

PETITIONER:
RAJESH KUMAR STATE OF HARYANA

Vs.

RESPONDENT:
DHARAMVIR & ORS.

DATE OF JUDGMENT: 12/03/1997

BENCH:
M.K. MUKHERJEE, B.N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NO.7 OF 1990
J U D G M E N T

M.K. MUKHERJEE. J.

Dharamvir, a resident of Samalkha in the District of Karnal, along with his three brothers Shakti Singh, Subhas and Suresh, and son Yudhvir was placed on trial before the Additional Sessions Judge, Karnal for rioting, committing the murders of Yogesh, his father Dinesh, and his grandfather Suraj Bhan, and attempting to commit the murder of his brother Rajesh. The trial ended with an order of convictions recorded against all of them under Sections 148, 302/149 (three counts) and 307/149 of the Indian Penal Code and of sentences of rigorous imprisonment for six months, imprisonment for life and a fine of Rs. 200/-, and rigorous imprisonment for seven years and a fine of Rs. 200/- respectively and a direction that the substantive sentences shall run concurrently. In appeal the High Court set aside their convictions and sentences; and aggrieved thereby the State of Haryana and the complainant Rajesh have filed these appeals.

The deceased Dinesh Chander was the younger brother of Tulsi Ram, who is the father of accused Dharamvir, Shakti Singh, Subhash and Lachhi Ram (since deceased). The families of Dinesh and Tulsi used to live in adjacent houses, both of which open into a lane on the west. To the adjacent east of the house of the accused is a shop with a common inner boundary wall. Over that shop litigations were going on between the two families and a few days before the incident, out of which these appeals stem, a decree was passed in favour of deceased Suraj Bhan by the Additional District Judge, Karnal. In another suit filed by Tulsi Ram to evict Hari Krishna, the tenant of that shop, he also got a decree and in execution thereof recovered its possession on May 5, 1994 at or about 2 P.M., through the Court bailiff (P.W.10).

According to the prosecution case on the same day at or about 4.30 P.M. the five accused and Lachhi Ram started demolishing the inner boundary wall of the 'shop' in order to make it a part of their own house. On hearing the sound of pounding on the wall Yogesh went to the lane in front of

their house and asked the accused not to demolish the wall. Immediately thereafter accused Dharamvir, armed with a Lathu, and other four accused and Lachhi Ram with knives came out of the shop and started inflicting blows on Yogesh with their respective weapons. On hearing the alarms raised by him when Rajesh (P.W.18), his father Dinesh Chander, and his grand-father Suraj Bhan came forward to his rescue Subhas, Lachhi Ram and Suresh, assaulted Rajesh with their knives. All the five accused persons and Lachhi Ram also assaulted Dinesh Chander and Suraj Bhan causing injuries on their persons. At that stage Dinesh Chander fired a shot from his licensed gun, which hit Lachhi Ram. In the meantime Krishna Devi (P.W.14), mother of Rajesh, had also reached the spot. Thereafter the five accused persons ran away with their weapons. Though Yogesh had succumbed to his injuries there, his body was taken to the local primary health Centre, where injured Dinesh Chander, Suraj Bhan, and Lachhi Ram were removed for treatment. Injured Rajesh however first went to Samalkha Police Station to lodge the FIR.

After recording the FIR, S.I. Borth Raj (P.W.21) sent Rajesh to the health Centre for medical examination. He then went to the spot, prepared a site plan, and seized blood stained earth and empty cartridge (Ext. P.6) from there and a hammer (Ext. P.4) and a chisel (Ext. P.5) from the shop. Thereafter he went to the health centre at Samalkha and held inquest on the dead body of deceased Yogesh. In the meantime Suraj Bhan, Dinesh Chander and Lachhi Ram had been removed to Medical College Hospital, Rohtak for better treatment. Lachhi Ram, however, succumbed to his injuries on the same evening and Suraj Bhan on the following day. Dinesh Chander continued to be treated in that hospital till he died on May 10, 1988.

During investigation accused Dharamvir and Yudhvir were arrested on May 8, 1984 and the other three on May 10, 1984. On May 11, 1984, while on police custody, accused Shakti Singh made a disclosure statement, which resulted in discovery of a blood stained knife. On completion of investigation Police submitted chargesheet against the five accused-respondents and in due course the case was committed to the court of sessions.

