

(2013) 03 BOM CK 0129
In the Bombay High Court
Case No : Criminal Appeal No. 367 of 2007

Beersingh Jagatsingh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 100, 300, 302, 304, 96

Citation : (2013) 3 ABR 444 : (2013) ALLMR(Cri) 2298 : (2013) 3 BomCR(Cri) 153 : (2013) CriLJ 2248

Hon'ble Judges : V.K. Tahilramani, J;P.D. Kode, J

Bench : Division Bench

Advocate : Yug Mohit Chaudhary, for the Appellant; P.S. Hingorani, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.K. Tahilramani, J.—This appeal is directed by the appellant-original accused against the judgment and order dated 24.11.2006 passed by the learned 8th Ad-hoc Additional Sessions Judge, Seweree, Bombay in Sessions Case No. 548 of 2006. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s 302 of IPC and sentenced him to RI for life. The prosecution case briefly stated, is as under:

PW-3 Pravin, appellant and Ashish (deceased) were residing on the foot-path at Tardeo, Mumbai since about 15 years. They used to do the work of collecting waste and scrap. They were addicted to consuming brown sugar. On 7.4.2006, PW-3 Pravin was smoking brown sugar in the bushes near the race-course at Haji Ali, Mumbai. At that time, quarrel took place between the deceased and the appellant on account of "vada-pav". The quarrel took place from 11.00 a.m. till evening of that day. During the quarrel, deceased Ashish took out a bamboo stick and he assaulted the appellant with bamboo stick. The appellant then snatched

bamboo stick from the hand of the deceased and started assaulting the deceased with it. The deceased fell down. This was witnessed by PW-3 Pravin.

Police received information that a dead body was lying near the race-course, hence, police came to the spot. Then PW-1 Police Naik Bhoir lodged F.I.R. on behalf of the State. Thereafter investigation commenced. The dead body of Ashish was sent for post-mortem. PW-5 Dr. Meshram conducted the post-mortem.

2. Dr. Meshram found abrasions and laceration on the head, two injuries on the shin and one injury each on the left ear, arm, shin and knee.

On internal examination, Dr. Meshram found following injuries:

1) Multiple haematoma in an area 8 cm x 5 cm in its maximum dimension over the left temporo parietal region.

2) Irregular depressed comminuted with shattering, 15 cm x 9 cm in its maximum dimension, horizontally placed of the left squamous temporal and parietal bones, with its lower limit 3 cm above the tip of the left mastoid process.

The appellant was arrested on 14.4.2006. On 15.4.2006, he was referred for medical examination. Injuries were found on the body of the appellant. During the course of investigation, blood stained clothes came to be recovered at the instance of the appellant in the presence of panch PW-4 Prashant vide Memorandum and panchnama Exh. 15 and Exh. 15A. After completion of investigation, the charge sheet came to be filed against the appellant. In due course, the case was committed to the Court of Sessions for trial.

3. Charge came to be framed against the appellant u/s 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. His further defence is that the incident took place while exercising the right of private defence. After going through the evidence adduced by the prosecution, the learned Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

4. We have heard the learned counsel for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, we are of the opinion that the appellant assaulted Ashish (deceased) with Bamboo stick which resulted in death of Ashish, however, for the reasons stated below by us, the judgment and order of conviction and sentence passed by the learned Judge requires to be partly modified.

5. The prosecution case is mainly based on the evidence of PW-3 Pravin who is an eye witness to the incident. PW-3 Pravin has stated that he knew the appellant as well as the deceased. All three of them were doing the work of collecting waste and scrap. All of them were addicted to brown sugar. On the first Friday of April, 2006 (7.4.2006) he saw that quarrel was going on near the Race-

course between the appellant and Ashish (deceased). During the course of quarrel, Ashish took out a Bamboo stick and he assaulted the appellant with it. The appellant then snatched the Bamboo stick from the hand of Ashish and started assaulting Ashish with it. Ashish fell down. PW-3 Pravin ran away from the spot on account of fear. Nothing has been elicited in the cross-examination of this eye witness so as to disbelieve his testimony. His testimony shows that the appellant assaulted Ashish with Bamboo stick.

