
(2003) 12 AHC CK 0007
In the Allahabad High Court
Case No : Criminal Appeal No. 1575 of 1980

Dan Behari

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 15-12-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 301, 302, 304, 307

Citation : (2004) 2 ACR 1577

Hon'ble Judges : U.S. Tripathi, J;M. Chaudhary, J

Bench : Division Bench

Advocate : Arvind Srivastava, H.N. Singh and Tej Pal, for the Appellant; Rajul Bhargava, Km. Adhya Gupta, Sudhir Agrawal, R.P. Dubey and M.S. Vahid and Shekhar Yadav, A.G.As., for the Respondent

Judgement

U.S. Tripathi, J.—This appeal has been preferred against the judgment and order dated 16.7.1980 passed by Additional Sessions Judge, Mathura, in Sessions Trial No. 164 of 1979 convicting the Appellant Dan Behari u/s 302 read with Section 301, I.P.C. and sentencing him to undergo imprisonment for life.

2. The prosecution story, briefly stated, was that Appellant Dan Behari was Bhanja (sister's son) of Kaushal Kishor (P.W. 4). Father of Kaushal Kishor got appointed Appellant Dan Behari for "Pooja" in Rao Raja Girdhari Sharanji temple. After death of Girdhari Sharan, his widow Rajbir Kaur became owner of said temple. Kaushal Kishor was residing as a tenant in a house belonging to Rajbir Kaur. The Appellant with the help of Rajbir Kaur wanted to evict Kaushal Kishor from the said house. Litigation regarding it was pending in Civil Court, Mathura. On 18.2.1979 Chandrabhan S/o Kaushal Kishor was going to Mathura. In the way Dan Behari Appellant and his brother Yogendra chased him. A report regarding said occurrence was lodged. Yogendra and Dan Behari Appellant had also assaulted Chandra Prakash another son of Kaushal Kishor. Report of the said occurrence was also lodged.

3. On the morning of 19.2.1979 at about 8.30 a.m. Dan Behari Appellant and his

brother Yogendra were eating Kachauri at the shop of Tonu (P.W. 3) in Mohalla Patharpura, P.S. Vrindavan. Kaushal Kishor (P.W. 4) along with Chandra Bhan was passing through the road. Observing Dan Behari and Yogendra, Kaushal Kishor asked them as to why they had assaulted his son. On it, Dan Behari and Yogendra started abusing him. Kaushal Kishor threw a brick bat towards them, so that they might stop abusing. On it, Dan Behari Appellant whipped out a country made pistol and fired towards him. Kaushal Kishor sat down and shot hit Buddha deceased a boy aged about 6 years, son of Than Singh (P.W. 1), who was standing behind him. Sudhan (P.W. 2) was also present at the shop of Tonu. He picked up Buddha deceased and took him to his house. Than Singh (P.W. 1), father of Buddha deceased, took him to C.F.C. Hospital Vrindaban, where he was medically examined by Dr. G. K. Kautil (P.W. 5), who found fire arm injury on his chest. His injury was operated at about 5 p.m., but he died at 10.35 p.m.

4. After admitting Buddha deceased in the hospital, Than Singh (P.W. 1) got prepared report (Ext. Ka-1) from Chandu and lodged the same at P.S. Vrindaban at 10.30 a.m. On the basis of written report, chik F.I.R. (Ext. Ka-6) was prepared by Head Moharrir Vishambhar Singh (P.W. 7), who made an endorsement of the same at G.D. report (Ext. Ka-7) and registered a case u/s 307, I.P.C. against the Appellant.

5. Investigation of the case was taken by Shivram Singh Sengar (P.W. 8), who interrogated Than Singh (P.W. 1) at C.F.C. Hospital. Thereafter, he visited the place of occurrence and interrogated Tonu (P.W. 3), inspected place of occurrence and prepared site plan. He took into possession two brick bats from the shop of Tonu and interrogated Kaushal Kishor (P.W. 4). The Appellant was absconding.

6. Inquest of the dead body of deceased was conducted on 20.2.1979 by Sub-Inspector Babu Ram Dixit, who prepared inquest report and sent the dead body for post-mortem.

7. Autopsy on the dead body of Buddha deceased was conducted on 20.2.1979 at 4.15 by Dr. C. B. Srivastava (P.W. 6) who found following ante mortem injuries:

(1) Firm arm injuries 1-3/4 cm. ? 1 cm. ? muscle deep on front of left arm joint below shoulder joint with blackening and charring surrounding the wound.

