

CASE NO.:

Appeal (crl.) 445 of 2001

Appeal (crl.) 838 of 2001

Appeal (crl.) 693 of 2001

PETITIONER:

DHARMINDER

Vs.

RESPONDENT:

STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT: 03/09/2002

BENCH:

R.C. Lahoti & Brijesh Kumar.

JUDGMENT:

Durga NandVs.

State of Himachal Pradesh

State of Himachal Pradesh

Vs.

Hukmu Devi

JUDGMENT

BRIJESH KUMAR, J.

The above-noted appeals arise out of the judgment and order dated September 20, 2000 passed by the High Court of Himachal Pradesh in CrI. Appeals No. 304 and 367 of 1998. The three appeals before us have been heard together and they are being disposed of by one common judgment.

The appeals preferred by Dharminder and Durga Nand are against their conviction under Section 302/34 IPC for murder of Laiq Ram. They have been sentenced to undergo imprisonment for life and also to pay a fine of Rs.5000 each and in default of payment of fine, to undergo rigorous imprisonment for a further period of two years. They have also been convicted under Section 307/34 IPC for attempt to murder of Neel Kanth son of Laiq Ram and sentenced to undergo rigorous imprisonment for seven years and also to pay a fine of Rs.1000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. They have also been convicted under Section 323 read with Section 34 IPC for causing simple injuries to Gangawati, wife of Laiq Ram and sentenced to undergo rigorous imprisonment for six months and also to pay a fine of Rs.500/- each and in default of payment of fine, to undergo rigorous

imprisonment for a further period of two months. So far the appeal filed by the State of Himachal Pradesh is concerned, it has been preferred against acquittal of Hukmo Devi, Promod Kumar and Padma Ram by the trial court and upheld by the High Court.

According to the prosecution case the incident occurred on 24.10.1995 at about 2.00 P.M. when Gangawati PW-5 on return to her house after cutting grass from Jungle, heard the sound of cutting of tree and on going to the spot, she found that the appellant Durga Nand was cutting her Baan tree and the appellant Dharminder was ploughing the field. She wanted to go to her house to inform her son but in the meantime the appellants along with Hukmu Devi, Bhaskra Nand and Bimla Devi attacked her with Dandas. They were also helped by Pramod. She raised alarm, upon which Neel Kanth, her son arrived to rescue her. All the accused persons started beating Neel Kanth. On seeing this merciless assault, Laiq Ram, father of Neel Kanth and husband of PW-5 Gangawati, finding himself helpless to save his son, took up the gun and fired to scare away the assailants as a result of which Durga Nand received injuries on his legs, thighs and abdomen. The accused persons are said to have snatched the gun of Laiq Ram and he was also given lathi blows. They are said to have pushed Laiq Ram and Neel Kanth below the field. Durga Nand gave a blow with pipe on the head of Laiq Ram. As a result of the injuries received, Laiq Ram died at the spot. His dead body was thrown in the Nala. It is further alleged that Neel Kanth who had also received severe injuries was dumped near the dead body of Laiq Ram.

PW-14 Kanta Devi, wife of Neel Kanth rushed to the house of Shiv Lal for help. He came to the spot and saw Laiq Ram lying dead and Neel Kanth in the injured condition. He went to Lafughati where he lodged the report and his statement was recorded by PW-18 Pratap Singh, ASI. He also took Neel Kanth to Theog and got him admitted in the hospital.

The police after completing the investigation filed the chargesheet against the aforesaid persons.

The prosecution case in so far motive for commission of crime is concerned is that Padma Ram, at the instance of Ganeshu, father of Gangawati started living in Ganeshu's house in village Kelvi Jubber, Gangawati was then aged about 6 or 7 years. Laiq Ram and Durga Nand are sons of Padma Ram. On the death of Ganeshu, Padma Ram started looking after the entire property of Ganeshu. It is said that Ganeshu desired that his daughter Gangawati be married with Laiq Ram. Gangawati on attaining majority inherited the property of her father. Padma Ram married his son Laiq Ram to Gangawati. The prosecution case further is that Padma Ram

