
(2014) 03 DEL CK 0284
In the Delhi High Court
Case No : Writ Petition (C) 5548 of 2003

Madan Singh Bishta

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:

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

Citation : (2014) 03 DEL CK 0284

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; Anjana Gosain and Mr. Pradeep Desodiya, for the Respondent

Judgement

Pradeep Nandrajog, J.—The charge at which petitioner, working as a Constable with BSF, was tried at a General Security Force Court was for having committed an offence punishable u/s 302 IPC, in that, near village Thana Basti, PS: Khowai, District Tripura (West) on June 25, 1999 around 19:30 hours he caused the death of Sh. Lalit Deb Barma by firing a shot from his 7.62 mm SLR Butt No. 325, Registration No. BC-9989. The finding of the Court is that the petitioner was guilty of culpable homicide not amounting to murder punishable u/s 304 Part I IPC and the sentence imposed is to undergo RI for 10 years and being dismissed from service.

2. Regretfully we note that the petitioner has undergone the sentence for the reason he was declined suspension of the sentence and the writ petition has matured for hearing in the list of final hearing matters today.

3. At the trial the petitioner did not dispute the homicidal death of Lalit Dev Barma. As per him the deceased died when, armed with a Dah (Chopper), he assaulted the petitioner who was on patrol duty; the petitioner warded off the attack by using his SLR as a shield; the deceased tried to snatch his SLR and the petitioner was constrained to fire one shot in self defence.

4. At the trial Asst. Comdt. Kamal Singh Rathore PW-1, the Second In Command: 2-IC M.S. Sharma PW-2, Deputy Comdt. R.S. Jhakar PW-3 and HC R.K. Bhadra, the Post Commander PW-4 deposed that as they heard of the incident they rushed to BOP Asharambari and saw a dead body and the petitioner nearby who informed them that he spotted 5-6 persons in suspicious condition and as he challenged them. Some ran away and one assaulted him with a Dah. They saw a small cut on petitioner's face below the right eye with a blood clot. The petitioner showed a cut mark on the front hand guard of his rifle. Buttons of the shirt of the petitioner were torn. They also saw a Dah lying there. The local police seized the Dah, the torn shirt of the petitioner and the damaged rifle. The witnesses also stated that militants had in the recent past fired at force personnel in the area, meaning thereby the area was prone to militancy.

5. Dr. Narayan Chandra Saha PW-13 who had conducted post-mortem of the deceased and had also examined the petitioner on the night of the incident deposed that he had observed a minor injury on petitioner's person and that the post mortem of the deceased showed two injury marks, one caused by the entry of a bullet and the other by the exit; the entry point being just above the right nipple over Mammary Region with black discolouration around the wound. As per him the weapon had been discharged from a close distance of approximately 2 feet.

6. Shambu Telanga PW-6, Smt. Panchmi Telanga PW-7, Manty Telanga PW-8, Draupadi Telanga PW-9, Savita Telanga PW-10 and Surender Dev Barma PW-11 were the local inhabitants and we note that cumulatively read their testimony would be that before the incident a BSF personnel had a fight with Shambhu Telanga. Two personnel came and took along with them the BSF personnel who had beaten him. At that time the deceased was present in house and also left. The BSF personnel who had beaten Shambu Telanga shot dead Lalit Dev Barma. Relevant would it be to highlight that whereas PW-6, PW-7 and PW-8 did not identify the petitioner as the one who had shot Lalit Dev Barma, Draupadi Telanga PW-9 and Savita Telanga PW-10 deposed to have witnessed the shooting and said that the petitioner was the assailant.

7. Record would establish that whereas the petitioner was charged for the offence of murder by shooting dead Lalit Dev Barma, seven other constables were charged for the offence punishable u/s 201 IPC i.e. misstating facts to hide evidence and before the trial two separate proceedings of Recording of Evidence were conducted. One concerning the petitioner and the other concerning said seven persons. In neither Recording of Evidence proceedings the two ladies identified the petitioner as the assailant. In fact at the Recording of Evidence concerning the seven constables who were tried for the offence punishable u/s 201 IPC the two ladies gave an entirely different picture when they stated that on the day of the incident Lalit Dev Barma entered their house in a state of intoxication and out of fear lest he creates trouble and they get blamed they thought it wise to leave him at some distance from their house. They led him up

the village path and as he walked away at some distance they heard a gun shot fire and being pitch dark and raining slightly they could not see who had fired the shot.

8. SI Pryatosh Dass PW-15, the police officer of P.S. Khowai who had conducted investigation in two cross FIR Nos. 34/99 and 35/99 stated that he seized the weapon of offence, the shirt of the petitioner which had broken buttons as also the Dah from near the dead body. He affirmed that he saw a cut mark on the butt of the weapon of the offence.