The accused pleaded not guilty to the charges levelled against them when examined under Section 313 Cr.P.C. and accused Subhash gave the following version of the incident :

"On the day of occurrence at about 3.00/4.00 P.M. Lachhi was in the process of breaking the wall of the shop to make it a part of our house of the shop to make it a part of our house after Shakti had taken possession of the shop in a legal manner. Rajesh and his brother Yogesh after hearing the noise came outside our house while armed with knives. They started knocking at our closed door but Lachhi did not bother in spite of the fact that they had started abusing us and threatening us that Rajesh and Dinesh were successful in breaking the door and I also came down stairs after arming myself with a knife because I had seen PWs Rajesh and Yogesh armed with knives and in an aggressive mood both of them attacked Lachhi and me and we

defended ourselves. Lachhi caused injuries to Rajesh with the hand-pump handle and was successful in throwing down his knife. When Lachhi was being attacked by Yogesh I gave him a blow in his back. Meanwhile Lachhi grappled with Yogesh and dis-armed him and snatched his knife. Lachhi was much stronger than Yogesh. Meanwhile Dinesh armed with a gun and Suraj Bhan armed with laths came there and Suraj Bhan gave a lathi blows to Lachhi and me. I grappled with Suraj Bhan and gave him knife blows in self defence. Meanwhile Dinesh fired shots one shot hit Lachhi as he was re-loading his gun, Lachhi gave him blows but he was successful in reloading the gun. He fired on more shot at Lachhi. When I was grappling with Suraj Bhan, Dinesh fired a shot towards away to save my life because lachhi had not got up and I was alone. I went to bonepat and got myself treated there first from Dr. Romesh Batra and then got myself medically examined also from the Civil Hospital, had witnessed the entire occurrence. None of the other accused was present at the spot. They have been falsely involved in the case Krishna was not present at the spot"

The other four accused denied their presence at the spot at the time of the incident and accused Shakti claimed that at the material time he was with his lawyer at Panipat.

In support of their respective cases the prosecution examined twenty three witnesses and defence five.

After taking us through the entire evidence and the impugned judgment Mr. Uma Datta, the learned counsel appearing for the appellants, contended that the judgment of the High Court was patently wrong as it was based on contradictory findings and misappreciation or principles of law relating to the exercise of right of private defence. In refuting the above contentions Mr. Kohil, the learned counsel appearing for the accused respondents, on the other hand submitted that the order of acquittal passed in their favour was based on proper appreciation of evidence and this court would not be justified in interfering with the same, more so, as it was neither vitiated any grave error of law nor did it cause serious miscarriage of justice.

It is true that ordinarily this court does not interfere with an acquittal recorded by the High Court but if it is found that the order of acquittal suffers from substantial errors of law and fact, it becomes the duty of this Court to interfere with the same to redeem the course of justice. Having carefully gone through the impugned judgment in the light of the evidence soon record we find that this case essentially calls for such interference.

In view of the respective cases of the parties as detailed above, there is no room for doubt that in course of the incident that took place on that fateful afternoon, Rajesh, his brother Yogesh, their father Dinesh and grand-

father Suraj Bhan as well as Lachhi Ram, brother of accused Shakti Singh, sustained injuries. The parties however joined issue as to the manner in which the occurrence took place and, for that matter, how the victims sustained those injuries and all, except Rajesh, met with their death. To appreciate the steps of reasoning of the High Court for upsetting the findings of the trial Court on the above issue it will be necessary to first look into the evidence of the doctors, namely, Dr. K.L. Khurana (P.W.1), Dr. Mahesh Prakash (P.W.2), Dr. O.P. Gogia (P.W.3), Dr. D.K. Sharma (P.W.5), and Dr. Rajesh Bhalla (P.W.6), who deposed about the injuries found on the above five persons and as to the cause of death of four of them. Dr. K.L. Khurana (P.W.1) examined Rajesh and found eight injuries on his person, including one incised wound and six lacerated wounds. Dr. Mahesh Prakash (P.W.2) held autopsy on the dead body of Yogesh and found two incised wounds and one abrasion, while Dr. O.P. Gogia (P.W.3), who held autopsy on the dead body of Lachhi, found one incised wound and five lacerated wounds, of which, he opined, the first was a surgical wound and the others were caused by fire-arms. Dr. Rajesh Bhalla (P.W. 6), who examined Suraj Bhan on the night of the incident found seven incised wounds on his person and Dr. D.K. Sharma (P.W.5), who held post-mortem examination on his dead body on the following day corroborated the evidence of P.W.6. Dr. Sharma also held postmortem on the dead body of Dinesh Chand and found stitched wound on his abdomen. The doctors, who held the post-mortem examinations opined that the injuries found on the persons of the four deceased were sufficient to cause death in the ordinary course of nature.

