

CASE NO.:
Appeal (crl.) 773 of 2005

PETITIONER:
Jalaram

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 24/11/2005

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T

S.B. SINHA, :

This appeal is directed against the judgment and order dated 19.03.2004 passed by Rajasthan High Court whereby and whereunder an appeal preferred by the Appellant herein against the judgment and order of conviction and sentence passed against him under Sections 147, 302 and 323/149 of the Indian Penal Code (for short, 'IPC') was converted to conviction under Section 302 IPC simpliciter.

The prosecution case as disclosed in the First Information Report is as under :

One Pratapa (PW-5) lodged a written report at about 2.00 p.m. on 14.3.1998 before the S.H.O., Police Station Bagoda, District Jalore, stating that at about 9.00 a.m. on the said day while he was going with his brothers Hanja (PW-1), Vasna (deceased) and Raimal (PW-4) from his dhani towards Oran for the purpose of grazing the cattle and when they had been passing through the field of the accused Sonaram, the Appellant herein together with Bhagirath, Kisana Ram, Naringa, Poonmaram and Bhikhram, who were hiding themselves in the field, assaulted them with lathies. Whereas the Appellant Jalaram is said to have given a lathi blow on the head of the deceased, Bhagirath gave a lathi blow on the head of PW-1 and Kisana Ram gave a lathi blow on the informant's leg.

Although the Appellant herein was named in the First Information Report, no charge-sheet was submitted against him as also against Bhagirath, Poonmaram and Bhikharam. A charge-sheet for commission of offences punishable under Sections 147, 148, 302, 323 read with Section 149 IPC was submitted against Kisana Ram, Naringa, Sonaram, Ghamanda and Deva Ram. However, after examination of five prosecution witnesses and on an application made in this behalf, the Appellant herein and others were summoned by the Trial Judge in terms of Section 319 of the Code of Criminal Procedure, whereafter charges were amended against all the accused.

The prosecution examined 11 witnesses in support of its case.. The learned Trial Court acquitted Sonaram, Ghamanda and Deva Ram (Accused Nos.1, 4 and 5 respectively) but found the Appellant guilty for commission of offences punishable under Sections 147, 302 and 323/149 IPC and the other accused, namely, Kisana Ram, Naringa, Bhagirath, Poonmaram and Bhikharam for offences punishable under Sections 147, 302/149 and 325/149 IPC.

Two appeals preferred thereagainst by the accused were heard by a Division Bench of the Rajasthan High Court and, as noticed hereinbefore, by

reason of the impugned judgment the Appellant alone was held guilty for commission of an offence punishable under Section 302 IPC and the other accused persons were acquitted. The High Court, however, held Kisana Ram and Naringa guilty of commission of an offence punishable under Section 323 IPC for causing hurt to Pratapa (PW-5) and Hanja (PW-1) and sentenced them to the period already undergone.

The High Court in its judgment held :

"Thus from the statements of star witnesses p.w. 5 Pratapa and p.w.1 Hanja, the following facts have emerged :

(i) That at the time of alleged incident, six accused appellants, namely, Jalaram, Bhagirath, Kisana Ram, Bhikaram, Poonmaram and Naringa were present.

(ii) That the alleged incident took place when p.w. 1 Hanja, p.w. 5 Pratapa and deceased along with their revar (cattle) were passing through the way, which was in the field of accused Sonaram (who has been acquitted by the learned trial Judge).

(iii) That accused appellant Jalaram caused lathi blow on the head of the deceased.

(iv) That except accused appellant Jalaram, no other accused persons caused any injury to the deceased.

(v) That accused appellant Kisana Ram caused lathi blow to p.w. 5 Pratapa.

(vi) That accused appellant Naringa caused lathi blow to p.w. 1 Hanja.

(vii) That p.w. 1 Hanja and p.w. 5 Pratapa have not explained the injuries received by accused appellant Kisana Ram and accused Sonaram (who has been acquitted by the learned trial judge).

(viii) That there is a way in the field of accused Sonaram (who has been acquitted by the learned trial judge) for reaching gochar land of Punasa and that fact has also been stated by other prosecution witnesses."

In arriving at the said finding, the High Court held : (i) as the fight took place without premeditation, the same can be said to be a sudden one and by reason thereof no unlawful assembly can be said to have been formed; (ii) In the case of group rivalry enmity, it often happens that the tendency develops to rope in as many as persons as possible having participated in the assault and applying the said principle, the finding of the trial court that the accused persons formed a common intention was not correct; (iii) As no accused instigated the Appellant Jalaram to inflict injuries on the deceased, and, thus, no unlawful assembly was formed with a common object to commit the murder of the deceased; (iv) The Appellant Jalaram alone was responsible for causing the death of the deceased, as his presence on the scene of occurrence cannot be doubted in any manner; (v) The Appellant has failed to prove his plea of alibi; (vi) He has also failed to prove that he, in the peculiar facts and circumstances of the case, could exercise his right of private defence; (vii) As a right of way was claimed in the field of Sonaram, there was no reasonable apprehension of danger either to the body or the crops of the Appellant; and (viii) Although accused Kisana Ram and Sonaram had received one injury each but the injury suffered by them being simple in nature, it would reasonably be inferred that

there had been no reason for apprehension of danger to the body of the accused leading to exercise of their right of private defence. (ix) The injury on the person of Kisana Ram and Sonaram being minor in nature were not required to be explained.