6. In addition to the evidence of eye witness PW-3 Pravin, the prosecution is relying on the circumstance of recovery of blood stained clothes at the instance of the appellant. Panch witness PW-4 Prashant deposed on this aspect. Memorandum and Panchnama in relation to recovery of clothes is at Exh. 15 and 15A.

7. The learned advocate for the appellant submitted that the act of the appellant would not fall u/s 302 of IPC but it would fall u/s 304-II of IPC or at the most Section 304-I of IPC. He submitted that the incident occurred during a sudden quarrel and the evidence on record shows that in fact, first deceased assaulted the appellant with Bamboo stick then the appellant snatched the said Bamboo stick from the hand of the deceased and gave him blows with the Bamboo stick. The learned advocate for the appellant submitted that this shows that the appellant was exercising his right of private defence and thus, the case would be covered by Exception 2 to Section 300 of IPC.

8. No doubt, the evidence on record shows that the appellant assaulted the deceased, however, the main question which arises in the facts and circumstances of this case, is what is the nature of the offence proved against the appellant ? It is an admitted fact that the incident had occurred during a sudden quarrel. It is also seen from the evidence on record that first the deceased assaulted the appellant with Bamboo stick, thereafter, the appellant snatched the same Bamboo stick from the hand of the deceased and assaulted him. The fact that the appellant was first assaulted by the deceased, is stated by PW-3 Pravin who is an eye witness to the incident. The fact that the appellant was assaulted is also borne out from the arrest panchnama (Exh. 12) which shows that the appellant had many injuries on his person. The appellant was arrested on 14.4.2006 i.e. a week after the incident. When he was arrested, injury was found on the right and left side of his chest and on his right hand, on his left arm and on his left and right leg. The fact that the appellant had injuries on his person is also corroborated by the evidence of PW-5 Dr. Meshram who examined the appellant. Dr. Meshram has stated that the injuries found on the appellant were 5 to 7 days old. He has further stated that the injuries were possible by Bamboo stick (Article 4). It is pertinent to note that the incident took place on 7.4.2006 and the appellant was arrested on 14.4.2006 i.e. a week after the incident. PW-5 Dr. Meshram has stated that injuries on the body of the appellant were 5 to 7 days old. This shows that the defence taken by the appellant that he was assaulted by the deceased and thereafter in exercise of the

right of private defence, he assaulted the deceased, is borne out by the evidence of PW-3 Pravin as well as the medical evidence. In the present case, there was no premeditation on the part of the appellant. He has taken the same Bamboo with which he was assaulted by the deceased, from the hand of deceased and thereafter he had assaulted the deceased with it.

9. Exception 2 to Section 300 reads as under:

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 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.

10. "Right of private defence" is not defined. Nothing is an offence in terms of Section 96 of the Penal Code, if it is done in exercise of the right of private defence. Section 97 deals with the subject-matter of private defence. The plea of right of private defence comprises the body or property. It, however, extends not only to the person exercising the right; but to any other person. The right may be exercised in the case of any offence against the body and in the case of offences of theft, robbery, mischief or criminal trespass and attempts at such offences in relation to property. Sections 96 and 97 confer a right of private defence against certain offences and acts. Section 100 provides that the right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the six descriptions enumerated therein. The first two descriptions are that (1)-such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; (2)-such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault." To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.

11. In *Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal*, the Supreme Court observed that a right of private defence need not specifically be taken and in the event the court on the basis of the materials placed on record is in position to come to such a conclusion, the court may act thereupon.

12. In *Surendra and Another Vs. State of Maharashtra*, , the Supreme Court held: (SCC pp. 439 and 441, paras 26-27 and 32):

26. We are not unmindful of the fact that in all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific plea of right of private defence has been raised. It may be true that in the event prosecution discharges its primary burden of proof, the onus would shift on the accused but the same would not

mean that the burden can be discharged only by examining defence witnesses.