Coming now to the manner in which the incident took place, the prosecution relies on the evidence of Rajesh (P.W.13) his and mother Krishna Devi (P.W.14), and the defence on that of Smt. Bimlesh (P.W.4), wife of accused Shakti Singh, in support of their respective versions. On a detailed discussion of their evidence and correlating the same with other evidence adduced by the parties the trial court accepted the version of the prosecution in preference to that of the defence.

In dealing with the above aspect of the matter the High Court first made the following observations:-

"The parties are however, at variance about the place, and the manner in which the occurrence took place, as well as, about the presence and participation of the accused other than Subhash, and their companion Lachhi Ram deceased. According to the prosecution story, besides Rajesh Kumar, first informant witnessed the occurrence that took place in the lane in front of their house, adjoining the house of the accused. Taking into consideration all these facts, as well as the time of the occurrence and fact that after the occurrence Rajesh Kumar P.W.2 lodged the report with the police within half an hour of the occurrence it is quite patent that his presence and that of his mother Smt. Krishna Devi (P.W.14) at the spot at the time of the occurrence is quite natural.

Probable and convincing. Mere fact that after the occurrence Smt. Krishna Devi did not accompany the injured or her deceased son to the hospital, and instead preferred to stay at her home possibly because she would be under great shock on seeing the ghastly sight, would not be sufficient to uphold the defence plea that her presence at the spot at the time to the occurrence is doubtful."

(emphasis supplied)

Thereafter the High Court passed the question as to whether the accused acted bonafide in exercise of right of private defence of their persons and property and observed that to resolve the issue the place and the manner in which the occurrence took place assumed considerable importance. The High Court then discussed the relevant evidence and answered the question in the following manner :-

"According to the testimony of S.I. Bodh Raj, who went to the spot on the evening of the occurrence, blood was lifted by him from the street, which, as per the report of the Chemical Examiner, and, that of the Serologist, was found stained with human blood. No blood was lifted from inside the shop in dispute, where, according to Subhash accused, the complainant party initially went in order to stop the accused from dismantling the house of the accused, the complainant party attacked him and his brother Lachhi Ram and the latter inflicted injuries to Rajesh Kumar P.W. with the handle of hand pump, and Subhash accused, who was armed with a knife gave a blow with the same to Yogesh (deceased) on his back. This tell the circumstances does support the ocular account given by Rajesh Kumar and his mother Krishna Devi, FIRs. that the entire occurrence took place in the lane itself."

(emphasis supplied)

On perusal of the record we notice that the above quoted findings are based on proper appraisal of the evidence and in agreement with the findings of the trial court. Surprisingly however, in spite of such findings recorded favour of the prosecution - which would have necessarily led to the affirmance of the judgment of the trial court - the High Court upset the same, accepting the plea of right of private defence of person and property raised by the accused persons. In so doing, we are constrained to say, the High Court not only contradicted those findings but also arrived at findings which are patently wrong-both factually and legally.

Though the High Court found that Rajesh (P.W.13) and his mother Krishan Devi (P.W.14) were reliable witnesses, (as the earlier quoted passages indicate) it disbelieves their statements that Dinesh came to the spot with his

licensed gun and opened fire after he and his other family members were assaulted. According to the High Court it was difficult to believe that after the complainant party became aware that the accused party started dismantling the common wall between the shop-in-dispute only Yogesh would come put in the lane to dissuade the accused from carrying out their aforesaid plan. On that premise, the High Court observed that it seemed quite probable beside Yogesh his brother Rajesh, their father Dinesh and their grand-father Suraj Bhan came to the spot together armed with deadly weapons. The above observation runs counter to the positive case made out by accused themselves, as noticed earlier, while narrating the sequence of events. Subhash stated in his examination under Section 313 Cr.P.C that when the fighting was going on between Rajesh and Yogesh on the one hand and Lachhi Ram and him on the other Dinesh arrived at the scene armed with a gun and Suraj Bhan with a lathi. Smt. Bimlesh (D.W.4) was more specific on the point for she stated that in course of the scuffle that was going on between Yogesh and lachhi, Yogesh fell down on the ground and Suraj Bhan and Dinesh at once came out of their house, the former with a lathi and the latter with a gun. The High Court was therefore not justified in making out a third case based on surmise and conjecture.

