
(2006) 07 RAJ CK 0028
In the Rajasthan High Court

Kalu @ Laxmi Narayan

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 25-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 103, 104, 147, 148, 149

Citation : (2007) 5 RCR(Criminal) 733 : (2007) 3 RLW 2501

Hon'ble Judges : Shiv Kumar Sharma, J; Chatra Ram Jat, J

Bench : Division Bench

Judgement

Shiv Kumar Sharma, J.—Challenge in these three appeals is to the legality of judgment dated January 28, 2002 rendered by the learned Additional Sessions Judge No. 2, Kota, whereby the appellants, five in number, have been convicted and sentenced as under:

Appellant Kalu @ Laxmi Narayan:

Under Section 302 IPC:

To suffer imprisonment for life and fine of Rs. 500/-, in default to further suffer simple imprisonment for two months.

Appellants Kamal @ Kamal Kumar, Sattu @ Satya Narayan, Mukesh @ Anil Kumar

Under Section 302/149 IPC:

Each to suffer imprisonment for life and fine of Rs. 500/-, in default to further suffer simple imprisonment for two months.

Appellants Kalu @ Laxmi Narayan, Kamal @ Kamal Kumar, Sattu @ Satya Narayan, Mukesh & Anil Kumar

Under Section 148 IPC:

Each to suffer rigorous imprisonment for six months.

The substantive sentences were ordered to run concurrently.

2. Put briefly the prosecution case is as under:

On November 9, 1999 at 10.15 PM informant Pappu @ Mukesh (PW. 7) submitted a written report (Ex. P. 5) at Police Station Kaithooni Pole Kota to the effect that on the said day around 8.30 PM he saw Santu, Kalu @ Laxmi Narain, Kamal, Mukesh Koli and Anil Mochi going towards Inspectory School. They were armed with knives. The informant followed them and found his younger brother Manoj standing in front of Inspectory School. On seeing Manoj, Kalu @ Laxmi Narayan made attempt to inflict knife blow on the person of Manoj but Manoj saved himself and ran for life. All the five assailants chased Manoj and caught him. Kalu @ Laxmi Narayan then gave blow with knife on the left side of his abdomen as a result of which Manoj fell down. Santu," Kamal, Mukesh and Anil who were armed with knives they caused injuries on the person of Manoj. The incident had been witnessed by Sushila (wife of informant). In the meanwhile Guddu and Babu also arrived. Manoj was removed to the hospital where he was declared dead. On that report police station Kaithooni Pole Kota registered a case under Sections 147, 148, 149 and 302 IPC and investigation commenced. Necessary memos were drawn. Statements of witnesses were recorded. Dead body was subjected to autopsy. The appellants were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge No. 2 Kota. Charges under Sections 148, 302 and 302/149 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 17 witnesses. In the explanation u/s 313 Cr.P.C, the appellants claimed innocence. Appellant Anil Kumar stated that Guddu, Babu and Ramrai made assault on him behind the house of Madar Bux and caused injury with Katar (knife) on the left side of his chest and caused injury over his left rib, on account of which he was hospitalized and had undergone two operations. Cross case bearing FIR No. 220/1999 u/s 307 IPC was lodged against complainant party and challan was also filed against Guddu, Babu and Ramrai. Dr. Rakesh Sharma (DW. 1) was examined as defence witness by the appellants. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. We have heard the contentions raised before us and with the assistance of learned Counsel perused the record.

4. Death of deceased Manoj was undeniably homicidal in nature. As per autopsy report (Ex. P. 6) following ante mortem injury was found on the dead body:

Stab wound 4x1 1/2 cm x cavity deep on Lt. lumbar region on anterior abdominal wall. Transversly placed, margins clean cut, loops of intestine with peritoneum coming out.

In the opinion of Dr. Ashok Mundra (PW. 8) the cause of death was shock as a result of injury to abdominal aorta.

5. In the same incident appellant Anil Kumar also sustained stab wound on the left side of his chest. As per injury report (Ex. D. 8) following injuries were found on his person:

1. Stab wound 2 x 1 x CD on left side of chest.
2. Bruise 6x2 cm on Rt. shoulder."
3. Bruise 5x2 cm on the Left shoulder.
4. Incised wound 1 x 1/4 x SD on Rt. middle finger.

Vide X-ray report (Ex. D-9) the injury No. 1 was found dangerous to life.