(2) Fire arm injury 1 cm. lateral to injury No. 1.

Both the above injuries were connected through and through the muscle.

Injury No. 1 was wound of entry and injury No. 2 was wound of exit.

(3) Fire arm injury of entry 1 cm. ? 1 cm. ? chest cavity deep about middle third of right side clavicle. The wound was surrounded by blackening and charring.

(4) Fire arm injury of exit 3/4 cm. ? 1/2 cm. ? chest cavity deep on right side back of chest just below shoulder blade.

Injuries 3 and 4 were connected with each other when the chest was exposed.

(5) (Surgical) stitched wound 18 cm. obliquely on right lateral side of chest 3 cm. above injury No. 4.

(6) Cut open (incised) wound 1 cm. × 1/2 cm. × muscle deep just above medial side of right ankle joint.

(7) Lacerated wound 1 cm. × 1/4 cm. × muscle deep on mucus surface of upper lip at left angle of mouth.

On opening right side collar bone was fractured under injury No. 3. Pleura was lacerated under injury No. 4 covered with surgical stitches.

Internal examination showed that right side clavicle was fractured under injury No. 3. Pleura was lacerated under injury No. 4 covered with surgical stitches. Pleural cavity contained 5 ounce blood. Surgical stitching were present at helium of right lung. Cause of death was due to syncope as a result of shock and haemorrhage due to injuries sustained.

8. The case was altered u/s 302, I.P.C. The Appellant subsequently surrendered in the Court. The I.O. on completion of investigation submitted charge-sheet against the Appellant u/s 302, I.P.C.

9. Cognizance of the case was taken by the Magistrate, who committed the case to the Court of Session.

10. The Appellant was charged with the offence punishable under Sections 301/302, I.P.C. and 324, I.P.C. He pleaded not guilty and contended that on the date of occurrence he along with his brother Yogendra was eating Kachauri in the shop of Tonu. At about 9 a.m. Kaushal Kishor (P.W. 4) and his sons Chandra Bhan alias Sukkhi and Nanhe came there abusing him. They threw brick bats on him and his brother. His brother Yogendra sustained injuries. He was taking his brother to police station. Kaushal Kishor fired on him, which hit Buddha. Yogendra lodged report of the occurrence at the police station and got him medically examined.

11. The prosecution in support of its case examined Than Singh (P.W. 1), Sudhan (P.W. 2), Tonu (P.W. 3) and Kaushal Kishor (P.W. 4) as eye-witnesses, besides Dr. G. K. Kautil (P.W. 5), Dr. C. B. Srivastava (P.W. 6), Head Constable Vishambhar Singh (P.W. 7) and S.I. Shivram Singh Sengar, I.O. (P.W. 8). Affidavit of Constable Indu Shekhar was also filed. The Appellant examined Ramesh Chandra Sharma (D.W. 1), Radha Ballabh Sharma (D.W. 2), Constable Mahendra Singh (D.W. 3), Madan (D.W. 4), Dr. C. P. Srivastava (D.W. 5), Hari Gopal Malhotra (D.W. 6), Keshaw Acharya (D.W. 7) and Har Prasad Shastri (D.W. 8).

12. The learned sessions Judge on considering evidence of the prosecution and that of Appellant held that Appellant Dan Behari fired shot on Kaushal Kishor, which hit the deceased. The injuries caused to Buddha were fatal, therefore, the Appellant was liable for the offence punishable u/s 302, I.P.C. He further held that there was no evidence that Nandu also received gun shot injuries, therefore,

the Appellant was entitled to acquittal u/s 324, I.P.C. With these findings, the learned Sessions Judge acquitted the Appellant u/s 324, I.P.C., but convicted him u/s 301/302, I.P.C. and sentenced to life imprisonment.

13. Aggrieved with his above conviction and sentence, the Appellant has come up in this appeal.

14. The appeal was once decided by a Division Bench of this Court on 3.2.2003 in the absence of Appellant. The Appellant thereafter went in appeal before the Apex Court. The Apex Court set aside the judgment and order of this Court, vide order dated 8.9.2003, restored the appeal to the file of this Court and remanded the same for fresh decision after hearing counsel of the Appellant within a period of 4 months.