Another consideration that influenced the High Court to accept the defence plea on right of private defence was the testimony of Satbir Singh (D.W.3), who was examined by the accused to prove that on the day following the occurrence one of the leaves of the outer door of their house was missing. The High Court, however, did not discuss his evidence and, were are sure that if the High Court had done so, it would have agreed with the finding of the trial court that he was a procured witness.

From his testimony we get that he is a resident of Sonapat and there he runs a photo studio. On May 6, 1984 one Mool Shankar approached him at Sonapat and took him to the house of accused at Samalkha. There he took photographs (Ext.DC,DE and DH) of the outer door of the house, one leaf of which he round broken, and of a hand pump with its handle missing. In cross-examination he stated that his studio was situated at Bohana road, Sonapat and in between the bus stand of Sonapat and his studio there were about 20-25 other photo studios on that road. He further stated that Mool Shankar was not known to him from before lastly, he stated there were photographers in Samalkha also. Having regard to the undisputed fact that Sonapat is at a distance of about 40 kilometers from Samalkha and that there were photographers in Samalkha, it seems strange that the services of Satbir Singh, who was not known to the accused were requisitioned. When the evidence of D.W.3 is considered in the light of the evidence of S.I. Bodh Raj (P.W.21), S.I. Piara Ram (P.W.19) and Sat Prakash (P.W.12), who was witness to the seizure of the articles by P.W.21 and P.W.19, it becomes crystal clear that the story of the breaking of the door was contrived by the accused later on the build up a defence. All these witnesses categorically replied, when cross examined on this aspect, that they did not notice any leaf of the outer door of the house broken when they went there in the evening of May 5, 1984. The comment of the High Court that their such reply was evasive is wholly unjustified for if they had not seen any mark of violence on the door, the only answer they could have given to that question was that they did not notice any such mark.

With its assumptive view that all the accused came together armed with deadly weapons and implicit reliance on

the evidence of D.W.3, the High Court then drew the following inference :-

"This aspect of the case probabilities that defence plea that the complainant party went armed and tried to break open the outer door of the house of the accused party. Thereafter, the accused party retaliated and attacked the complainant party. This aspect of the case would indicate that the complainant party was the initial aggressor and the accused party in order to retaliate came out in the lane and attacked the complainant party after the latter had damaged the outer door of the house of the accused."

(emphasis supplied)

In view of our preceding discussing the conclusions drawn by the High Court that the complainant party tried to break open the outer door of the house of the accused party must be said to be factually untenable; and the discussion to follow will demonstrate that on the above factual conclusions the accused persons were not legally entitled to the right of private defence.

Section 96 of the Indian Penal Code provides that nothing is an offence which is done on the exercise of the right of private defence and the fascicle of Sections 97 to 106 thereof lays down the extent and limitation of such right. From a plain reading of the above Sections it is manifest that such a right can be exercised only to repel unlawful aggression- and not to retaliate. To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges levelled against them by bestowing them the right to retaliate and attack the complainant party.

We reach the same conclusion through a different route- even if we proceed on the assumption that the finding of the High Court that the accused party came out in the lane and attacked the complainant party after the latter had damaged the outer door of their house is a proper one. The offence that was committed by the complainant party by causing such damage would amount to 'mischief' within the meaning of Section 425 of the Indian Penal Code and, thereby, in view of Section 105 of the Indian Penal Code the accused would have been entitled to exercise their right of private defence on property so long as the complainant party continued in the commission of the mischief. In other words, after the damage was done, the accused had no right of private defence of property, which necessarily means that when they attacked the complainant party in the lane they were the aggressors. Consequently, it was the complainant party- and not the accused- who was entitled to exercise the right of private defence of their persons; and their act of gunning down Lachhi after four of them were assaulted by the accused party with deadly weapons would not be an offence in view of Sections 96 to 100 of the Indian Penal Code. In drawing this conclusion we have drawn sustenance from the following finding of the High Court which, in our view, is based on correct appraisal of the evidence:

"However, from the evidence on the record it is quite apparent that Lachhi, companion of the accused,

was shot after he and Subhash accused had allegedly inflicted injuries to Yogesh (deceased) and Rajesh P.W. by that time both Dinesh Chander and Suraj Bhan had already received injuries at the hands of the accused party. The sequence of events clearly shows that Lachhi deceased received firearm injuries at the fag and, when Yogesh, Rajesh Kumar and Dinesh Chander, and Suraj Bhan had already received injuries on their person at the hands of the accused party".