wanted that Durga Nand be also recorded as co-sharer to the extent of half share in the property inherited by Gangawati but Gangawati and Laiq Ram did not agree to it. Appellant Durga Nand, Padma Ram and other members of the family harassed Laiq Ram so much on that count that he started living in another village Kathog with one Soda. Gangawati is said to have been pregnant at that time and later she gave birth to Neel Kanth. It is further said that Laiq Ram stayed away from home for about 20-22 years. In the meantime Padma Ram succeeded in getting half share in the property of Gangawati recorded in the name of Durga Nand. Neel Kanth persuaded his father to come back to the village in 1994 during Diwali festival. Return of Laiq Ram was not liked by Padma Ram and Durga Nand and members of his family so much so that they wanted to finish him and in that regard Padma Ram is said to have asked Gangawati and Neel Kanth not to come out of their house on 24.10.1995 as he apprehend such an incident to take place. The accused persons do not dispute that the incident occurred on 24.10.1995 in which Laiq Ram died and Neel Kanth received injuries but they pleaded right of self defence. They have also submitted their written statements in defence u/s 233 of Criminal Procedure Code. According to the accused persons land bearing Khasra No.69, 206/17 and 178 measuring 24 bighas 9 biswas situate in Chak Lafu, Pergna Dharthi, village Kelvi Jubber belongs to them. Laiq Ram after having come to the village, conspired to dispossess them from the land. With that end in view on 24.10.1995 at about 2.00 P.M. while Durga Nand was working on Plot No.69, Laiq Ram, Gangawati and Neel Kanth trespassed on his land. Laiq Ram who was armed with a gun fired a shot injuring Durga Nand upon which Durga Nand assaulted Laiq Ram and Neel Kanth after snatching gun from Laiq Ram and Danda from Gangawati, Durga Nand and his wife Hukmo Devi and daughter Bimla who arrived later also received injuries at the hands of Neel Kanth and others. Durganand also lodged a report which was partially investigated by the police. According to Durga Nand the fight was between him on one hand and Laiq Ram and Neel Kanth on the other. Appellant Dharminder, HukmU Devi and Padma Ram filed their separate written statements taking up the case of self defence as has been taken up by Durga Nand. According to them Dharminder and Padma Ram were not present at the time of the actual incident nor they participated in the fight at all. Yet another written statement had been put in by Pramod in defence who alleges to have arrived at the spot on hearing the gunshot and saw the fight going on between Durga Nand on the one hand and Laiq Ram and Neel Kanth on the other. He took Durga Nand to the hospital. The prosecution, in all, has produced 18 witnesses to prove its case out of whom PW-4 Gangawati, PW-5 Neel Kanth and PW-14 Smt. Kanta are the eye witnesses. PW-14 Kanta is the wife of Neel Kanth. PW-6 Shiv Lal lodged the first

information report at Theog Police Station. PW-12 Dr. Ashwani Tomer examined the injuries of Neel Kanth and prepared the memo of injuries Ex. PW 12/A. PW13 Dr. Kuldeep Kanwar medically examined Gangawati and prepared injury report but the same has not been proved by the doctor in the statement. PW-13 Dr. Kuldeep Kanwar also performed the post mortem examination on the dead body of Laiq Ram. The post mortem report is Ex.PW13/B. The case was investigated by PW-18 Shri Pratap Singh. PW-15 Shri Mohan Singh, S.H.O. Police Station Theog stated that he had partly investigated the report of Durga Nand. He also investigated the case on the report of Shiv Lal. The remaining witnesses are more or less of formal nature.

So far accused persons are concerned, they have examined four defence witnesses. DW-1 Baldev Singh has been examined to support the version of defence that Laiq Ram came at the spot armed with a gun and fired on Durganand. DW-2, Jagat Ram stated that on hearing the cries of Hukmo he went to the spot and found Durga Nand being removed by Hukmo and Dharminder with the help of Baldev and Pramod. He also stated that he did not see Laiq Ram, his wife and son at the place of occurrence. DW-3 Shri Yashpal Thakur, Sr. Pharmasist produced record to prove injuries on Durganand. DW-4 Dr. P.L. Ghonta examined Durga Nand on 3.4.1997 and recovered pellets from his scrotum.

We may now peruse the injuries which are said to have been received by both the parties. The injuries of Neel Kanth were examined by PW-12, Dr, Kuldeep Tomer on 24.10.1995 at 9.10 P.M. at Civil Hospital, Theog. He found:
Injury No.1

Multiple lacerated wounds on scalp which consisted of:

- i) H shaped lacerated wound on frontal region each limb 10 cm. X bone deep;
 - ii) V shaped lacerated wounds on right side (Lateral) to Injury No.1 on parietal region placed at distance of around 5 cm. Each. It is also bone deep;
 - iii) Lacerated wound on right parietal region 6 cm. X bone deep placed in saggital plane. Redish coloured;
 - iv) Curved lacerated wound on occipital region horizontally placed 8 cm. x bone deep;
 - v) Lacertated wound on occipital region 2 cm. X bone deep 5 cm.
- Below injury No. iv.

