

(2004) 09 RAJ CK 0037
In the Rajasthan High Court
Case No : Criminal Appeal No. 393 of 1999

Ghanshyam @ Ghanti and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 30-09-2004

Acts Referred:

Arms Act, 1959 — Section 25, 27, 3

Penal Code, 1860 (IPC) — Section 301, 302, 304, 307, 323

Citation : (2005) 1 RLW 73 : (2005) 1 WLC 316

Hon'ble Judges : Shiv Kumar Sharma, J; Khem Chand Sharma, J

Bench : Division Bench

Advocate : A.K. Gupra, Rinesh Gupta and Alka Bhatnagar, for the Appellant;
M.L. Goyal, Public Prosecutor, for the Respondent

Judgement

S.K. Sharma, J.—The appellants four in number, were the accused on the file of learned Additional Sessions Judge No. 3, Alwar bearing Sessions Case No. 28/1997. Learned Judge vide judgment dated May 25, 1999 convicted and sentenced the appellants (herein after described as accused") as under:-

Ghanshyam @ Ghanti & Babu Lal @ Banti:

Under Section 302 IPC:

Each to suffer Imprisonment for life and fine of Rs. 1000/-, in default to further suffer One Year Simple Imprisonment.

Under Section 307 IPC:

Each to suffer Rigorous Imprisonment for Seven Years and fine of Rs. 500/-, in default to further suffer six Months Simple Imprisonment.

Under Section 3/27 of Arms Act:

Each to suffer Rigorous Imprisonment for Three Years and fine of Rs. 200/- in default to further suffer Three Months Simple Imprisonment.

Ghanshyam @ Ghanti:

Under Section 3/25 of the Arms Act:

To suffer Rigorous Imprisonment for Three Years and fine of Rs. 200/- in default to further suffer Three Months Simple Imprisonment.

Smt. Guddo @ Nirmala and Smt. Seema:

Under Section 323 IPC:

Extended the benefit of probation.

The substantive sentences were directed to run concurrently.

2. It is the prosecution case that informant Raghunandan (PW. 2) submitted a written report (Ex.P. 2) with the Police Station Malakhera on June 30, 1997 at 4.00 PM, with the averments that while he was on duty his brother Shiv Charan informed him on telephone that Ghanshyam, Babulal, Guddo, Seema, father-in-law of Ghanshyam and Billu were hurling abuses and beating them. When Raghunandan reached the house Ghanshyam opened fire at him, that kissed his shoulder but hit one Kalya, who was standing nearby Kalya died on the spot. Finding the target missed. Babulal snatched the gun from the hands of Ghanshyam and opened another fire at Raghunandan, that too missed and hit another bystander Kalli @ Ramkishan, who also died. Therefore Guddo and Seema gave lathi blows on his head and hand. Other accused pelted stones on him. Hearing hue and cry Khiladi, Shiv Charan and many other gathered there. Police Station Malakhera registered a case Under Sections 147, 148, 149, 323, 307, 307, 302 IPC and 3/15 of the Arms Act and investigation commenced. On completion of investigation charge sheet was filed and in due course the case came up for trial before the learned Additional Sessions Judge No. 3. Alwar Charges u/s 147, 148, 302, 307, 302/149, 307/149, 323/149, 323/149 IPC 3/5 Arms Act were framed against the accused who denied the charges and claimed trial. The prosecution in support of its case examined as may as 23 witness. In the explanation u/s 313 Cr.P.C. the appellants claimed innocence. The accused examined Anuradaha Jain (DW.1) as defence witness. Learned trial Judge on hearing the final submissions convicted and sentenced the accused as indicated herein above.

3. We have heard the submissions and carefully gone through the evidence adduced at the trial.

4. Both the deceased Kalu @ Ajay Patel and Ram Kishan as per the post mortem reports Ex.P-26 and Ex.P-27 sustained fire arm injuries and according to Dr. Raj Kumar Saxena (PW. 17) who performed the autopsy on the dead bodies, the injuries were ante mortem in nature and sufficient in the course of nature to cause death. The prosecution thus established that the death of Kalu @ Ajay Patel and Kalli @ Ram Kishan was homicidal.