27. The learned courts below committed a manifest error of law in opining that the appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. The Courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case.

32. In regard to the duty of the prosecution to explain the injuries on the part of the accused, this Court observed: (Bishna case 3 SCC pp. 683-84, paras 78-80).

"78. Section 105 of the Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence left by the prosecution itself.

79. 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 save himself from those 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.

80. 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 u/s 304 IPC".

13. In Satya Narain Yadav Vs. Gajanand and Another, , the Supreme Court observed as under:

In moments of excitement and disturbed mental 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, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper-technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that

in the guise of self-preservation, the Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

14. In Subhash Mallikarjun Menase Vs. The State of Maharashtra, , this Court has held that:

If the benefit of plea of right of private defence is available on the basis of the prosecution evidence, the said benefit cannot be merely denied because, the statement of the accused is not in tune and harmony from what has emerged in favour of the accused from the evidence of prosecution. This is because the burden on accused, is only to prove his plea of right of private defence by preponderance of probabilities and once that burden is discharged, in view of the admissions emerging from the prosecution evidence, it hardly matters if a similar admission is not made by the accused in his statement u/s 313, Criminal Procedure Code. The right of private defence of person cannot be weighed in golden scales and the person who is victim of aggression cannot be expected to weigh each blow which he gives. Where the appellant himself had received four incised wounds, out of which two were on vital parts of body, he was entitled to inflict the injuries.

15. The accused need not affirmatively establish that he had a right of private defence and he exercised the same in that manner. The General Exception which deals with the right of private defence, lays emphasis on the reasonable apprehension in the mind of the accused while exercising the right of private defence. Where an injury is found on the person of accused and if the accused comes forward with a specific plea, the same has to be considered in the facts and the surrounding circumstances obtaining in the case. Every kind of explanation put forward particularly at the belated stage by the prosecution will not be sufficient and cannot be held to be an appropriate explanation to reject the version put forward by the accused particularly when it does not appear to be false but, on the other hand, appears to be plausible.

16. Looking to the evidence on record i.e. especially evidence of PW-3 Pravin and the fact that the appellant had received many injuries on his person, it shows that the appellant exercised the right of private defence of person in good faith. No doubt, he has exceeded the right of private defence and caused death of Ashish. But the said act was done by him without premeditation and without any intention of doing more harm than is necessary. Looking to the fact that the appellant had sustained four injuries on various parts of his body including on vital parts, we are of the opinion that the case would be covered by Exception 2 to Section 300 of IPC. Looking to the nature of weapon used, circumstances in which the incident took place, the injuries on the body of the appellant as well as the deceased, the fact that there was no premeditation and mainly the fact that the appellant was first assaulted with a bamboo stick many times by the deceased, the case would not fall u/s 302 of IPC.

17. Where the deceased attacked the appellant and in fact injuries were inflicted on the right and left side of the chest of the appellant which is a vital part of the body, it cannot be said that the accused had no reasonable apprehension that grievous hurt, at least, would be caused to him. In such a case, naturally, a reasonable apprehension would have been there in the mind of the appellant. It is in this background that the plea set up by the appellant has to be considered and it has to be seen whether the appellant was justified in exercise of right of private defence. The plea set up by the appellant cannot simply be brushed aside. The circumstances in the instant case reveal that the appellant had exercised the right of self-defence. However, having regard to the injuries inflicted by him on the deceased, he certainly exceeded the same. Therefore, Exception (2) to Section 300 IPC, is attracted and not the General Exception. Looking to the nature of injuries and the part of the body where it was inflicted, the appellant is liable to be convicted u/s 304 Part I and not u/s 302 of IPC. Hence, we pass the following order.

ORDER

1) The conviction and sentence of the appellant u/s 302 of IPC is set aside. Instead the appellant is convicted u/s 304 Part-I of IPC and is sentenced to rigorous imprisonment for seven years and fine of Rs. 1000/- in default S.I. for one month.

2) Appeal partly allowed in the above terms.