(emphasis supplied)

Before we conclude our discussion on the above aspect it would be necessary to refer to the statement made by accused Subhash in his examination under Section 313 Cr. P.C. (quoted earlier), wherein he stated that on being attacked by Rajesh and Yogesh he assaulted Yogesh and Suraj Bhan. In support of his statement he examined Dr. Ramesh Batra (D.W.1) and Dr. N.K. Verma (D.W.5), D.W.1 testified that on May 5, 1984 at 11 P.M. he examined Subhash in his clinic at Sonapat and found a lacerated wound 3 cms. x 1cms over the left parietal region and he stitched that wound. The other doctor (D.W.5), who claimed to have examined Subhash on the following day (May 6, 1984) at 6.45 P.M., deposed that he (Subhash) had one stitched wound over the left parental bone, a bruise over the front of the right knee, abrasion on the right shoulder, sub-conjunctival haemorrhage over the middle part of the left eye and swelling over the left eyebrow. According to D.W.5 all the injuries that he found on the person of Subhash were caused by blunt weapon. Apart from the fact that the evidence of the two doctors vary regarding the number of injuries found on the person of Subhash, the injuries could not have been caused in the manner alleged by him, namely, attack by knives by Rajesh and Yogesh in which case we would have expected incised wounds. Indeed, D.W.4, who gave the defence version of the incident, did not state in her examination of having seen subhash being attacked by Rajesh and Yogesh much less with knives and in cross examination she categorically stated that Subhash did not receive any injury with the knife and that he received 3/4 injuries with lathis. All these facts and circumstances not only militate against the defence versions but also persuade us to hold that the claim of Subhash that he sustained injuries in the incident owing to assault by Rajesh and Yogesh with knives is unfounded.

That brings us to the question whether the High Court was justified in accepting the plea of alibi raised by accused Shakti Singh. As already noticed all the accused except Subhash took the plea to alibi but only Shakti Singh led evidence to substantiate it. According to him he had gone with the bailiff Dina Nath (P.W.10) to Panipat after the possession of the shop had been delivered to him to consult Shri H.K. Singal, Advocate about the other pending case and to inform him that the possession had been taken and that he was with Shri H.K. Singal till 5 P.M. on May 5, 1984. Therefore, he stated, he could not have been present at the time of occurrence, as alleged by the prosecution. In support of his contention he examined Shri Singal (D.W.2). He deposed that his office timing in summer were from 4.30 P.M. TO 8.00 P.M., and his office used to be opened by his clerk at 4.00 P.M. On the day Shakti Singh took possession

of a shop at Samalkha in the beginning of may 1984 he came to has office and informed him about it. He lastly stated that Shakti Singh left his office at about 5.00 P.M. Though D.W.2 claimed to be the Advocate of Shakti Singh in the litigation, no contemporaneous document was produced by Shakti Singh or D.W.2 in support thereof or to prove the plea of alibi. In absence thereof it is difficult to believe that D.W.2, would be remembering who met him, on which date and at what time. It is trite that a plea of alibi must be proved with absolute certainty so as to completely excluded the presence of the person concerned at the time when and the place where the incident took place. Judged in that context we are in complete agreement with the trial Court that the testimony of D.W.2, for what it is worth, does not substantiate the plea of alibi raised on behalf of the accused Shakti Singh.

On the conclusions as above we unhesitatingly hold that the prosecution has been able to prove the charges levelled against the accused beyond all reasonable doubt. We, therefore, allow these appeals, set aside the judgment of the High Court and restore that of the trial court. The five accused-respondents, namely, Dharamvir, Shakti Singh, Suresh, Subhash and Yudhvir, who are on bail, shall now surrender to their respective bail bonds to serve out the sentence imposed upon them by the trial Court.