

PATHUBHA GOVINDJI RATHOD & ANR.

v.

STATE OF GUJARAT

(Criminal Appeal No. 2282 of 2014)

JANUARY 21, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

Penal Code, 1860 – s.304 (Part-I) r/w s.149 – Fight between two groups – Cross-complaints – Resulting in conviction of the accused in both the cases [including the conviction of appellant No. 1 u/s 302/149 and of appellant No. 2 u/s 304(part I)] – Appellants taking plea of private defence – Held: The present was a case of free fight – Normally right of private defence is not available in such cases – But in view of the fact that appellant No. 1, having suffered knife injury exceeded his right to private defence, his case would be covered under Exception 2 of s.300 IPC – Thus conviction of appellant No. 1 altered to one u/s 304 (Part-I) r/w s.149 – Sentence reduced to 10 years RI from life imprisonment – Conviction and sentence of appellant No. 2 is affirmed.

Partly allowing the appeal, the Court

HELD: 1. In the present case, there are cross-versions of the incident, and cross-complaints were lodged with the police. Both the cases resulted in conviction. Considering the number of persons involved in the incident, it can be safely said that it is a case of free fight between two groups of people. In the cases of free fights, accused are to be fastened with individual liability taking into consideration the specific role assigned to each one of them, and normally right of private defence is not available in such cases unless circumstances in a given case warrant so. But that is not a rule without exception. [para 13 and16] [500-H; 501-B-C; 502-E]

A 2. Considering the facts and circumstances of the present case and evidence on record, it is evident that accused/appellant No.1 who suffered knife injury in the incident has caused death of one of the deceased by firing several shots thereby exceeding right of private defence. A person faced with injury with a deadly weapon to his life, cannot be expected to weigh in balance the precise force needed to avoid danger. [para 14 and 16] [501-D; 502-G-H]

C *Bhanwar Singh v. State of M.P.* 2008 (9) SCR 1 = 2008 (16) SCC 657, this Court, in *State of Rajasthan v. Manoj Kumar* 2014 (5) SCC 744; *Mohd. Khalil Chisti v. State of Rajasthan* 2012 (13) SCR 777 = 2013 (2) SCC 541 – relied on.

D 3. Thus, it is a case of culpable homicide not amounting to murder covered under Exception 2 of Section 300 of IPC. The conviction and sentence recorded against accused/appellant No.1 under Section 302 IPC r/w Section 149 IPC is altered to one u/s 304 (Part-I) IPC and he is sentenced to imprisonment for a period of ten years. The conviction and sentence recorded against accused/appellant no. 2 u/s 304(Part I) read with Section 149 IPC, does not require any interference. [para 17] [503-B-E]

F Case Law Reference:

2008 (9) SCR 1	relied on	para 14
2014 (5) SCC 744	relied on	para 14
2012 (13) SCR 777	relied on	para 15

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2282 of 2014.

H From the Judgment & Order dated 30.06.2014 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1391 of 2007.

Meenakshi Arora, Tulika Prakash, Sheeba Khan, Vasav Anantharaman for the Appellants. A

Jesal, Hemantika Wahi, Preeti Bhardwaj, Puja Singh for the Respondent.

The Judgment of the Court was delivered by B

PRAFULLA C. PANT, J. 1. This appeal is directed against judgment and order dated 30.6.2014 passed by High Court of Gujarat whereby the said Court has partly allowed the criminal appeals arisen out of Sessions Case No. 85 of 2003 and the cross Sessions Case No. 53 of 2004, which were decided by two separate orders of the same date, i.e., 5.10.2007 by Additional Sessions Judge/Fast Track Court, Junagarh. C

2. We have heard learned counsel for the parties and perused the record. D

3. Prosecution story, in brief, is that complainant Satish Jotva (PW-42) used to live with his family in Village Arena. On 2.9.2003 his uncle Bhurabhai Jivabhai (PW-46) was going to his field on a bicycle. At about 10.30 a.m., he was intercepted by Pathubha Govindji Rathod (appellant no. 1) near bus stand. Accused/appellant no.1 picked up a quarrel with Bhurabha Jivabhai as to why he supported Natha Nagabhai (one of the deceased) in Gram Panchayat Election with whom the accused/appellant no.1 was not having cordial relations. Meanwhile Natha Nagabhai came there and joined Bhurabhai Jivabhai in the quarrel. This led heated exchange of words between both the sides, and crowd gathered there. Accused/Appellant no.1 was joined by his other supporters (co-accused), who were armed with deadly weapons like swords, knives and sticks. Out of the accused persons, accused Pathubha Govindji was armed with revolver, and accused Bhavubhai Gagubhai, Bhuraji Gaguji, Kirit Jesing and Punjaji Muluji were armed with swords. Accused Mala Gaguji was armed with knife. Rest of H