2. Lacerated wound on face, right side near right Zygomatic arch. 7 cm. Lateral to right eye obliquely downwards.

3. Patterned bruises 5 in number on back lateral to spine 6 cm. Lateral to the spineon

right side obliquely downwards.

4. Four bruises on right fore-arm, redish blue in colour 10 cm. X 2 cm swelling positive in the region of right radius.

5. Three patterned bruises on back left side 4 cm. Lateral to spine. Redish blue.

6. Abrasion on right leg 10 cm. Long obliquely downwards in upper 1/3rd and lower 2/3rd lateral aspects.

7. 10 cm. X 4 cm. Long brownish black, linear abrasion with clotted blood on left region.

Injury No.1 is noted to be dangerous to life

According to the doctor he was semi

conscious when brought to the hospital. The

injuries could be caused by sticks and iron pipe.

PW13 Dr. Kuleep Kanwer Sr. Medical Officer, Civil Hospital, Theog conducted the post mortem examination on the dead body of Laiq Ram. He found lacerated wound on the left frontal portion 2" x 1/2"x1/2" two inches above the left eye brow, abrasion on the right hand on the ring and the middle finger size approximately 2"x2" on the back side.

On internal examination the doctor found multiple fracture of the left frontal parietal region with extensive laceration of the underlying brain with its covering. In the opinion of the doctor Laiq Ram died of the brain injury.

PW13 Dr. Kuldip Kanwar stated to have medically examined PW 4 Gangawati who had received simple injury but the report was not formally proved while recording the statement of the doctor.

Durga Nand was medically examined on 24.10.1995 at 5.00 P.M. The doctor found multiple pellet injuries on both legs, thighs and abdomen. There were burn marks around the injury which were circular and oval in shape. According to the opinion of the doctor the injuries were caused by the use of a fire arm, fired from a distance of more than 20 meters.

Appellant Durga Nand was also examined by DW-4 Dr. P.L. Ghonta, Registrar, Department of Urology, IGM, Shimla. Pellets from scrotum were removed by the doctor who also stated that it was not dangerous to life.

So far the facts are concerned, there is no dispute about the date time and place of occurrence. It is also not in dispute that both sides received injuries at the hands of each other but according to them in different manner. The crucial question therefore which falls for consideration is as to which party initiated the assault on the other and in what manner and circumstances.

Learned amicus curiae appearing for the appellants has vehemently urged that the

prosecution has suppressed the injuries of Durga Nand and that by itself is sufficient to throw out the case of the prosecution since injuries of Durga Nand remain unexplained. Therefore, their version of having caused injuries to the complainant side in self defence is but to be accepted.

Reliance has been placed on Thakhaji Versus Thakore Kubersing Chamansing and others (2001) 6 S.C.C. 145. No doubt in view of the observations made in the above-noted case, prosecution is under duty to explain the injuries on the accused persons but it has further been observed in Paragraph 17 of the judgment that non-explanation of injuries of the accused persons does not necessarily lead to the conclusion that prosecution case is false and must be thrown out. It is further observed that "where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witness and consequently the whole of the prosecution case"

Another decision which has been referred to is reported in (2000) 4 S.C.C. 298 - Rajinder Singh and others versus State of Bihar. It is on the same proposition as laid in the case of Thakhaji (supra). It has been observed that non-explanation of injuries on the accused, ipso facto can not be held to be fatal to the prosecution case. It is also observed, ordinarily prosecution is not obliged to explain each and every injury on the accused even though injuries might have been caused during the course of occurrence and they are minor in nature but where the injuries are grievous, non-explanation of such injuries attract the Court to look at the prosecution case with little suspicion on the ground that prosecution has suppressed the true version of the incident.

Apart from what has been indicated above, in so far as the question of the suppression of the injuries of Durga Nand by the prosecution is concerned, it may be observed that factually it does not appear to be so. It is true that the FIR does not mention about the injuries of Durga Nand but the fact cannot be lost sight of that the FIR was lodged by PW 6 Shiv Lal who was not an eye witness to the incident. But PW 14 Kanta in her statement under Section 161 Cr. P.C. had come out with the fact that Laiq Ram had fired gun shot injuring Durga Nand because of the murderous assault on Neel Kanth by the accused persons. In the statement in court she appears to have stated that the fire was shot by Dharaminder but she was confronted with her previous statement which has been brought on record. In the statement, other witnesses have also stated about the firing on their behalf.

