

(1987) 09 RAJ CK 0016

In the Rajasthan High Court

Case No : Criminal Appeal No's. 937 of 1976 and 132 of 1977

Karaniya

APPELLANT

Vs

State of Rajasthan and Vice Versa

RESPONDENT

Date of Decision : 08-09-1987

Acts Referred:

Penal Code, 1860 (IPC) — Section 103, 302, 304, 325, 342

Citation : (1987) WLN 478

Hon'ble Judges : Shyam Sunder Byas, J; Milap Chand Jain, J

Bench : Division Bench

Judgement

Shyam Sunder Byas, J.—As the appeals are directed against one and the same judgment of the learned Additional Sessions Judge), Jodhpur dated September 29, 1976, they were heard together and are decided by a common judgement. By the impugned judgment, accused Karaniya was convicted u/s 302, IPC and sentenced to imprisonment for life. He has come up in appeal to challenge his conviction. The State has also come-up in appeal with a prayer that the appellant should also be convicted under Sections 325, 342 and 447, IPC.

2. Put briefly, the prosecution case is that PW 14 Allahabux was allotted agricultural land Mauja Peeparla-ki-seed district Jaisalmer. He was cultivating it since the allotment. In Samvat Year 2027, Allahabux went with his live-stock to some other area. Taking advantage of his absence, accused Karaniya made unlawful possession over that field and started cultivating it. When Allahabux returned, he asked the accused to deliver possession of the field to him. The accused refused to do so. Allahabux filed a civil suit against the accused for recovery of possession over the field. His suit was decreed and possession was delivered to him in execution of the decree before the incident took place. He then started living in this field by raising a Dhani therein. He had sown Gwar and Bajri crops in the field in 1975.

3. At about 11.00 a.m. on July 19, 1975, the accused came with his wife and two sons and a camel. They placed their goods in the hut raised by PW 4 Allahabux.

The accused threw away the goods of Allahabux lying in the hut. The accused had also a country-made single barrel gun. His sons had Gupti and sword while his wife had an axe. The accused asked Allaha Bux to leave the field. Allahabux claimed his possession and refused to leave the field. The accused thereupon tied Allahabux with a rope and put him a few yards away from the hut. When the numbers of his family came to his rescue, they were threatened by the accused that in case they tried to rescue him, they would be shot dead. Allahabux raised cries. At about 5.00 p.m., PW 1 Hussain, PW 3 Surta, PW 4 Balwant Ram, PW 5 Babra, PW 6 Abdullah and Illias came there in the field and asked the accused to set free Allahabux. Illias untied Allahabux. This irked the accused and he fired his gun at Illias. The shot hit Illias on his chest. He fell down and passed away instantaneously on the spot. The Station House Officer Jawansingh (PW 15) happened to go to village Peeparla on July 19, 1975. PW 1 Hussain appeared before him and verbally lodged report Ex.P 5 of the incident. The police registered a case u/s 302, IPC and proceeded with investigation. The SHO Jawansingh (PW 15) arrived on the spot, inspected the site, prepared the site plan and inquest of the victim's dead body. He collected blood-stained soil from the place of incident. The post-mortem examination on the victim's dead body was conducted at about 10.00 a.m. on July 20, 1975 by PW 12 Dr. S.P. Banerjee, the then CAS, Jawahar Hospital, Jaisalmer. The postmortem examination report prepared by him is Ex.PW 1. In the opinion of Dr. Banerjee, the death of the victim was caused due to syncope, shock and haemorrhage as a result of gunshot injury to the vital organs, heart, lung and liver. The injuries of PW 1 Hussain and PW 3 Surta were also examined and one abrasion was found on the person of Hussain and one contusion was found on the person of Surta. The accused was arrested and in consequence of the information furnished by him, one gun was recovered. On the completion of the investigation, the police submitted a challan against the accused in the Court of the Chief Judicial Magistrate, Jaisalmer, who, in his turn, committed the case for trial. The case came for trial before the learned Additional Sessions Judge(1), Jodhpur, who framed a charge u/s 302, IPC against the accused, to which he pleaded not guilty and faced the trial. The defence taken by the accused was that the field, in which the incident had taken place, was allotted to him and he was in actual physical possession of it. In the Revenue Records, the field was shown in his possession. No suit was decreed against him and the possession of the field was never taken from him and delivered to PW 14 Allahabux. In support of its case, the prosecution examined fifteen witnesses and filed some documents. In defence, the accused examined two witnesses and also filed some documents. On the conclusion of the trial, the learned Additional Sessions Judge found the charge duly brought home to the accused. He was consequently convicted and sentenced, as mentioned at the very out-set. Aggreived against his conviction, the accused has taken this appeal. The contention of the State is that the accused should have been also convicted under Sections 325, 342 & 447, IPC.