6. Appellant Anil Kumar was admitted to MBS Hospital Kota and his parcha bayan (Ex. D. 5) was recorded on November 9, 1999 at 10.25 PM wherein he stated as under:

eSa csdjh dk dke djrk gwWA vkt fnukad 9-11-99 dks eSa vkSj IRrw rFkk eukst rhuksa gh jaxckMh eqds? Is feyus x;s FksA ogka tkrs le; ge rhuksa gh ?jkc ihdj x;s FksA ogka ij FkksM+h nsj :d dj rhuksa gh ldwVj Is djhc 9&15 cts ?ke dks okil vk;sA mlds ckn ik;sxk Ldwy ds ikl eq>s eukst vkSj xqMMw feys ftuesa eukst ds gkFk esa pkdw Fkk rFkk xqMMw ds gkFk esa dVkj Fkh mugksus eq>s fcuk dkj.k gh tku Is ekjus ds fy, eukst us esjs lhus ij ekjuk pkgk eSaus nkfgus gkFk Is idM dj cpko fd;k ftlls esjs nkfgus gkFk dh vaxqyh dV xbZ vkSj xqMMw us eq>s tku Is ekjus ds fy, dVkj dh ckbZ ilyh ij ekjh tks esjs ?jhj ds vUnj /kal xbZ rFkk xqMMw ds ,d lFkh ftldk uke ugha tkurk mlus yB dh esjs dka/kksa ij ekjh og cksj[ksMk jgrk gSA

Police Station Kaithooni Pole Kota, on the basis of Parcha bayan registered a case u/s 307/34 IPC against Manoj and Guddu. Charge sheet (Ex. D. 6) u/s 307/34 was filed against Guddu, Ramdas and Babu.

7. Coming to the prosecution case we notice that alleged eye witnesses viz. Sushila (PW. 1) Guddu (PW. 5), Babu (PW. 6) and Mukesh (PW. 7) have not explained the injuries sustained by appellant Anil Kumar. According to Sushila (PW. 1) Sattu, Kalu, Laxmi Narayan, Mukesh, Kamal and Anil who were armed with knives chased her Dewar Manoj and near Sripura Inspectory School they caught Manoj and started inflicting knife blows. Kalu inflicted blow on the left side of Manoj due to which he fell down thereafter all accused inflicted blows with legs and fists. She, her husband, Guddu and Babu tried to intervene but the accused threatened them to kill therefore they remained five steps away. In the cross examination she admitted that at the place of incident there was no source of light. It was a dark night and road lights were off. She denied the suggestion that Guddu, Babu and Manoj attacked on Anil and the case was lodged against them.

8. Guddu (PW. 5) in his deposition stated that on the date of incident he was at his house Babu came to him and told that Kamal, Anil, Sattu, Mukesh and Kalu surrounded Manoj. Thereafter he and Babu chased appellants and found them

surrounding Manoj. Kalu inflicted knife blow on left rib of Manoj. At that time Sushila and Mukesh also reached there. In the cross examination he admitted that Manoj was his relative and except Kalu other accused did not cause any injury to Manoj. He further admitted that the case lodged by Anil was pending against him.

9. Babu (PW. 6) in his deposition stated that on the date of incident he and Manoj came from the side of Mandi and stayed near Inspectory school. From the opposite side Kalu @ Laxmi Narayan, Sattu, Mukesh, Anil and Kamal came and surrounded them. They ran for their life but Manoj was caught by the appellants near the house of Madar. Kamal, Sattu, Anil and Mukesh caught hold of Manoj and Kalu inflicted knife blow on the left side of Manoj. In the cross examination he admitted that Anil lodged a case against them.

10. Informant Mukesh (PW. 7) in his deposition narrated the facts that were stated by him in the written report. He denied the suggestion that Anil received any injury in the incident.

11. Prahlad Rai, Investigating Officer (PW. 11) in his deposition stated that on November 9, 1999 Pappu Mukesh and Babu submitted a written report to him and thereafter he conducted investigation. In the cross examination he admitted that on the report of Anil a case bearing FIR No. 220/99 was registered under Sections 307 and 34 IPC and he filed charge sheet in that case against Ramesh @ Guddu, Ramdas @ Ramesh Singh, Babu @ Babu Lal for the offence u/s 307 IPC.

12. From the material on record salient features of the case may be summarised thus:

- (i) Cross cases were registered between both the parties.
- (ii) Appellant Anil received four injuries and the injury No. 1 on the left side of chest was dangerous to life. He undergone two operations.
- (iii) Deceased Manoj received only one injury on his person.
- (iv) Injuries sustained by Anil were not superficial and the prosecution witnesses did not explain the said injuries.

13. Coming to the contention of learned Counsel for the appellants that complainant party was the aggressor and the appellants had right of private defence. We find that Section 97 IPC recognises the right of a person to defend his own or another's body. Their Lordships of the Supreme Court in Mahabir Choudhary Vs. State of Bihar, indicated two measures of right of private defence, one is the first degree which shall not reach up to causing of death of the wrong doer, the other is the full measure which may go upto causing death. Both measures are however subjected to the restriction enumerated on Section 99. Section 104 IPC contains the bridle that right of private defence shall not cross the limit of first degree as against acts which would remain as theft, mischief or

criminal trespass. But Section 103 recognises extension of the said right upto the full measure, even as against the aforesaid acts but only if such acts or their attempts are capable of inculcating reasonable apprehension in the mind that death or grievous hurt would be the consequence if the right is not exercised in such full measure. The emerging position is that unless one has reasonable cause to fear that otherwise death or grievous hurt might ensue, the right of private defence cannot be used to kill the wrong doer. It was held that when the acts are amounted to mischief the accused had a right of private defence to thwart the same. In the course of exercise of such right of private defence, the accused who gunned down the mischief makers, has obviously acted far in excess of right of private defence. Nonetheless the first degree of right of private defence cannot be denied to the accused.