15. We have heard Sri H. N. Singh, learned Counsel for the Appellant, learned A.G.A. for the Respondent and have perused the evidence on record.

16. In this case, the injuries, the death and cause of death of Buddha deceased are not disputed. The prosecution alleged that Appellant Dan Behari fired pistol shot on Kaushal Kishor (P.W. 4), which hit Buddha deceased. While the contention of Appellant was that Kaushal Kishor fired on him and his brother, but shot hit Buddha deceased. The medical evidence of Dr. G. K. Kautil (P.W. 5) shows that the deceased had sustained one penetrating wound, right upper part of chest just below mid clavicular joint 1/4" x 1/4" depth could not be ascertained and three contusions on left arm 1/4" x 1/4" with fracture of right clavicle.

17. The child was operated at about 5 p.m. on 9.2.1979 and right upper lobectomy was done under 6A as upper lobe was haemorrhagic due to injury. The bullet could not be traced. In the post operation period, the patient's respiration stopped all of a sudden at 11.35 p.m. on 19.2.1979.

18. The evidence of Dr. C. P. Srivastava (P.W. 6) referred to above shows that the fire arm injury of the deceased resulted in fracture of right side clavicle and laceration of pleura, which resulted into his death. As such, it is established that Buddha deceased sustained fire arm injuries, which resulted into his death.

19. The date, time and place of occurrence are also not disputed. It is admitted case of the parties that occurrence took place at about 8.30-9.00 a.m. on 19.2.1979 in the shop to Tonu in Mohalla Patharpura, P.S. Vrindaban.

20. The case of the prosecution was that Dan Behari fired shot from country-made pistil on Kaushal Kishor (P.W. 4), which hit Buddha deceased, who was standing behind him, while the case of Appellant was that it was Kaushal Kishor (P.W. 4), who fired shot on his brother Yogendra Kumar, which hit the deceased. In order to prove its case the prosecution examined Sudhan (P.W. 2), Tonu (P.W. 3) and Kaushal Kishor (P.W. 4). All these witnesses have stated that the shot was fired by Dan Behari Appellant. Sudhan (P.W. 2) stated that he was present at the shop of Tonu where Dan Behari and his brother Yogendra were also present.

Kaushal Kishor (P.W. 4) came there and observing them enquired from them as to why they had assaulted his sons. Kaushal Kishor also threw brick bats on them which hit Yogendra. On it, Dan Behari fired on Kaushal Kishor, which hit the deceased. In his cross-examination the witness admitted that he was maternal uncle of Buddha deceased. No enmity, ill-will or grudge has been shown with the witness. There is nothing on record to show that Sudhan (P.W. 2) had any reason to depose falsely.

21. Tonu (P.W. 3) is admittedly owner of the shop in which the occurrence took place. He also stated that Dan Behari Appellant fired on Kaushal Kishor, which hit Buddha deceased, who was standing behind him. No enmity, ill-will or grudge has been shown with the witness. The Appellant has also admitted presence of Tonu (P.W. 3) on the spot. There is nothing on record to show that the witness had any reason to depose falsely.

22. Kaushal Kishor (P.W. 4) is maternal uncle of Buddha deceased. No doubt, there was enmity between the Appellant and Kaushal Kishor and litigation was going on in the civil court, but the version given by the witness that Appellant Dan Bihari fired on him, which hit Buddha deceased is supported by other independent witnesses Sudhan (P.W. 2) and Tonu (P.W. 3). Therefore, his evidence is worthy of credence.

23. To prove his contention, the Appellant examined Madan (D.W. 4), his maternal uncle and brother of Kaushal Kishor (P.W. 4), but he has not supported defence version and was declared hostile. The contention of the Appellant was that Kaushal Kishor fired on him, but evidence on record shows that Buddha deceased was standing behind Kaushal Kishor and in case he had fired on Appellant, there was no question of shot hitting Buddha deceased, who was behind him.

24. From the evidence on record, it is, therefore, established that the Appellant fired shot on Kaushal Kishor (P.W. 4), but the same hit Buddha deceased.

25. The learned Counsel for the Appellant contended that the transferred liability of the Appellant falls u/s 304, Part 2, I.P.C. and not u/s 302, I.P.C. as on the own showing of the prosecution the Appellant fired shot when Kaushal Kishor threw brick bats on his brother Yogendra Kumar and he sustained injuries on his mouth. Thus, Kaushal Kishor provoked the Appellant and he fired under sudden provocation. Having considered the manner and cause of fire by deceased, we find that the Appellant fired in exercise of right of private defence and not under sudden provocation.