5. Coming to the evidence, we find that Neeta Sharma (PW.1), Raghunandan

Patel (PW.2), Asha (PW.3), Heera Lal (PW.4), Jaggi (PW.5), Daya Ram (PW.7) and Daulat Ram (PW.8) were the star witnesses of the prosecution. Neeta Sharma (PW.1) in her deposition stated that because of altercations between her daughter and the daughters of Babulal, Seema started hurling abuses, Ghanshyam and Babulal also came over there. Ghanshyam then went inside and came armed with gun and opened fire at Raghunandan, but the bullet hit Kalu @ Ajay Patel, who died at the spot. Thereafter Babulal snatched the gun and opened fire at Raghunandan, but the bullet hit Kallu @ Ramkishan, who also died at the spot. Nirmala inflicted injuries with the stick on her head, whereas Seema caused injury on the fingers of her right hand. Testimony of Neeta Sharma stood corroborated by the statements of Raghunandan (PW.2), Asha (PW.3), Heera Lal (PW.4), Jaggi (PW.5), Daya Ram (PW.7) and Daulat Ram (PW.8).

6. It is contended on behalf of the accused that in the course of the incident three accused sustained simple and grievous injuries. The injury reports were placed on record and marked as Ex.D-7, Ex.D-8 and Ex.D-9. The prosecution has withheld origin and genesis of the occurrence. Injuries received by the accused were not explained. The fact that gun was accidentally fired and the accused had right of private defence was not properly considered. Witnesses Khiladi and Shiv Charan, who were named in the FIR were not examined. Since ocular testimony of the witnesses examined by the prosecution was not trustworthy, the accused could not have been convicted. Reliance is placed on *Yogendra Morarji Vs. State of Gujarat*, *Mohd. Ramzani Vs. State of Delhi*, *Mohinder Pal Jolly v. State of Punjab*, (AIR 1979 SC 377), *Tara Chand and Another Vs. State of Haryana*, *Dev Raj and Anr. v. State of H.P.*, (1994 Supp. (2) SCC 552), *Madan Mohan Pandey Vs. State of U.P.*, *Chuhar Singh Vs. State of Punjab*, *Kashi Ram and Others Vs. State of M.P.*, *Veera v. State of Rajasthan*, (1981 (5) RCC 169) and *Lakshmi Singh and Others Vs. State of Bihar*,

FACTUAL SITUATION:

7. At first we may catalogue certain material facts appearing on record. These are:-

(i) No sooner Raghunandan Patel did reach his house accused Ghanshyam targeted him and opened fire that hit Kalya @ Ajay after kissing shoulder of Raghunandan, as a result of which Kalya @ Ajay died;

(ii) Babu Lal then snatched the gun from the hands of Ghanshyam and opened fire that hit Kalli @ Ram Kishan, who also died;

(iii) Khiladi and Shiv Charan were named in written report, but the prosecution did not examine them;

(iv) Raghunandan (PW.2) vide injury report (Ex.P-1) sustained following injuries:-

"1. Lacerated wound 5 cm x 2 cm x 4 cm (depth) on Lt. Parietal temporal region of skull acrossing Lt. to Rt.

2. Lacerated wound 1, 1/2 cm x 3/4 cm Rt. little finger dorsal aspect
3. Lacerated wound 1, 1/2 cm x 3/4 cm Rt. ring finger dorsal aspect.
4. Gunshot wound O margin inverted tattooing present 4 cm in diameter Lt. shoulder back side.
5. Abrasion oblique shape 6 cm x 2 cm.

Rt. Lower Abd. From posterior to anterior."

(v) Lead pellets of cartridges were seized from the place of incident vide memo Ex.P-12.

(vi) 12 Bore double barrel gun was seized at the instance of accused Ghanshyam vide Ex.P-15.

(vii) Vide Ex.P-39, District Magistrate Alwar granted sanction to prosecute accused Babu Lal and Ghanshyam;

(viii) Accused Seema vide injury report Ex.D-7 sustained following injuries:-

- "1. Lacerated wound over base of Rt. ring finger 4 cm x 2 cm x 3 cm (depth)
2. Lacerated wound over base of little finger 8 cm x 2 cm x 3 cm (depth)
3. C/o of pain Lt. wrist - No external injury seen."