Thus it cannot be said that there was any suppression as such of the injuries of Durga Nand. It was disclosed at the first opportunity to the investigating agency in the statement under Section 161 Cr.P.C.

It is then submitted that Durga Nand had lodged his report against Laiq Ram but that case has not been investigated by the police otherwise the case of self defence as taken up by the appellant would have clearly been made out. In this connection, the Police Inspector had stated that he had started the investigation on that report which was not completed. It is submitted that Laiq Ram who was accused in the case had since died, there was no point in further investigating the case. Without further going into the question whether the investigation was rightly closed in view of the death of Laiq Ram or not, suffice it to say that in the facts and circumstances of this case it will make little difference as it shall be discussed shortly.

It is to be noted that to prove its case of private defence the appellants have examined defence witnesses in support of their version. The accused persons including the appellants have also submitted their written statement in defence u/s 233 Cr.P.C. They are all placed on record. Therefore, in the present case the merits may have to be examined on the basis of the evidence on record and as to whether facts and circumstances make out a case of self defence in favour of the appellants or not. It may also be noted though not very significantly that Durga Nand also does not seem to have pursued the matter on the basis of his FIR in the manner whatever may have been available under the law to do so.

In the above circumstances and facts of the case, the decision reported in (2002) 1 S.C.C. 71 Kashiram and others versus State of M.P. on the question of non investigating of the report of Durga Nand will not be helpful to the appellant. Our attention has been particularly drawn to Para 22 of the decision that in case injuries on the accused person had been noticed, the investigating officer could have made an effort to find out the cause of the injuries so that the defence version of the incident would have come in the knowledge of the I.O. In the case in hand we find that the investigation has taken note of the fact which came to light during investigation of this case particularly regarding the injuries caused to Durga Nand by gun shot fired by Laiq Ram which was also the case of Durga Nand in his FIR. The prosecution has proceeded to prosecute the case on these lines and the effort of PW14 to assign the firing to appellant Dharminder in the statement before the Court was thwarted by confronting her with her previous statement. The I.O. had actually investigated the case on the report of Durganand

to some extent. He had both versions before him. It was not so in Kashi Ram's case. The High Court considered the relevant provisions of law pertaining to the right of self defence available to the accused persons as contained under Chapter IV of the Indian Penal Code and Section 105 of the Evidence Act relating to onus of proof on the accused persons to establish the plea relating to exceptions e.g right of private defence. After considering the relevant law on the point it has been observed, and in our view rightly, that onus of proof to establish the right of private defence is not as onerous as that of the prosecution to prove its case. And where the facts and circumstances lead to pre-ponderance of probabilities in favour of the defence case, it would be enough to discharge the burden to prove the case of self defence.

We may now consider the merits of the present case, in the light of the evidence available on the record as well as the circumstances and pre-ponderance of probabilities as emanating from record and surrounding circumstances. The prosecution witnesses have categorically stated that PW 4 Gangawati was attacked first by Durganand and others and on her alarm her son arrived at the spot who was also severely assaulted by Durganand Dharaminder and other accused persons. The prosecution case further is that Laiq Ram who also arrived in the meantime seeing the murderous assault on his son picked up the licensed gun of his wife, Gangawati and fired the shot which hit Durga Nand causing multiple pellet injuries on his legs, thighs and some pellets on his abdomen. Thereafter the gun was snatched from Laiq Ram by Durganand, Laiq Ram thereafter was assaulted by the accused persons as a result of which he received head injury, under which multiple fractures were found. He succumbed to his injuries and died at the spot. We have already noticed the injuries received by Neel Kanth quite a few of them are multiple injuries which in all would not be less than 20 injuries spread all over his body including five on the head itself. A simple injury was also found on the person of Gangawati.