4. We have heard the learned amicus curiae Mr. Rajendra Singhvi and the

learned Public Prosecutor. We have also gone through the case file carefully.

5. We will first take the appeal of accused. Mr. Singhvi, the learned amicus curiae did not challenge the opinion of Dr. Banerjee (PW 12) relating to the cause of death of Illias. We have also gone through the statement of Dr. Banerjee and find no reasons to distrust his opinion. The death of Illias was due to gun-shot injury. His death was, thus, homicidal and not natural.

6. In challenging the conviction, the sole contention raised by the learned amicus curiae is that the accused was in possession of the field wherein the incident had taken place. The accused was in peaceful possession of the field since long. His possession over this field was shown in the Revenue Records. He had raised a specific plea in the defence that the field, in which the incident had taken place, was in his long and continuous possession. But the learned Sessions Judge did not touch this vital question as to who was in possession of the field the accused or PW 14 Allahabux. The prosecution has not filed any judgment or decree or allotment order or rent receipts to show that PW 14 Allahabux was in possession of the field. The material on record sufficiently shows that it was the accused who was in actual physical possession of the field. The members of the complainant party had come to take forcible possession over this field by dispossessing the accused. The accused, therefore, had a right of private defence of property. The learned Sessions Judge again failed to deal with this plea of the accused relating to the right of private defence of the property. Since the accused was in possession of the field wherein the incident had taken place, he had right to defend it even by killing the trespasser. Sections 96 and 97 of the Indian Penal Code give him a complete shield and his killing one of the trespassers does not amount to any offence.

7. It was, on the other hand, contended by the learned Public Prosecutor that PW 14 Allahabux was in possession of the field. There are several witnesses who have stated about his possession over it. Though the question of possession was not decided by the trial Court, it can be now decided. We have taken the respective submissions into consideration.

8. The accused has taken a specific plea in defence that the field, in which the incident had taken place, was in his actual physical possession. Now, in a case of fight for possession, the test of criminality is "was the accused in possession or not at the time when the alleged offence was committed." Sections 96 and 97, IPC lay down the principle that a person in possession can maintain his possession and resist by force any attack made on it. Thus, in a case of right of private defence of the property, the question as to who was in actual physical possession is of paramount importance. Criminal trespass is one of the offence specified in Clause 2ndly of Section 97, IPC, against which there is a right of private defence. Every person is, therefore, entitled to defend his property against criminal trespass by another person. It is unfortunate that the learned Sessions Judge has not, at all, decided this vital question as to who was in possession of the field wherein the incident had taken place was he the accused

or was he PW 14 Allahabux.

9. According to the prosecution the field was in possession of PW 14 Allahabux. The prosecution has not filed any revenue record nor examined any revenue official to show that the field was in possession of PW 14 Allahabux. The prosecution has, however, relied upon the oral testimony of PW 1 Hussain, PW 3 Surta, PW 4 Balwant Ram, PW 5 Babra, PW6 Abdullaha and PW7 Mubarak and PW 14 Allahabux to show that it was PW 14 Allahabux who was in possession of the field on the day of incident. No doubt, these witnesses have stated that PW 14 Allahabux was in possession of the field wherein the incident had taken place, but there are several reasons to dismiss what they testified about the possession of PW 14 Allahabux, over the field. PW 14 Allahabux stated that the accused had made unlawful possession over his field in Samvat Year 2027 when he had gone to some other place with his live stock. He further stated that he filed a suit against the accused for recovery of the possession over the field in the Court of the Munsif and his suit was decreed. He further stated that in execution of that decree, possession of the field was delivered to him and the accused was dispossessed. Unfortunately, the judgment, decree, the warrant of delivery of possession or the proceeding of Amin that possession was really delivered to PW 14 Allahabux by dispossessing the accused, have not been filed by the prosecution. No revenue record was, also, filed in support of the possession. The allotment order, by which the field is said to have been allotted to PW 14 Allahabux has also not been filed by the prosecution. Admittedly, according to PW 14 Allahabux, the accused had taken possession over the field in Samvat Year 2027. The presumption will, therefore, be that the accused was in possession of the the field since S.Y. 2027. If he was dispossessed later on by the order of the Court, all the documents, such as judgment, decree, warrant of possession, proceeding of delivery of possession etc. should have been filed. No document of this kind was at all filed. The allotment order was also not filed by which it can be said that the field was allotted to PW 14 Allahabux, The prosecution also did not file the revenue record showing the possession of PW 14 Allahabux over the field in dispute. The prosecution has, thus with held the best evidence of possession available to them.