(ix) Accused Ghanshyam vide Ex.D-8 received following injuries:

- "1. Lacerated wound over Rt. Fronto parietal region
3 cm x 3 cm x 4 cm
2. Lacerated wound over Lt. thumb inner aspect 4 cm x 1 cm"

(x) Accused Babu Lal vide Ex.D-9 sustained following injuries:-

- "1. Lacerated wound over mid of skull 6 cm x 3 cm x 4 cm (depth)
2. Lacerated wound over Rt. Temporo occipital region
3 cm x 3 cm x 4 cm (depth)
3. Complaining of pain Lt. elbow joint no ext. injury is seen
4. C/o pain Rt. Elbow joint No. ext. injury is seen.
5. Bruise over Rt. Scapular region 4 cm x 12 cm (width)
6. Abrasion over Rt. Middle finger dorsal aspect 1 cm x 3 cm
7. Abrasion dorsal of Rt. Second metacarpal upper part.
4 cm x 2 cm
8. C/o pain Rt. Lower chest in Ant. Axillary line No. ext. injury is seen." (xi)

Written report Ex.D-11 was made by Ghanshyam to S.P. Alwar.

(xii) Copy of FIR No. 224/97 (Ex.D-12) was registered at Police Station Malakhera District Alwar;v(xiii) X-ray report of Ghanshyam (Ex.D-14) demonstrates that he sustained grievous injury;

(xiv) Raghunandan (PW.2) in the cross examination stated that the fact that Babu Lal had snatched the gun from Ghanshyam and opened fire was known to him (Raghunandan) in the hospital on being informed by his family members;

(xv) Raghunandan denied this suggestion that gun got fired while lathi blow aimed by Anil at Ghanshyam hit the gun;

(xvi) Injuries sustained by Seema, Ghanshyam and Babu Lal were not explained by the prosecution.

RIGHT OF PRIVATE DEFENCE:

8. At this juncture it will be worthwhile to consider the principles governing exercise of right of private defence.

9. It is well settled that where the charge against the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in Section 299 of the Penal Code. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises.

10. In *Mohd. Ramzani v. State of Delhi* (supra), the Hon"ble Supreme Court indicated that the onus which rests on an accused person u/s 105, Evidence act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. A person faced with imminent peril of life and limb of himself or another is not expected to weigh in "golden scales" the precise force needed to repeal the danger. Even if he at the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it.

11. In *Mohinder Pal Jolly v. State of Punjab* (supra), the Hon"ble Supreme Court indicated as under:-

"The onus is on the accused to establish the right of private defence of property or person not on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability, he might or might not take this plea explicitly or might or might not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act which he committed was

justified in exercise of his right of private defence of property or person or both . But the exercise of this right is subject to the limitations and exceptions provided in Section 99 of the Penal Code."

12. In *Chuhar Singh v. State of Punjab* (supra), where in the quarrel was between the accused and deceased the accused received injuries during the course of occurrence causing death of deceased by gun shot, the accused could be said to have exceeded his right of private defence and convicted u/s 304 Part 11PC Their Lordships of Supreme Court observed as under:-

"Now the question that arises for our consideration is whether the appellant would be entitled for a complete acquittal on the plea of right of private defence of his person. We have no hesitation in coming to the conclusion that the appellant had exceeded his right of private defence of his body when causing the death of the deceased by using the dangerous weapon, namely, the gun and hence he is not entitled for complete acquitted but would be liable to be convicted u/s 304 Part-I IPC."

13. In *Devraj and Anr. v. State of H.P.* (supra), their Lordships of Supreme Court observed in para 9 as under:-

"As already mentioned, we are concerned only with Dev Raj now. Dev Raj as well as Des Raj undoubtedly received injuries during the same occurrence and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution. It is not necessary to refer to various decisions where it has been held that the accused if acted on self-defence, need not prove beyond all reasonable doubt and if two views are possible, the accused should be given the benefit of doubt, having regard to the nature of the injuries of the two accused persons, we find it difficult to hold that their pleas altogether are unfounded. Then the next question would be whether they had exceeded that right of self-defence. Admittedly, the occurrence is said to have taken place in a sudden manner. Even, according to the prosecution, they did not come there armed. A quarrel ensued there and they picked up iron pipes and wooden phattis that were lying there and a clash took place. In such a situation, their place of right of private defence has to be accepted, but having regard to the injuries inflicted by them on the two deceased persons as well as on PW.23, they have definitely exceeded the right of private defence and the accused are entitled to the benefit of Exception 2 of Section 300 and the offence punishable is one u/s 304 Part II IPC."