A the accused Gaguji Manji, Gomubha Halarwadi, Navalsinh Motisinh, Kanubha Jesangji, Dhiru Jesing, Kiritsinh Punjajai, Veraji Punjaji, Jayubha, Samatsinh, Sidharajsinh Manji, Bharat Manji, Kanu Bhai Devu bhai and accused/appellant no.2 Hemubha Govindji were armed with sticks. On hearing the
 B noise, complainant Satish Jiva Jotva (PW-42) and his another uncle Bhimshi Jiva (PW-47), father of the complainant Hamir Nagabhai (another deceased), Malde Nagabhai (PW-43), Bhurabhai Jivabhai (PW-46), Punjabhai Bhimshibhai (PW-44), Jagmal Jivabhai (PW-45) and some other villagers also
 C gathered there. When the quarrel further aggravated between the two sides, accused/appellant no.1 Pathubha Govindji exhorted his supporters to kill Natha Nagabhai and teach lesson to other supporters. Thereafter, accused/appellant no.1 Pathubha Govindji himself took out revolver from his pocket and
 D fired at him. Natha Nagabhai suffered bullet injuries on the stomach and fell down. In the incident, Bhimshibhai who was attacked with sword suffered injury on his head. Bhavubhai Gagubhai assaulted Punja Bhimshi with sword in his hand, and he also suffered injury on his head. Punjaji gave blow to Bharat Jiva on his head, Gomubha Halarwala gave blow on the head
 E of Jagmal Jiva. Accused/appellant no.2 Hemubha Govindji inflicted injury with sword on the head of Hamir Nagabhai. Accused Malde Nagabhai Jotva assaulted with stick to some other persons. Several persons suffered injuries in the incident on both sides. According to prosecution, after the incident
 F complainant took his uncle Natha Nagabhai on his motor cycle to Mangrol Government Hospital, and other injured persons were also taken on rickshaw to said Hospital for medical treatment. Out of the injured Natha Nagabhai, Bhimshi Jivabhai, Hamir Nagabhai, Bhura Jivabhai, Malde Nagabhai, Punjabhai
 G Bhimshibhai, Jagmal Jivabhai were shifted to Junagarh Hospital for further treatment. In the incident Natha Nagabhai and Hamir Nagabhai succumbed to the injuries and died.

H 4. A complaint was given by Satish Jiva Jotva regarding the incident on the basis of which ICR No. 70 of 2003 was

registered at Mangrol Police Station. A cross version of incident (ICR No. 71 of 2003) was also registered by the police. After investigation, charge sheets were filed by the police against both set of accused. Sessions Trial No. 85 of 2003 relates to the charge sheet filed against accused/appellants Pathubha Govindji Rathod and Hemubha Govindji Rathod and eighteen others. After hearing the parties in the aforesaid sessions case, a charge was framed by the trial court against all the twenty accused in respect of offences punishable under Sections 147, 148, 302 r/w 149, 307 r/w 149, 326 r/w 149, 325 r/w 149, 324 r/w 149 and 506 (2) r/w 149 of Indian Penal Code and under Section 135 of the Bombay Police Act. Accused/appellant no.1 Pathubha Govindji was further charged in respect of offence punishable under Section 25(1)(a) and Section 27 of Arms Act. All the accused pleaded not guilty and claimed to be tried.

5. On this, prosecution got examined PW-1 Dr. M.G. Satrodiya, PW-2 Dr. Linesh Makwana, PW-3 Dr. Anil Sakhiyani, PW-4 Naran Punja, PW-5 Desha Devshi, PW-6 Nasinghbhai Nensibhai, PW-7 Parsottambhai Savjibhai, PW-8 Ratibhai Khimjibhai, PW-9 Nagabhai Hirabhai, PW-10 Virambhai Kanabhai, PW-11 Hardas Desa, PW-12 Arjan Govindbhai, PW-13 Vikram Arjanbhai, PW-14 Bhikhabhai Virabhai, PW-15 Mansukh Amarsinh, PW-16 Lakhabhai Pethabhai, PW-17 Laxmanbhai Makwana, PW-18 Rasulkhan Gulamkhan, PW-19 Razak Ismail, PW-20 Hanif Ibrahim, PW-21 Ali Giga, PW-22 Ismail Hussain, PW-23 Gova Parbat, PW-24 Kanjibhai Karsanbhai, PW-25 Hasmukh Raja, PW-26 Karmanbhai Jethabhai, PW-27 Arjan Parbat, PW-28 Musabhai Allarakha, PW-29 Amadbhai Musabhai, PW-30 Dhirubhai Naranbhai, PW-31 Mohanlal Khimjibhai, PW-32 Mamadbhai Ismail, PW-33 Ibrahim Kasam, PW-34 Atul Prabhudas, PW-35 Dr. Jigna Dave, PW-36 Dr. Kartik Modha, PW-37 Bhanji Vashram, PW-38 Ranchhodbhai Rathod, PW-39 Dr. Bhalchandra Joshi, PW-40 Dr. Jitendra Gajera, PW-41 Dr. P.B. Nariyani, PW-42 Satishbhai Bhimsinh Jothwa (complainant), PW-43 Malde Naga (injured), PW-44 Punjabhai Bjhimsinhbhai