Mr. Uday U. Lalit, the learned Senior Counsel appearing on behalf of the Appellant, has raised a short question in support of this appeal. The learned counsel contended that having regard to the fact that ten simple injuries had been inflicted by the parties on each other; only because the Appellant herein has inflicted an injury causing death of the deceased would not lead to the conclusion that the Appellant herein had any motive therefor. It was pointed out that it is not a case where several blows were hurled on the deceased or other prosecution witnesses so as to arrive at a conclusion that the Appellant had the requisite mens rea.

Mr. Kumar Kartikay, the learned counsel appearing on behalf of the State, however, would draw our attention to the situs of the injury as also the force with which the same was inflicted by the Appellant herein to support the judgment of conviction and sentence passed by the High Court.

The short question, therefore, which arises for consideration is as to whether in the facts and circumstances of the case, the Appellant herein can be said to have committed an offence punishable under Section 302 IPC. Hanja (PW-1) had received four injuries and Informant Pratapa (PW-5) had received five simple injuries. It is also not in dispute that the accused Sonaram and Kisana Ram had also received one injury each. The injuries found on the body of the deceased upon post-mortem are as under :

"(i) Lacerated wound 7 cm x 3 cm x bone deep with fracture of bone on right side of parieto temporal region.

(ii) Abrasion 4" x 4" on left thigh on anterior side."

It is not in dispute that the occurrence took place in the field of Sonaram who has been acquitted by the trial court. It is also not in dispute that Jalaram had agricultural land nearby. It is furthermore not in dispute that no right of way by way of path/passage between the lands appurtenant to Khasra nos. 865, 866 and 1006 and the boundaries of village Punasa was found to have been recorded in the records of rights.

The defence had examined seven witnesses including DW-6 who was the Investigating Officer in the case. He stated that upon investigation carried out by him, he came to the opinion that no offence was made out against the accused Jalaram, Bhikharam and Poonmaram. DW-7 Udda Ram, who is an independent witness stated that there had been a free fight between 'Bishnois' and 'Rebaris' on the field of Sonaram Bishnoi. It has further not been disputed that the deceased and other on the date of the incident were proceeding with about 60 numbers of cattle for grazing to the field of Sonaram and Bhagirath. It also deserves to be noticed that the eye-witnesses Hanja (PW-1), Raimal (PW-4) and Pratapa (PW-5) although deposed that the accused persons gave indiscriminate beatings to the deceased but, the same has been, in view of the medical evidence, found to be not correct.

The right of way on the agricultural land belonging to Sonaram has not been established. If there was no established right of way by way of easement or otherwise and if there had been an apprehension in the mind of the accused that there was a threat of trespass in their land, indisputably they could exercise their right of private defence. In any event, such an apprehension on the part of the Appellant and other accused persons cannot be ruled out.

We have noticed hereinbefore, that the only one blow was hurled by

the Appellant herein was on the forehead of the deceased. The genesis of the occurrence, appears also not to have been disclosed by the prosecution. It is not the case of the prosecution that the Appellant herein and other accused persons had been nurturing any grudge against the deceased or the informant from before or had any motive to commit the aforementioned offence. Any motive on the part of the Appellant and other accused persons for hiding themselves near the place of occurrence and committing the offence has not been established. It is, thus, difficult to accept that part of the prosecution case.

Sonaram and Kisana Ram had also received one injury each. It is true, as has been held by the High Court, that the nature of injuries was simple one but it was, in the peculiar facts and circumstances of this case, obligatory on the part of the prosecution to prove as to how they received the same. It is also true that in all situations the injuries received by the accused persons need not be explained but a different situation may arise when a right of private defence is claimed. The prosecution has not placed any material before this Court to prove that it was the Appellant and other accused persons who were aggressors. If they were not the aggressors, the plea of right of private defence was available to them. Non-explanation of injuries on the person of Sonaram and Kisana Ram, thus, gains significance. Injuries on the persons of the accused persons having not been explained by the prosecution gives rise to the credibility to the defence put forth by the Appellant as regard exercise of his right of private defence.

In *Triloki Nath & Ors. Vs. State of U.P.* [2005 (9) SCALE 76], it has been held:

"No decision relied upon by the Appellants lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein."

In *Bishna @ Bhiswadeb Mahato & Ors. Vs. State of West Bengal* [JT 2005 (9) SC 290 : 2005 (9) SCALE 204], a Division Bench of this Court has recently noticed the nuances of the said right wherein it was held:

"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 hyper-technical 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."

It was further observed:

"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 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 Sekar alias Raja Sekharan vs. State Represented by Inspector of Police, T.N. [(2002) 8 SCC 354], it was observed :

"10. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered."

The Appellant herein also has raised a plea of private defence. He, however, has not been able to show that the threat on the person of Sonaram and Kisana Ram was such or even threat of dispossession was such, he had to hit the deceased at such place and with such force that he would breathe his last on the spot itself. He, therefore, in our considered opinion, exceeded his right of private defence.

We, therefore, are of the considered view that the Appellant is guilty of commission of an offence under Section 304, Part I of the Indian Penal Code and not under Section 302 thereof.

Keeping in view of the facts and circumstances of this case, we are of the opinion that imposition of a sentence of 10 years Rigorous Imprisonment under the aforementioned provision shall meet the ends of justice. The Appellant shall also pay a fine of Rs. 500/- in default whereof he will undergo simple imprisonment of three months. The Appeal is allowed in part and to the extent mentioned hereinbefore.