2001.

Kanhaiya Priyadarshi for the Appellants.

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Ram Naresh Yadav, Vibhuti Sushant, Pragati Neekhra for
the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed against the
judgment and order dated 15.04.2006 passed by the High
Court of Judicature for Rajasthan at Jaipur Bench in D.B.
Criminal Appeal No. 247 of 2001 whereby the High Court
dismissed the appeal in respect of the appellants herein and
confirmed their conviction and sentence awarded by the Court
of Additional Sessions Judge, Shahpura, District Jaipur,
Rajasthan vide judgment dated 18.04.2001 in Session Case
No. 24 of 2000.

2. Brief facts:

(a) As per the prosecution case, Rameshwar (since
deceased) was the guarantor for money settlement agreement
between one Santosh and Jagdish, residents of Tehsil
Bishangarh, P.S. Manoharpur, Jaipur, Rajasthan. When
Jagdish started demanding money from Santosh prior to the
expiry of the agreement, Rameshwar intervened between them.
Since then Jagdish started keeping a grudge against him which
is the root cause of the case in hand and resulted into death of
two persons in a fight between them.

(b) On 16.07.2000, at 07.30 a.m., when Bhagwan Sahai
(PW-8), Bodu Ram (PW-7) and Rameshwar (since deceased)
were going towards the well of Padmawati while crossing the
field of one Prabhat (since deceased), at that time, Gopal (A-
1), Jagdish, Mahesh (A-3), Patasi, Teeja, Gokali and Sita
belaboured Rameshwar by inflicting lathi and axe blows. Due
to the attack, Rameshwar died on the spot. When Bhagwan
Sahai and Bodu Ram tried to intervene, they were also beaten
by the accused party. When Prabhat (since deceased), who
was working in his field along with his son-Badri Yadav (PW-

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A 10), approached towards Rameshwar for help, he was also beaten to death by the accused persons.

B (c) On the very same day, at 09.45 a.m., Badri Yadav (PW-10) submitted a written report at P.S. Manoharpur relating to the above-said incident. On the basis of the aforesaid report, a case under Sections 147, 148, 149, 302 and 323 of the Indian Penal Code, 1860 (in short 'the IPC') was registered against the accused persons, viz., Gopal (A-1), Jagdish, Mahesh (A-3), Teeja, Patasi and Gokali and the same was committed to the Court of Additional Sessions Judge, C Shahpura, District Jaipur, Rajasthan and numbered as Sessions Case No. 24 of 2000.

D (d) The Additional Sessions Judge, Shahpura after trial, by order dated 18.04.2001, convicted Teeja under Section 302 of IPC and Gopal, Jagdish and Mahesh under Section 302 read with Section 34 of IPC and sentenced them to suffer rigorous imprisonment (RI) for life alongwith a fine of Rs.1,000/- each, in default, to further undergo simple imprisonment for 3 months. Gokali and Patasi Devi were convicted under Section E 323 of IPC and were sentenced to the period already undergone by them in custody.

F (e) Challenging the said order of conviction and sentence, the accused persons filed appeal being D.B. Criminal Appeal No. 247 of 2001 before the High Court. By impugned order dated 15.04.2006, the High Court while modifying the order dated 18.04.2001 of the Additional Sessions Judge, allowed the appeal in respect of Teeja, Jagdish, Gokali and Patasi and dismissed the appeal in respect of Gopal (A-1) and Mahesh (A-3), the appellants herein, and confirmed their conviction and sentence awarded to them. G

3. Heard Mr. Kanhaiya Priyadarshi, learned *amicus curiae* appearing for the appellants and Mr. Ram Naresh Yadav, learned counsel appearing for the respondent-State.

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Contentions:

4. After taking us through the entire material relied on by the prosecution and the defence, learned *amicus curiae* appearing for the appellants submitted that it is evident from the site plan that the members of the complainant's party were the aggressors and they came to the field of the accused persons and attacked them. He also submitted that the appellants also received injuries at the hands of the complainant's party and the prosecution had failed to explain the same. Finally, he submitted that since the members of the complainant's party were the aggressors and attacked on the accused persons causing injuries to Gopal (A-1) and Mahesh (A-3) (the appellants herein), the accused had a right of private defence, consequently, they are entitled for acquittal.