14. In *Subramani and Others Vs. State of Tamil Nadu*, the Apex Court propounded that if the appellants acted in exercise of their right of private defence of property, it cannot be said that they committed a criminal act in furtherance of a common intention, because Section 96 makes it abundantly clear that nothing is an offence which is done in the exercise of the right of private defence. They did not commit any criminal act or to do anything which may be described as unlawful. Their object was not to kill the deceased but to protect their property. It may be, that in a given case it may be found on the basis of material on record that some of them may have exceeded their right of private defence and for that they may be individually held responsible. But it cannot be said that the murder was committed pursuant to a common intention to commit such crime. The intention of the appellants was not to cause death of the deceased, but they had acted in exercise of their right of private defence. While acting in exercise of the right of private defence, the appellants cannot be said to be motivated by a common intention to commit a criminal act. Common intention has relevance only to the offence and not to the right of private defence.

15. Their Lordships of Supreme Court in *Subramani v. State of T.N.* (supra) in regard to non explanation of injuries sustained by the accused indicated as under:

The appellants suffered injuries on vital parts of the body, even though simple but the prosecution failed to give any explanation for such injuries. The prosecution feigned ignorance about the injuries suffered by the appellants. It is not possible to accept the submission that the injuries being simple, the prosecution was not obliged to give any explanation for the same. Having regard to the facts of the case the omission on the part of the prosecution to explain the injuries on the person of the accused may give rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence and had thus not presented the true version.

16. In *Vajrapu Sambayya Naidu and Others Vs. State of A.P. and Others*, the Apex Court held that where the injuries sustained by the accused were not explained by the prosecution it probabalise the case of defence that the prosecution party was the aggressor.

17. 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.

18. In Mohd. Ramzani Vs. State of Delhi, , 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 pern 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.

19. In Mohinder Pal Jolly Vs. State of Punjab, , 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.

20. In Chuhan Singh Vs. State of Punjab, 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 IIPC. Their Lordships of Supreme Court observed as under: (Para 6)

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 acquittal but would be liable to be convicted u/s 304 Part I IPC.

21. In Dev Raj and another Vs. State of Himachal Pradesh, 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 then 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 on 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 the 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 plea 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.

22. Division Bench of this Court in *Veera v. State of Rajasthan* (1981) 5 RCC 169 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 went off during the attack by the deceased, plea of self defence proved by the accused and made out by evidence sufficient to acquit him.

23. In *Puran Vs. State of Rajasthan*, . It was indicated that where sudden mutual fight ensued between the parties, there is no question of invoking the aid of Section 149 IPC for the purpose of imposing constructive criminal liability. The accused can be convicted only for the injuries caused by him by his individual acts.

24. In the case on hand as already noticed that mutual fight between the parties occurred all of a sudden. In such a situation it could not have been held that the accused formed unlawful assembly and charges under Sections 148 and 149 IPC are not found established. Having regard to the facts of the case, omission on the part of prosecution to explain the injuries on the person of accused gives rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence.

25. Accused appellant Kalu @ Laxmi Narayan, who as per the prosecution case inflicted one injury on left side of abdomen of the deceased, in the facts and circumstances of the case do not appear to have intention to cause murder of the deceased. This possibility can not be ruled out that in order to save Anil, Kalu @ Laxmi Narayan inflicted the solitary injury on the person of deceased and did not

repeat the same. He however obviously exceeded the right of private defence. He can be held guilty for his individual act and is entitled to the benefit of Exception 2 of Section 300 IPC. Since cross case was registered and appellant Anil Kumar received injuries that were, not explained, the possibility of over implication of appellants Sattu @ Satya Narayan, Mukesh and Kamal @ Kamal Kumar cannot be ruled out. Therefore the appellant Anil Kumar, Sattu @ Satya Narayan, Mukesh and Kamal @ Kamal Kumar are entitled to benefit of doubt.

26. For these reasons, we dispose of instant appeals in the following terms:

(i) We allow the appeal of Anil Kumar, Sattu @ Satya Narayan, Mukesh and Kamal @ Kamal Kumar and acquit them of the charges under Sections 148 and 302/149 IPC. These appellants are on bail. They need not surrender and their bail bonds stand discharged.

(ii) We partly allow the appeal of appellant Kalu @ Laxmi Narayan and instead of Section 302 IPC we convict him u/s 304 Part 11 IPC. Looking to the fact that appellant Kalu @ Laxmi Narayan has already undergone confinement for a period of more than 6 years and 7 months, the ends of justice would be met in sentencing him to the period already undergone by him in confinement. We however acquit appellant Kalu @ Laxmi Narayan u/s 148 of the Indian Penal Code. The appellant Kalu @ Laxmi Narayan, who is in jail, shall be set at liberty forthwith, if not required to be detained in confinement in any other case.