

PETITIONER:
BHUPENDRASINH A. CHUDASAMA

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 04/11/1997

BENCH:
M.K. MUKHERJEE, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

THE 4TH DAY OF NOVEMBER, 1997

Present:

Hon'ble Mr. Justice M. K. Mukherjee

Hon'ble Mr. Justice K. T. Thomas

Yashank Adhyaru, Manoj Wad, Advs. for Ms. J. S. Wad, Adv. for the appellant.

Ms. H. Wahi and Ms. Neithono Rhetso, Advs. for the Respondent.

J U D G M E N T

The following Judgment of the Court was delivered:
THOMAS, J.

One armed constable of Special Reserved Police (SRP) shot at his immediate superior (Head Constable) while the latter was perambulating around Khampla Dam site (in Gujarat State) during dusk hours of a cloudy day in July 1983. The victim died on the spot. Appellant was charged and tried for murder, but the trial judge entertained doubt about his complicity and acquitted him. However, a Division Bench of the High Court of Gujarat, while re-appraising the whole evidence on an appeal filed by the State, felt no speck of doubt that it was a cold-blooded murder perpetrated by the appellant. Accordingly, the acquittal was reversed and the appellant was sentenced to imprisonment for life. Appellant thus became entitled to file his appeal, as of right, under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

The victim of the gun shot was Ukadbhai Radvabhai. Head Constable of S. R. P. who was posted along with other police personnel at Khampla Dam site which was then in danger on account of heavy rainfall. Appellant was allotted to the same platoon and was placed below the deceased. Some Skirmishes developed and deceased had taken the appellant to task on the ground of dereliction in the discharge of the work allotted to him.

Prosecution case is that appellant was of a truculent temperament and as he did not lightly take the diatribe hurled against him by the deceased he was groping for a suitable opportunity to retaliate. On the evening of 2.7.1983 had noted the appellant walking near the tower of the Dam. He aimed his rifle at the deceased and pumped four

bullets into his vital parts which caused his end in a trice.

Post-mortem examination of the dead body revealed, inter alia, one fire arm wound on the back of the right shoulder with blackening of the skin and its exit wound was on the left axilla with a big hollow cavity through which lung tissues protruded; another entry wound on the right scapula, its exit wound on the 5th vertebra with tearing of skin and muscle over an area of 3" x 3", another entry wound below the left gluteal fold with blackening of the skin and its exit wound was on the upper gluteal fold. There was no dispute that death of deceased was due to piercing of bullets from a fireman.

In this case appellant did own the act of firing the rifle. He adopted the following defence which he submitted in writing before the trial court when he was examined under Section 313 of the Code of Criminal Procedure, the material portions of which extracted below:

"I was doing patrolling duty with the service rifle, and at about 7.45 P.M. when it was absolute dark I came near the bridge for proceeding towards the valve tower. Then I saw a flame near the tower and saw somebody moving. I suspected that some miscreant was about to commit mischief with fire on the valve tower. As I could not identify the moving person due to want of light I shouted at him to stop. But there was no reply. So I proceeded further and repeated the shout, and still there was no reply. I had to open fire in discharge of my duties. I heard the sound of something falling down. I then reported the incident to the persons who were in the office. When constable Laxmansinh (PW-2) and Jayantrajsinh (PW-3) arrived after seeing the body of the victim they informed me that it was Ukadbhai Radvabhai who received bullet injuries."

Trial court felt that the defence version is quite probable and hence he is entitled to the benefit of doubt. High Court found that the trial court went perversely wrong in entertaining such a doubt on the facts of the case. High Court took particular note of certain circumstances which showed that appellant was nutring grouse against the deceased.

Ext. B-15 report prepared by the deceased containing a complaint that appellant committed acts of dereliction of duties and that when appellant was warned about it he hurled invectives against the deceased and left the work place in a huff. Deceased expressed his apprehension, in Ext. B-15, that appellant might do something in revenge and so he made a request to his platoon commander to shift the appellant to some other section.

PW-3 Jayantrajsinh - a colleague of both deceased and appellant - narrated the incident which ensued exchange of words between appellant and deceased. The witness also said that when he knew about Ext. P-15 report he snatched it from the deceased and prevailed upon him to desist from forwarding it to the superiors, but later when he heard that the appellant was fuming with acerbity towards the deceased he returned Ext. P-15 to him. One most important circumstance is, Ext. P-15 report was collected by the police from the bag of the deceased after his death. There is no dispute regarding the authorship of that report.