14. Division Bench of this Court in *Veera v. State of Rajasthan* (supra) indicated that injuries on the person of the accused found immediately after the occurrence but not explained by the Prosecution, accused alleging that his gun wen off during the attack by the deceased, plea of self defence proved by the accused and made out by evidence sufficient to acquit him.

DOCTRINE OF TRANSFERRED MALICE:

15. Section 301 IPC embodies doctrine of transfer of malice or transmigration of motive. This doctrine makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended nor knew himself to be likely to kill. Lord Coleridge C.J. said:-

"It is common knowledge that a man who has an unlawful and malicious intent against another and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act."

16. In *Kashi Ram v. State of M.P.* (supra) Hon^{ble} Supreme Court indicated that in the case of accidental injury attracting applicability of "transferred malice" u/s 301 IPC and having held that the act of the accused was covered by Section 304 IPC, the court should lean in favour of convicting the accused under Part 1 of Section 304, if it is in doubt as to which one of the two parts of Section 304 IPC would be attracted.

17. In the case on hand as already noticed accused Ghanshyam received grievous injury and accused Babu Lal sustained two lacerated wounds over mid of skull and right tempo occipital region during the same occurrence and when they have taken the plea that they acted in self-defence that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution, having regard to the nature of the injuries on the accused Ghanshyam and Babu Lal we find some merit in their plea. The next question that arises for our consideration is whether the accused would be entitled for a complete acquittal on the plea of right of private defence on a close scrutiny of entire material on record. We have no hesitation in coming to the conclusion that the accused Ghanshyam and Babu Lal exceeded their right of private defence. Their Lordships of the Supreme Court in *Chuhar Singh's case* (supra) indicated that where in the quarrel between the accused and deceased, the accused received injuries during the course of occurrence causing death of deceased by gunshot, the accused could be said to have exceeded his right of private defence and convicted under Part 1 of Section 304 IPC.

18. We find ourselves unable to accept the submissions of learned counsel that because a lathi blow inflicted by Anil hit the gun it accidentally killed Kalya and Kalli. On the touchstone of trustworthiness when we scan the prosecution evidence we find that accused Ghanshyam and Babu Lal fired two gunshots aiming at Raghunandan which accidentally hit Kalya and Kalli. If the accused in the facts and circumstances, would cause injuries to Raghunandan, they would have been liable to be convicted u/s 304 Part 1 IPC. When the accused opened fire with the gun that struck the deceased, the accused must have known that the gun shot dealt on a vulnerable part of human body were likely to result in death. In these circumstances it would be quite legitimate to hold that the accused struck the deceased with the gun with the intention to cause injuries likely to cause death, in spite of Raghunandan having escaped unhurt and yet Kalya and Kalli having been injured though not aimed at, on the doctrine of

transferred malice as contained in Section 301 IPC the liability of accused Ghanshyam and Babu Lal remains the same and they are held guilty u/s 304 Part I IPC.

19. We are not impressed with the submission, canvassed in regard to conviction of the appellants u/s 307 IPC, 3/27 and 3/25 Arms Act and u/s 323 IPC.

CONCLUSION:

20. For the foregoing reasons, appeal of accused Ghanshyam @ Ghanti and Babu Lal @ Banti is partly allowed. Their conviction recorded and sentences passed u/s 302 IPC are set aside. Instead they are held liable to conviction u/s 304 Part I IPC. They stand convicted accordingly and sentenced to 10 years rigorous imprisonment each. Their conviction and sentences u/s 307 IPC, 3/25 and 3/27 Arms Act, are maintained. All the sentences are ordered to run concurrently. Appeal of Smt. Guddo @ Nirmala and Smt. Seema stands dismissed.