10. In defence, the accused has examined DW 1 Lakhpatt Singh Patwari, Patwar Circle, Peeparla. He was called in evidence along with revenue records. He stated that the field in dispute was allotted to accused Karaniya on March 25, 1965 and since then it was in his continuous possession. The area of the field allotted to the accused is seventy-five Bighas. We have therefore no hesitation to say that the field, in which the incident had taken place, was not in possession of PW 14 Allahabux. It was in possession of accused Karaniya since 1965 and his possession continued thereafter. It was accused Karaniya who was in actual physical possession of the field on the day of the incident.

11. It cannot be successfully gain-said by the accused that he did not fire the shot. The evidence of the eye witnesses PW 1 Hussain, PW 3 Surta PW 4 Balwant

Ram, PW 5 Babra, PW 6 Abdullaa and PW 14 Allahabux convincingly shows that the accused had fired his gun at Illias which hit him on his chest and caused his death. It appears that these eye witnesses have not given a true version of the incident. The circumstances show that these eye witnesses along with the deceased Illias went to the field in dispute to dispossess the accused and to take possession over it. The accused thereupon fired the gun. If these eye witnesses had not gone to dispossess the accused from his field, there was no occasion for him to fire the shot. The true version of the incident appears to be that these eye witnesses went to the field to dispossess the accused and it was then that the accused fired the shot killing one of them, namely, Illias. The accused had a right to defend his property from the criminal trespass committed by the deceased and the eye witnesses.

12. The question which now arises for our consideration is: whether the accused is absolutely protected Section 97, IPC lays down that every person has a right to defend his property against any act which is an offence falling under the definition of "criminal trespass". But at the same time, the Section lays down that this right is subject to the restrictions contained in Section 99, IPC. Section 99 lays down that the right of private defence, in no case, extends to the inflicting the more harm than it is necessary to inflict for the purpose of defence. Sections 97 and 99, IPC must be read together. Section 103, IPC speaks that the right of private defence of property extends to causing death if the offence, the committing of which is theft, mischief or house trespass. Criminal trespass is not covered by Section 103, IPC. The accused was, no doubt, entitled to protect his possession over the field by causing reasonable harm to the trespassers. His right of private defence did not extend to causing the death. He, therefore, by causing the death of Illias, exceeded the right of private defence of property granted to him by Section 97, IPC. The offence made out against him, therefore, falls u/s 304, IPC. His conviction u/s 302, IPC is erroneous.

13. Coming to the appeal of the State, we have held that it was the accused who was in possession of the field in dispute on all relevant times. He cannot be, therefore, said to have committed the offence of criminal trespass u/s 447, IPC. The injuries caused to PW 1 Hussain and PW 3 Surta are simple. Only one injury was caused to each of them. As such, the accused cannot be said to have committed any offence as he was entitled to use reasonable force against the trespassers. The appeal of the State, thus, has no force and must fail.

14. The accused was arrested on 20-7-1975 and remained in custody during investigation, inquiry, trial and thereafter, upto September 11, 1978. He thus, remained in detention nearly for three years and two months. The Offence was committed long back in 1975. In these circumstances, it would not be proper, now, to re-send him to jail.

15. In the result,

(1) the appeal of accused Karaniya is partly allowed. His conviction and sentence

u/s 302, IPC are set-aside and instead he is convicted u/s 304, IPC and is sentenced to three years" rigorous imprisonment. He has already served this period. He, therefore, need not surrender. His bail bonds shall stand cancelled; and

(2) the appeal of the State is dismissed. The appeals are accordingly disposed of.