The evidence in this case, in the light of the admissions made by the appellant, has narrowed down to the following points: Appellant had fired his rifle and the deceased who was on his duty, sustained the bullet injuries and died. As the High Court observed, it would have been a close range firing. This could be inferred from the

blackening of the skin around two entry wounds.

Learned counsel for the appellant first contended that since appellant was discharging his official duties he is entitled to acquittal. No person can claim immunity from culpable homicide merely on the ground that he killed another person in discharge of his official duties unless such killing would fall within the ambit of any of the exceptions enumerated in Chapter IV of the IPC. Pitted against the said legal position learned counsel made an endeavour to bring it within the scope of Section 80 of IPC which reads thus;

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention of knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

The primordial requirement of the said exception is that the act which killed the other person should have been done "with proper care and caution". The very fact that accused shot his own colleague at close range without knowing the identity of his target smacks of utter death of any care and caution. It appears to us that appellant did not even remotely entertain the idea putting forward a plea that his act of killing the deceased was done by accident or misfortune, leave apart the other ingredients necessary to form the right under the said exception. Argument on that score, therefore, deserves rejection outright at the threshold.

Learned counsel, alternatively, contended that the act of appellant can be justified under Section 103 of the Penal Code. That section protects a person who voluntarily caused death of another person in exercise of the right of private defence of property "if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, will be an offence of any of the descriptions hereinafter named namely:-

First - Robbery:-

Secondly, - House - breaking by night;

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

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

No doubt, right of private defence would command when a reasonable apprehension of danger to property commences and such right can extend to the killing another person even if there was only an attempt to commit any of the offences mentioned in the section. The right subsumed in the section is an expansion of the basic right of private defence founded in Section 97. When the two sections are telescoped with each other the right of private defence can be stretched up to the extent of killing another person in defending the property of not only his own but even of another person. Such right would be available to a public servant if the property sought to be protected is a public property. But there is a condition for claiming such an extended right if the property sought to be protected is a building. It should be a building used for human dwelling or for custody of property. If it is not a building of that type the person exercising right of private defence cannot go to the farthest extent of killing another person unless

the threatened mischief has caused a reasonable apprehension that death or grievous hurt would otherwise be the consequence.

In this case there was no pleas at all that appellant had any apprehension of death or grievous hurt. Nor is there a case that the tower (which he feared to have been under threat of incineration) was either used for human dwelling or custody of property. Hence, there is no question of countenancing the extended right of private defence envisaged in Section 103.

Nonetheless, if the building was not for the above use and even if appellant had no apprehension of death or grievous hurt, still a restricted right of private defence can be claimed by a person which is adumbrated in Section 104 of IPC:"

"If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 199, to the voluntary causing to the wrong-doer of any harm other than death."

Now, the question is whether appellant is entitled to the aforesaid restricted right of private defence of property.

The accused who pleads any of the exceptions under Chapter IV has to prove it since law has cast the burden on him in such situation. Under Section 106 of the Evidence Act the court will presume the absence of it. Of course, the standard of such proof is not akin to that of the prosecution to prove the guilt of the accused. It is trite law that such burden can be discharged by the accused showing a preponderance of probabilities.

Appellant put forward a case for right of private defence only when he was examined by the trial court under Section 313 of the code. High Court has noted that the has not disclosed to any of the prosecution witnesses that the was unable to identify his immediate superior and thought him to be a miscreant and observed that "no such question with regard to the mistaken identity was put to any other prosecution witnesses during the cross-examination." On the other hand, PW-12 (another SRP personnel who was also on duty) has deposed that he saw the appellant scampering away from the scene of occurrence and that when he was confronted he blurted out that he was proceeding to surrender himself since he had fired at the deceased. To none the appellant said that the fired the rifle for protecting the tower. To none he disclosed that the first had a glimpse of flame which he thought to be the movement of a miscreant, In fact when the dead body and the surroundings were closely examined by the police they did not come across any material which could have given any mistaken impression to the appellant as flame of a torch. Thus, the belated claim of right of private defence was far from the contemplation of the appellant when he opened the fire at the deceased.

In the light of the aforesaid discussion there is no scope to conclude that appellant had any right of private defence to property. Accordingly, we confirm the conviction

and sentence and dismiss the appeal.

JUDIS