- A (injured), PW-45 Jagmal Jivabhai, PW-46 Bhurabhai Jivabhai (injured), PW-47 Bhimsinhbhai Jivabhai (injured), PW-48 Chandrakant Natwarlal, PW-49 Mahipatbhai Bhikhubha, PW-50 Ravjibhai Valjibhai, PW-51 Jayeshbhai Tapubhai, PW-52 Karsanbhai Gangabhai, PW-53 Subhashbhai Vadhera, PW-54
- B Hasmukhlal Aahir, PW-55 Arjanbhai Meraman, PW-56 Harishchandra Trivedi, PW-57 Bharatbhai Mistri, PW-58 Vishnukumar Vyas, PW-59 Manharlal Mehta (Investigating Officer), and PW-60 Kalekhan Kureshi (Investigating Officer).

C 6. The trial court put oral evidence of above witnesses and documentary evidence including medical reports, inquest reports, post mortem reports of Natha Nagabhai and that of Hamirbhai Nagabhai, complaint, serologist report and chemical analyst report to the accused under Section 313 of Cr.P.C. In

D reply to the prosecution evidence accused stated that evidence adduced against them is incorrect. It is also pleaded that it were the accused, who were attacked by the complainant and his supporters. In defence, it was brought on record that serious injury was caused by Hamir Naga (deceased) to accused/

E appellant no.1 Pathubha Govindji, with a knife. It is also brought on record that from the side of accused/appellants, Gumansinh Motibha, Juvan Singh Gogubha, Punjaji Muluji, Navalsinh, Pathubha (present appellant no. 1), and Punja Bhimshi suffered injuries. It is also established that in cross Sessions Case No. 53 of 2004, witnesses of present case, namely, Malde

F Nagabhai Jotva, Bhimshi Jivabhai Jotva, Jagmal Jivabhai Jotva, Bhurabhai Jivabhai Jotva, Punjabhai Bhimshibhai Jotva are accused, who assaulted the accused of the present case. Due to death of Hamir Naga, his name did not figure in charge-sheet as an accused in the said sessions case.

G 7. After hearing the parties, learned Sessions Judge decided both the sessions trials by two separate orders of the same date and recorded conviction against the accused in both the cross cases. In Sessions Case No. 53 of 2004 the five

H accused, namely, Malde Nagabhai Jotva, Bhimshi Jivabhai

Jotva, Jagmal Jivabhai Jotva, Bhurabhai Jivabhai Jotva, Punjabhai Bhimshibhai Jotva were convicted by the trial court under Sections 323, 324, 325, 147,148 all read with Section 149 of Indian Penal Code and under Section 135 of the Bombay Police Act. Each one of accused in said Sessions Case No. 53 of 2004 was sentenced to undergo five years' simple imprisonment and to pay a fine of Rs.2500/- under Section 326 r/w Section 149 IPC, simple imprisonment for a period of one month and to pay a fine of Rs.1000/- under Section 324 r/w Section 149 IPC, simple imprisonment for a period of three months and to pay a fine of Rs.500/- under Section 147 r/w Section 149 IPC, simple imprisonment for a period of one year and to pay a fine of Rs.1000/- under Section 325 r/w Section 149 IPC, simple imprisonment for a period of one year and to pay a fine of Rs.1000/- under Section 148 r/w Section 149 IPC.