It is not understandable, if Laiq Ram had gone determined armed with a loaded gun for an aggression to deal with Durganand, he would fire a shot from a distance of about 20 meters, causing injury only on the lower part of the body rather most of which are on legs and thighs. This circumstance strengthens the case of the prosecution that Laiq Ram had used the licensed gun of his wife Gangawati to rescue his son Neel Kanth, who was being mercilessly beaten. It also militates against the story set up by the defence to claim right of private defence alleging aggression on the part of Laiq Ram. The medical evidence also supports the prosecution case, looking the large number of

injuries which have been found on the person of Neel Kanth including on the vital parts of the body. According to Durganand he was alone on his side. He dis-armed Laiq Ram of his gun and Gangawati of her Danda and assaulted Laiq Ram and Neel Kanth. Later Bimla daughter of Durga Nand and his wife Smt Hukmu Devi also arrived and they were also assaulted. They are said to have one simple injury each. What seems to be highly improbable is that Durganand after receiving the gun shot would be able to cause such large number of injuries to Neel Kanth and also the head injury with such force to Laiq Ram which caused multiple fractures of his head resulting in instantaneous death at the spot. It may also be noted that Neel Kanth would obviously be younger in age to Durganand. According to the doctor Durganand was brought to the hospital, who was then crying with agonizing pain. Later pellets were also recovered from his scrotum. In such a condition it is not possible that Durganand would be able to snatch Dandas and gun from the complainant party and would also assault in the manner indicated above. It is not a question of number of injuries caused to each side, at times an aggressor may receive more injuries than the defenders but the case in hand is not a case of that kind. Sequence of events as given out in the prosecution case also gets support from the medical evidence as well as broad probabilities leading to the conclusion that Smt. Gangawati and Neel Kanth had been assaulted first by Durganand and Dharminder, and Laiq Ram arrived later to rescue his son and by that time his son had already received a large number of injuries. The accused persons may have been successful in dis arming Laiq Ram and to hit on his head with such a great force that it proved to be a decisive blow causing injury sufficient to cause death in the ordinary course. Neel Kanth must have received injuries before and not after Durganand was fired at and received fire arm injuries. We don't attach much significance to the one simple injury received by Gangawati and Bimla each so as to make it necessary to deal with them in detail. It only indicates their presence at the spot at one or the other stage. It supports prosecution case that Gangawati was assaulted first at the initial stage. It is true that DW 1 Baldev Singh supports the version given by Durga Nand but DW 2 Jagat did not support the defence case, as when he arrived, he found Durganand being removed from the spot, he had not seen any assault on any one. It is difficult to place reliance on the statement of DW 1 Baldev Singh. The prosecution case is also supported by the circumstance that at the time Laiq Ram was not present at the scene then it would be better possible for Durganand and Dharminder to cause such large number of injuries to Neel Kanth numbering 20, all over the body. It could not be possible after Laiq Ram had arrived and fired the shot and Durganand had received the injuries.

Yet another feature of the defence case that Laiq Ram wanted his property back and came determined for the purpose is not borne out from any circumstances. There is no dispute that Laiq Ram had left the village and the property and according to prosecution in sheer disgust. He remained away from home for about 20-22 years. He did not return to the village at his own or for the love of his property but on persuasion of his son Neel Kanth i.e. for the affection of his son. It is nowhere indicated that during 20 - 22 years or during the period of one year after he came back to the village, he may have moved any authority or court agitating against the entries in the records made in the name of Durganand, or may have asked them to return the property. Nor that he may have made any effort earlier to get back the property. In this background it does not appeal to reason that one fine morning he would suddenly go armed with a gun to take possession of the property. On the other hand there is evidence on the record to indicate that none else but Padma Ram had told Neel Kanth that they may not go out of the house on that day as accused persons were not happy on the return of Laiq Ram and some trouble was in the offing on the fateful day. The above discussion clearly shows that the incident occurred in the manner indicated by the prosecution and pre-ponderance of probabilities also do not support the defence case.

For the reasons indicated above we find that the Court of Sessions as well as the High Court committed no error in recording the conviction of Dharminder and Durga Nand.

So far appeal against acquittal is concerned, PW14 Kanta had stated that Padma Ram was in the house. A finding has been recorded that Pramod and Padma Ram do not seem to have participated in the assault and they seem to have arrived at the scene of occurrence later on. So far as Smt. Hukmu is concerned, it was found that though she was present and participated yet her involvement has not been satisfactorily established. We do not find it a case fit for interference with the acquittal of the respondents which has been recorded and affirmed by the High Court.

In the result all the appeals - viz filed by Durga Nand and Dharminder against their conviction and the one filed by the State of Himachal Pradesh against the acquittal of Hukmu Devi, Pramod and Padma Ram are devoid of merit and they are dismissed.