26. Sudhan (P.W. 2) stated that the Appellant and his brother Yogendra Kumar were sitting on the shop of Tonu (P.W. 3), Kaushal Kishor and his son Sahu came in front of the said shop and observing the Appellant and his brother enquired from them as to why they assaulted his sons. On it, Appellant abused. Kaushal Kishor threw a brick bat, which hit on the mouth of Yogendra and then Dan Behari fired on him, which hit the deceased. Tonu (P.W. 3) also admitted in his

cross-examination that during course of altercation Kaushal Kishor threw brick bats on Yogendra and then, the Appellant fired on him. Kaushal Kishor (P.W. 4) also stated that when the Appellant started abusing, he threw a brick bat towards him and then the Appellant fired. The evidence of Dr. C. P. Srivastava (D.W. 4) shows that he examined Yogendra Kumar Sharma on 19.2.1979 at 11.30 a.m. and found following injuries on his person:

(1) Abrasion 1/2 cm. ? 1/4 cm. on right side of nostril with blood clots in both nostril.

(2) Lacerated wound 1-1/4 cm. ? 1 cm. ? muscle deep on right side of upper lip.

The crown of right side upper incisor tooth (Ist) was fractured out. The lower right sided first incisor was loosely attached to the socket with fresh bleeding.

(3) Lacerated wound 1/2 cm. ? 1/4 cm. ? muscle deep on mucous surface of lower lip.

Injuries were caused by blunt object and friction and were fresh.

27. Thus, it is clear that the Appellant would have not fired on Kaushal Kishor (P.W. 4), if the latter had not thrown brick bats on his brother Yogendra Kumar. It is also clear that when Kaushal Kishor (P.W. 4) caused injuries on the mouth of Yogendra Kumar, brother of Appellant, the Appellant got right to act in self defence of the person of his brother.

28. The learned Sessions Judge has discarded the plea of self-defence firstly: on the ground that the Appellant has no right of private defence against Buddha, secondly ; that Kaushal Kishor threw only one piece of brick bat, which caused trivial and superficial injuries on Yogrendra and did not give right to the accused to take the life of any one, so also he had no right of private defence and thirdly ; he had not pleaded right of private defence. It is settled law that accused is not required to specifically plead right of self-defence and prove it beyond reasonable doubt. If the evidence on record and facts and circumstances of the case disclose that the accused had right to act in private defence of person or property, the accused must be given its benefit. It is also settled that the accused need not prove the right of private defence beyond all reasonable doubts and he has to show only preponderance of probability that he got right of private defence. It is true that the Appellant had got no right of private defence against Buddha, but the Appellant was held liable for transferred liability of causing fire arm injury on Kaushal Kishor and, therefore, his right of private defence shall be considered vis-a-vis Kaushal Kishor and not Buddha. It is true that the injuries of Yogendra Kumar caused by Kaushal Kishor were not so serious, but in the facts and circumstances of the case, the Appellant got the right of private defence but exceeded the same. Therefore, the evidence on record established that the Appellant acted in right of private defence of person of his brother Yogendra Kumar, but he exceeded the power given to him by law and caused death of the deceased. As such, the act of Appellant is covered by Exception 2ndly of Section

300, I.P.C. and, therefore, he is liable for the offence of culpable homicide not amounting to murder punishable u/s 304, Part 2, I.P.C.

29. In view of our above discussions and observations, we find that the Appellant is liable to be convicted u/s 304, Part 2, I.P.C. read with Section 301, I.P.C. and not u/s 302, I.P.C. read with Section 301, I.P.C. The appeal thus partly succeeds.

30. The appeal is partly allowed. The conviction of Appellant u/s 302 read with Section 301, I.P.C. is set aside and instead of it, he is convicted u/s 304, Part 2, I.P.C. read with Section 301, I.P.C. and is sentenced to undergo R.I. for a period of 5 years and fine of Rs. 2,000. In default of payment of fine he shall further undergo R.I. for a period of three months.

31. The Appellant is on bail. He shall surrender before the C.J.M., Mathura to serve out the sentence as modified by this Court. The C.J.M., Mathura is directed to procure the arrest of Appellant by adopting all processes available under law and send him to jail to serve out the sentence.