8. On the other hand, in Sessions Case No. 85 of 2005 in which the present appellants were accused, the trial court convicted and sentenced each of the twenty accused under Sections 302, 307, 326, 325, and 324 all r/w Section 149 IPC, to undergo imprisonment for life and to pay a fine of Rs.5000/- under Section 302 r/w Section 149 IPC, imprisonment for seven years and directed to pay a fine of Rs.2500/- under Section 307 r/w Section 149 IPC, imprisonment for a period of five years and directed to pay a fine of Rs.2500/- under Section 326 r/w Section 149 IPC. Similar sentence was passed against each of them under section 325 r/w Section 149 IPC. As to the offence under Section 324 r/w Section 149 IPC each one was sentenced to imprisonment for one year and directed to pay a fine of Rs.1000/-. Similar sentence was passed under Section 147 r/w Section 149 IPC. On the count of charge of offence punishable under Section 148 r/w Section 149 IPC each one of twenty accused was sentenced to imprisonment for a period of one year and directed to pay fine of Rs.1000/- Under Section 506 r/w Section 149 IPC, the trial court sentenced each convict to imprisonment for a period of seven

A years and directed to pay a fine of Rs.1000/-. The trial Court further convicted accused/appellant no.1 Pathubha Govindji under Section 27 of Arms Act, and sentenced him to imprisonment for a period of three years and directed to pay a fine of Rs.2500/-.

B 9. Criminal Appeal No. 1391 of 2007 and Criminal Appeal
 C No.1394 of 2007 were filed by the convicts of Sessions Case No. 85 of 2003, and Criminal Appeal No. 1244 of 2007 was filed by the convicts of Sessions Case No. 53 of 2004, before the High Court. All the three appeals were decided by the High Court by common judgment challenged before us. The High Court decided three appeals with following directions:

“26. For the foregoing reasons, the following order is passed;

D (I) All the three appeals are partly allowed.

E (II) Insofar as Criminal Appeal No.1391/2007 and1394/2007 are concerned, the judgment and order passed by the Court of learned Addl. Sessions Judge, Junagadh in Sessions Case No.85/2003 dated 05.10.2007 is modified to the extent that original accused no.1Pathubha is convicted for the offence punishable u/s.302 IPC and is sentenced to undergo imprisonment for life. The order regarding fine and default sentence is not disturbed qua
 F original accused no.1. It is also clarified that punishment of imprisonment for life imposed upon original accused no.1 shall not mean imprisonment till last breath and that the State may grant the accused benefit of remission at the appropriate time. His conviction and sentence u/s.27
 G of the Arms Act is also confirmed.

Insofar as original accused no.2 Hemubha is concerned, his conviction is altered to one punishable u/s.304 Part1 IPC instead of Section 307 r/w. Section 149 IPC. For
 H conviction u/s.304 Part1 IPC, original accused no.2 is

sentenced to undergo imprisonment for Ten years. The order regarding fine and default sentence is not disturbed qua original accused no.2. The jail report shows that original accused no.2 is on bail. His bail bonds stand cancelled and he is ordered to surrender to custody within a period of Ten Weeks from today.

Out of original accused no.3 to 20, original accused no.5, original accused no.13 and original accused no.16 have expired. Therefore, the appeals stand abated qua the said three accused persons.

Insofar as the remaining accused persons are concerned, viz. original accused no.3, 4, 6 to 9, 11 to 12 and 14, 15 and 17 to 20, their conviction is altered to one punishable u/s.323 IPC without the aid of Section 149 IPC. For conviction u/s.323 IPC, the sentence already undergone by each of the accused persons is ordered to be treated as sufficient sentence and each of the accused is ordered to pay fine of Rs.2500/. None of the accused person is required to undergo any further sentence in respect of the offence in question. The above accused persons are on bail and hence, their bail bonds stand cancelled and surety, if any, stands discharged.

Rest of the impugned judgment and order remains unaltered.

(III) Insofar as Criminal Appeal No.1244/2007 is concerned, the judgment and order passed by the Court of learned Addl. Sessions Judge and Fast Track Court, Junagadh in Sessions Case No.53/2004 dated 05.10.2007 is modified whereby, each of the five accused persons, viz. original accused no.1 to 5, is convicted u/s. 323 IPC without the aid of Section 149 IPC. Their conviction, accordingly, stands altered to one punishable u/s.323 IPC. For conviction u/s.323 IPC, the sentence already undergone by each of the five accused persons is ordered to be treated

A as sufficient sentence and each of the accused is ordered
to pay fine of Rs.2500/. None of the accused person is
required to undergo further sentence in respect of the
offence in question. The above accused persons are on
B bail and hence, their bail bonds stand cancelled and surety,
if any, stands discharged.

Rest of the impugned judgment and order remains
unaltered.”

C 10. The present appeal has been filed before us by way
of Special Leave Petition, by two of the above convicts, namely,
Pathubha Govindji Rathod and Hemubha Govindji Rathod.