5. On the other hand, learned counsel for the respondent-State supported the findings of the trial Court and the order of the High Court affirming the conviction and sentence insofar as the appellants are concerned and, consequently, prayed for dismissal of this appeal.

6. We have carefully considered the rival contentions and perused the relevant materials.

Discussion :

7. It is a case of double murder. Admittedly, Rameshwar and Prabhat were died in the incident in question. Though, initially, the prosecution proceeded against 6 persons and the trial Court convicted and sentenced all of them, in the appeal before the High Court, except the present appellants (A-1 & A-3), others were acquitted.

8. In support of their claim, the prosecution heavily relied on the evidence of Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) – injured eye-witnesses and Badri Yadav (PW-10) – son of Prabhat (since deceased). Bodu Ram (PW-7), in his

A evidence has stated that about 4 months back, at about 7.30
 a.m., he along with his brother Bhagwan Sahai and uncle -
 Rameshwar was going to work at the well. When they reached
 near the field of Gopal (A-1), they found that Gopal (A-1),
 Jagdish, Mahesh (A-3), Patasi, Teeja, Gokuli were plucking
 B round gourd (*Tinda*) from their field and on seeing them, they
 attacked on them and, thereafter, they went to the police station
 at 10 o' clock.

9. Bhagwan Sahai (PW-8), in his evidence has stated that
 at 7.30 a.m., when he along with Rameshwar (since deceased)
 C and Bodu Ram (PW-7) reached near the field of Gopal (A-1),
 they noticed that the accused persons were plucking round
 gourd (*Tinda*) and on seeing them, they started fighting with
 them. He further explained that Teeja had an axe and other
 accused persons were having lathis. Rameshwar was beaten
 D by Mahesh (A-3) with lathi and he fell down. Teeja hit
 Rameshwar with an axe on his forehead and she also gave a
 hit at his armpit and one at his back. He further stated that he
 was hit by Gopal (A-1), Patasi and Jagdish with lathis. Bodu
 Ram (PW-7) was hit by Gokuli on his forehead and Jagdish
 E and Mahesh (A-3) hit him at his hand and armpit side
 respectively. He further deposed when Prabhat, who was
 working in the field alongwith his son Badri (PW-10),
 approached us in order to help, at that time, Gopal (A-1),
 Mahesh (A-3) and Jagdish ran after him and he (Prabhat) ran
 F back towards Durga-ki-Dhani and all the three accused after
 chasing him hit him with lathis. Banshi, Murli, Gopal and mother
 and wife of Badri had also seen Prabhat (since deceased)
 being beaten by them. Prabhat and Rameswhwar both died in
 the incident. Like Bodu Ram (PW-7), Bhagwan Sahai (PW-8)
 G also sustained injuries and he categorically stated that on
 seeing that Prabhat was running towards Durga-Ki-Dhani, the
 present appellants and other accused persons chased him and
 hit him with lathis due to which he died. His evidence
 corroborates with the statement of Bodu Ram (PW-7) and
 H proves the case of the prosecution.

10. Badri Yadav (PW-10), in his evidence has stated that about 4 months back, at about 7 to 8 a.m., when he was working in his field behind his house alongwith his father Prabhat (since deceased) who was sitting there, at that time, he noticed Bodu Ram (PW-7), Bhagwan Sahai (PW-8) and Rameshwar (since deceased) going towards the well. He further deposed that when they reached near the field of Gopal (A-1), who was plucking vegetables in his field along with Mahesh (A-3), Jagdish, Gokali, Teeja and Patasi, on seeing them coming, they attacked on the complainant's party. Teeja hit Rameshwar with an axe on his neck. When Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) tried to save him, Gokali and Mahesh (A-3) fought with them and Bhagwan Sahai (PW-8) was beaten by Patasi, Gopal and Jagdish. He further stated that he saw the incident from a distance of 20 steps. He also stated that when his father – Prabhat (since deceased) ran towards Durga-Ki-Dhani, Gopal (A-1), Jagdish and Mahesh (A-3) beat him with lathis. He further explained that due to lathi blows, Rameshwar and Prabhat died. From his evidence, it is seen that the incident occurred in the field of Gopal (A-1) and after killing Rameshwar, the accused persons chased Prabhat and inflicted lathi blows, due to which, he also died.

