
(2009) 03 SC CK 0151

In the Supreme Court Of India

Case No : Criminal Appeal No. 672 of 2005

Hanumantappa Bhimappa Dalavai and Another

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 31-03-2009

Acts Referred:

Evidence Act, 1872 — Section 105

Penal Code, 1860 (IPC) — Section 100, 101, 102, 103, 104

Citation : (2009) AIRSCW 5425 : (2009) AIRSCW 3675 : (2009) CriLJ 3045 :
(2009) 4 JT 634 : (2009) 5 KarLJ 644 : (2010) 1 KCCR 20 : (2009) 5 SCALE
142 : (2009) 11 SCC 408 : (2009) 5 SCR 286 : (2009) 5 Supreme 566

Hon'ble Judges : Asok Kumar Ganguly, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Rajesh Mahale, for the Appellant; Sanjay R. Hegde, A. Rohen Singh,
Vikrant Yadav and Nishant Mishra, for the Respondent

Final Decision : Allowed

Judgement

Arijit Pasayat, J.—Challenge in this appeal is to the judgment of a Division Bench of the Karnataka High Court upholding the convictions of the appellants for offence punishable u/s 302 of the Indian Penal Code, 1860 (in short the `IPC'). The appellant No. 1 was additionally convicted for offence punishable u/s 326 IPC.

2. Prosecution version in a nutshell are as follows:

The accused Nos. 1 to 3 - the deceased and injured belonged to Salahalli Village. There is a tea shop of the accused No. 1 situated outside the village, by the side of the compound of which a public road is situated, some jail hedges have grown in the said land of accused No. 1 by the other side of the road, which have over grown obstructing to some extent the public path. With regard to the inconvenience caused to the passers-by and the persons taking vehicles like tractor, the complainant - Irappa Aijappa Kuri (P.W.5) often complained to the accused No. 1 to cut the excess hedges, to which the accused No. 1 paid no heed. On 1.2.1995, while coming home, the complainant asked the accused No. 1 to cut

the excess growth of hedge for which the accused No. 1 became angry and threatened that he would see the person who dared to cut the hedges and also abused the complainant. The next day evening, the complainant's younger brother - Mahadev (first deceased) came from Gokak and when the complainant and his family members told about the incident that had taken place on the previous day, Mahadev immediately expressed his desire to go to the accused No. 1 and confront him about this. Then immediately, he left the place followed by the complainant (P.W.5), complainant's wife - Lalithawa Kuri (P.W.18), complainant's elder brother - Basappa Sidnal (the second deceased), complainant's sister - Suit Yallawwa Dundappa Shidnal (P.W.19), complainant's brother - Siddappa Ajjappa Kuri (P.W.20), complainants sisters-in-law - Renuka Kuri (P. W. 24) and Smt. Anasuya Sidnal (P.W.26). When Mahadev questioned the accused No. 1 about his behaviour with the complainant the previous day, the accused No. 1 became angry about the audacity of Mahadev in coming to his hotel about that matter and to question him; and challenging Mahadev, he went inside the hotel, brought a crow-bar and by that instrument gave a blow on the head of Mahadev. In the meantime, the accused No. 1's son - Vittal (accused No. 2) brought a stick and another son-Maruti (accused No. 3) brought an iron rod saying that these people would not be allowed to go, and started assaulting them. The accused No-3 assaulted Basappa by means of an iron rod on account of which Basappa started to bleed. The accused No. 1 gave a blow on the complainant's wife Lalithavva by means of the crow bar on account of which she fell down and when he attempted to give a blow by means of that crow-bar on the complainant, the complainant avoided it but the blow fell on his left hand and he sustained injury. The accused No. 2 attacked P.W.18 by means of a stick. In the meantime, the people assembled and saved these persons. But, by that time Mahadev and Basappa had sustained grievous injuries. The injured were taken to Ramadurga in the jeep of Prakash (P.W.25). The doctor at Ramadurga examined Mahadev and pronounced him dead. For further treatment, Basappa and Lalithavva were taken to Belgaum hospital where Basappa died later. In the meantime, the police had received information in Kattakol Police Station, which had jurisdiction over the area and the. Sub-Inspector of Police went to Ramadurga with a Police Constable and took the complaint, on the basis of which a case was registered and investigation was taken up. The accused were not available. They were traced on 9.2. 1995 and were arrested and were produced before the learned Magistrate. They were remanded to judicial custody. After investigation, the Police filed a charge sheet against the accused.

The accused pleaded not guilty to the charges and claimed to be tried. The prosecution examined in all 30 witnesses out of whom PWs. 5,18,19,20 to 26 are eye witnesses. The accused No. 1 advanced a theory of self defence contending that the injured persons and the deceased persons had come to his hotel armed with deadly weapons challenging when he was alone in the hotel and challenging him they attempted to assault him. He contended when he ducked to avoid a blow, it fell on the head of the person, who was holding him and in consequence

that person sustained injuries and that in the meantime, he managed to snatch one of the weapons held by the assailants and in self defence, a wide hit was given by him to the assailants and thereafter he escaped from the blows. It was his contention that he was not responsible for any injuries found on the deceased and the injured.

4. The trial court disbelieved the plea of right of private defence and held the appellant guilty as aforestated.

5. In appeal the High Court upheld the conviction discarding the stand of the appellant that this was a case of right of private defence.

6. In support of the appeal it was submitted that this is a case where the right of private defence is clearly applicable, and prosecution version is not believable. Learned Counsel for the respondent-State on the other hand supported the judgment.

7. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. u/s 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material

on record. (See *Munshi Ram and Others Vs. Delhi Administration*, : *State of Gujarat Vs. Bai Fatima and Another*, : *State of U.P. Vs. Mohammad Musheer Khan and Others*, and *Mohinder Pal Jolly Vs. State of Punjab*,). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body u/s 97, that right extends u/s 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in *Salim Zia Vs. State of Uttar Pradesh*, , runs as follows:

It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.

8. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

9. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See *Lakshmi Singh and Others Vs. State of Bihar*,]. In this case, as the Courts below found there was not even a single injury on the accused persons, while PW2 sustained large number of injuries and was hospitalized for more than a month. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and 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. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. 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 is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

10. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until that there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In *Jai Dev Vs. The State of Punjab*, it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

11. 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. Thus, running to house, fetching a tabli and assaulting the deceased are by no means a matter of course. These acts bear stamp of a design to kill and take the case out of the purview of private defence. Similar view was expressed by this Court in *Biran Singh and Others Vs. The State of Bihar*, in *Sekar @ Raja Sekharan Vs. State rep. by Inspector of Police, T. Nadu*, and in *Ananta Deb Singha Mahapatra and Others Vs. State of West Bengal*.

12. It is to be noted that there were a large number of eye witnesses who also had suffered injuries. PWs. 5,8,19,22 and 26 are such witnesses whose version is clear, cogent and credible and there is no reason to discard their version. Trial court and the High Court have rightly relied upon their evidence. Additionally when the factual scenario is tested on the touchstone of legal principles relating to right of private defence are concerned it is clear that the plea is without substance. Above being the position present appeal is sans merit, deserves dismissal, which we direct.