D 11. The only point pressed and argued before us in this
appeal is that the courts below have erred in law in not
accepting the plea of private defence taken by appellant no.1.
It is argued that the accused/appellant no.1 was assaulted with
a knife and suffered the injury on the vital part, as such he has
a right of private defence to save his person. It is further
contended that charge relating to causing death of Natha Bhai
E with a fire arm, even if proved, is covered by Exception 2 of
Section 300 IPC.

12. We have considered the submissions of the learned
counsel for the appellants. Exception 2 to Section 300 IPC
reads as under: -

F “Exception 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
G 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.”

H 13. It is not disputed in the present case that there are
cross versions of the incident, and cross complaints were

lodged with the police. It is also not disputed that in both the cases police submitted charge sheets against both set of accused. It is also evident from the record that both Sessions Case No 85 of 2003 and Sessions Case No. 53 of 2004 resulted in conviction on conclusion of trial by Additional Sessions Judge, Junagarh. Considering the number of persons involved in the incident it can be safely said that it is a case of free fight between two groups of people. It is settled principle of law that in the cases of free fights accused are to be fastened with individual liability taking into consideration the specific role assigned to each one of them, and normally right of private defence is not available in such cases unless circumstances in a given case warrant so.

14. A person faced with injury with a deadly weapon to his life cannot be expected to weigh in balance the precise force needed to avoid danger. Referring to case of *Bhanwar Singh v. State of M.P.*¹, this Court, in *State of Rajasthan v. Manoj Kumar*², has observed as under: -

“15.3. In *Bhanwar Singh v. State of M.P.*, it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death; and if the court were to reject the said plea, there are two possible ways in which this may be done i.e. on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2 IPC.”

15. In *Mohd. Khalil Chisti v. State of Rajasthan*³, this court

1. (2008) 16 SCC 657.
2. (2014) 5 SCC 744.
3. (2013) 2 SCC 541.

A has observed in para 42 as follows:-

B “42. The analysis of the materials clearly shows that two
 versions of the incident adduced by the prosecution are
 discrepant with each other. In such a situation where the
 prosecution leads two sets of evidence each one which
 contradicts and strikes at the other and shows it to be
 unreliable, the result would necessarily be that the court
 would be left with no reliable and trustworthy evidence upon
 which the conviction of the accused might be based.
 C Though the accused would have the benefit of such
 situation and the counsel appearing for the appellants
 prayed for acquittal of the appellants of all the charges, in
 view of the principles which we have already discussed,
 we are of the view that each accused can be fastened with
 individual liability taking into consideration the specific role
 D or part attributed to each of the accused. In other words,
 both sides can be convicted for their individual acts and
 normally no right of private defence is available to either
 party and they will be guilty of their respective acts”.

E 16. No doubt normally the right of private defence is not
 available to either of the parties in incidents of group fighting,
 but that is not a rule without exception. In the case at hand, we
 have a special circumstance where the injured person
 (appellant no. 1) who was given 2cm x 2cm x 1.5cm deep knife
 F blow on his back (scapular region) has retorted by using
 licensed firearm, and killed one of his rivals in the same incident.
 Accused/appellant Pathubha Govindji has taken plea of private
 defence right from beginning of the trial. From the judgment of
 the trial court also, it is clear that the plea of private defence
 G was taken by the appellant no.1. Considering the facts and
 circumstances of the present case and evidence on record, it
 is evident that accused/appellant no.1 Pathubha Govindji
 Rathod who suffered knife injury in the incident has caused
 death of one of the deceased by firing several shots thereby
 exceeding right of private defence. Injuries suffered by both the
 H sides are on record.

17. In the above circumstances, from the evidence, as discussed above, we are inclined to accept the argument that it is a case of culpable homicide not amounting to murder covered under Exception 2 of Section 300 of IPC. Therefore, after weighing the submissions of learned counsel for the parties and going through the papers on record, we are of the opinion that appeal of the accused/appellant no. 1 deserves to be allowed partly. Accordingly, the appeal is partly allowed and the conviction and sentence recorded against accused/appellant no.1 under Section 302 IPC read with Section 149 IPC is set aside. Instead he (accused/appellant no.1 Pathubha Govindji Rathod) is convicted under Section 304 Part-I IPC and sentenced to imprisonment for a period of ten years and directed to pay fine of Rs.5000/-, in default of payment of fine he shall undergo simple imprisonment for a further period of six months. He is reported to have undergone nine years and six months of imprisonment. He shall serve out unserved part of the sentence. The conviction and sentence recorded against accused/appellant no. 2 Hemubha Govindji Rathod under Section 304 Part I read with Section 149 IPC, does not require any interference.

18. The appeal stands disposed of.

Kalpana K. Tripathy

Appeal partly allowed.