11. Dr. Shiv Kumar Tanwar, who did post mortem, was examined as PW-25. He also explained that the death of Rameshwar and Prabhat was due to the injuries inflicted with lathis.

12. The materials placed and relied on by the prosecution show that Rameshwar (since deceased), Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) had gone to the field of the appellants and there was a fight between both the groups. It is also clear that the appellants fought to repel the attack and in the course of incident, both sides sustained injuries, as a result of which, Rameshwar died. In such circumstances, it would be possible for this Court to accept the claim of the appellants that since they were defending themselves, they had a right of

A private defence. In fact, the High Court has accepted the above stand.

B 13. Regarding the plea of private defence, it is useful to refer a decision of this Court in *V. Subramani & Anr. Vs. State of T.N.* (2005) 10 SCC 358. The following principles and conclusion are relevant:

C “11. The only question which needs to be considered is the alleged exercise of right of private defence. 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. Under Section 105 of the Indian Evidence Act, 1872 (in short “the Evidence Act”), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea

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of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See *Munshi Ram v. Delhi Admn.* (1968) 2 SCR 455, *State of Gujarat v. Bai Fatima*, (1975) 2 SCC 7, *State of U.P. v. Mohd. Musheer Khan*, (1977) 3 SCC 562, and *Mohinder Pal Jolly v. State of Punjab*, (1979) 3 SCC 30.) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in *Salim Zia v. State of U.P.*, (1979) 2 SCC 648 runs as follows: (SCC p. 654, para 9)

“It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.”

- A The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.”
- B Based on the above principles, in view of the discussion of the prosecution witnesses, viz., PWs 7, 8 and 10 coupled with the fact that the incident occurred in the field of the appellants, who also sustained injuries which is evident from the evidence of the doctor, who examined the injuries of Gopal (A-1) and Mahesh (A-3)-appellants herein, the stand of the appellants, as
- C rightly argued by learned *amicus curiae*, is to be accepted. However, as per the prosecution story, not only Rameshwar but in the same incident Prabhat also died due to lathi blows inflicted by the appellants herein.
- D 14. The only moot question for consideration is whether the right of private defence is still available to the appellants when they chased Prabhat near Durga-ki-Dhani and inflicted lathi blows on him? We have already noted the evidence of PWs 7, 8 and 10 which clearly established that Prabhat (since
- E deceased) was not present at the place where Rameshwar was assaulted. It is also seen that after inflicting injuries on the person of Rameshwar, the appellants ran towards Prabhat, who was standing 10 steps away from the place of incident. It is further seen from their evidence that after seeing the incident
- F relating to the death of Rameshwar, Prabhat started running towards Durga-ki-Dhani and he was chased by the accused persons and they inflicted lathi blows on his person. In such a situation, we are of the view that the appellants have no right to invoke the right of self defence by chasing Prabhat and causing fatal injuries on him. In other words, the reasonable
- G apprehension has disappeared when they noticed that Prabhat was running away from the scene in order to escape, in such circumstances though the appellants were entitled to the plea of private defence insofar as the death of Ramehwar is concerned, they are not justified in availing the same for the
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cause of death of Prabhat. On the other hand, they exceeded their limit and the materials placed by the prosecution clearly show that they chased Prabhat at some distance near Durga-Ki-Dhani, pushed him down and inflicted several blows with lathis due to which he died. In such circumstances, the trial Court was justified in convicting the appellants under Section 302 read with Section 34 of IPC and sentencing them to suffer RI for life. Taking note of all these aspects, we are of the view that the High Court was fully justified in confirming the order of conviction and sentence insofar as the present appellants and dismissing the appeal in respect of them.

15. In the light of the above discussion, we find no merit in the appeal and the same is accordingly dismissed. We wish to record our appreciation for the assistance rendered by Mr. Kanhaiya Priyadarshi, learned *amicus curiae* in putting forth the case of the appellants.

B.B.B.

Appeal dismissed.