9. From the fact that the petitioner has been convicted for the offence of culpable homicide not amounting to murder punishable u/s 304 I IPC, keeping in view the fact that the deceased died due to gun shot wound being fired upon at the chest, it is apparent that the Court has accepted the version of the petitioner for the reason; given the two rival versions, if the civilian witnesses had to be believed it had to be a clear case of murder and if the petitioner had to be believed the further question whether petitioner exceeded the right of private defence had to be considered for if a person exceeds the right of private defence and causes a homicidal death the offence would be culpable homicide not amounting to murder punishable either u/s 304 Part I or Section 304 Part II IPC because of the law declared in the decision reported as Munney Khan Vs. State of Madhya Pradesh, , wherein the Supreme Court held as under:-

Since such a right did exist, the case would fall under the exception under which culpable homicide does not amount to murder on the ground that the death was caused in exercise of right of private defence, but by exceeding that right. An offence of this nature is made punishable under the first part of Sec. 304, IPC. Consequently, the conviction of the appellant must be under that provision and not u/s 302, IPC.

And the law declared in the decision reported as Mohinder Pal Jolly Vs. State of Punjab, , wherein the Supreme Court held as under:-

The right of private defence of property also, therefore, in the appellant's case extended to causing of any harm other than the death. Undoubtedly the appellant did exceed this right of private defence and apparently the murder which he committed within the meaning of clause "4thly" of Section 300 squarely fell within Exception 2 thereof.

A question now arises whether the appellant was guilty under Part I of Section 304 Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder with the meaning of clause "4thly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to

cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I.

10. Since decisions at the General Security Force Court are sans any reasons by the Court and the verdict is either "Guilty" or "Not Guilty" or "Guilty of a lesser offence", we have nothing of guidance from the verdict and further because we are not experts at transcendental meditation and sitting in the Court cannot access the mental condition of the Court. Thus, what weighed with the Court in deciding that the petitioner exceeded the right of private defence cannot be gathered by us from the verdict.

11. In such a situation our job as a Writ Court would be to ascertain from the record whether in the summing up address by the law officer to the Court he correctly drew the attention of the Court to the law on the right to private defence and further did he draw the attention of the Court to the relevant evidence having a bearing on the decision whether the right of private defence was exceeded. We need not bother ourselves on the subject whether the situation warranted exercise of right of private defence for the reason inherent in the decision of the Court is the finding that in the opinion of the Court the petitioner was faced with a situation that he had to exercise a right of private defence.

12. In the address to the Court the law officer has stated as under:-

Right to Private Defence

The right of private defence is codified in Section 96 to 106 IPC. Nothing is an offence, which is done in the exercise of right of private defence. The right of private defence does not arise merely because an act is unlawful or wrongful. The act must amount to an offence and it must amount an offence of particular kind.

The determination of the question whether in any particular case there existed a right of private defence is always a question of law whether the act done by accused was in exercise of right to private defence is question of fact. The right of private defence applies not only where the accused is charged individually but also where the charge is laid against him as a member of group which has together committed an offence so as to make each member of the group liable U/ S. 34, as if he had alone committed the offence.

Availability or Non Availability of Private Defence

In order to find whether right of private defence is available or not, the entire incident must be examined with care and viewed in its proper setting. The injuries received by the accused, the imminence of threat to his safety, the injury 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 on a

plea of private defence. Alongwith these factors one has also to remember the following limitations on the right of private defence of person or property.

(a) That if there is sufficient time for recourse to public authorities, the right is not available.

(b) That more harm than that is necessary should not be caused.

(c) That there must be a reasonable apprehension of death or grievous hurt or hurt to the person or damage to the property concerned.

Section 100 IPC (read) enumerates six circumstances in which right of private defence of body extends to the causing of death of the assailant. Thus law authorizes a man who is under reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assault either when the assault is attempted or directly threatened. It is settled law that it is the reasonable apprehension of death or grievous hurt that gives rise to the right of private defence under clause 1 & 2 of Sec 100 IPC and it has nothing to do with the actual injury that the person exercising right of private defence has suffered which may or may not be grievous. The mere fact that the accused sustained some injuries in the course of some transaction does not make it conclusive that the accused had the occasion to cause death in private defence. However, under sec 101 IPC (read) any harm short of death can be inflicted in exercise of right of private defence in any case which does not fall under Sec 100 IPC.

Similarly, Sec 103 IPC (read) enumerates four circumstances in which right of private defence of property extends to the causing of death of the wrong doer. There must be reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in this sec or at attempt to commit one of those offence. Sec 104 IPC (read) provides that if offence committed or attempted to be committed is not one specified in Sec 103 then any harm other than death can be caused by the person exercising right of private defence, where the accused has exceeded his right to private defence of body or property, his case would fall within the ambit of exception II to Sec 300 IPC (read) and would amount to culpable homicide not amounting to murder.

13. We find that the law officer has summed up the legal position very broadly. Regretfully we find that while analyzing the evidence he has just not highlighted anywhere that if the Court took the view that the petitioner was faced with a situation where he had to exercise the right of private defence, on the subject whether the right was exceeded, the Court had to take into account:-

(i) That the petitioner had an injury on his cheek from which an inference had to be drawn that the assailant came within striking distance of the petitioner.

(ii) The SLR of the petitioner had a cut mark on the front hand guard from which an inference had to be drawn that the assailant struck a second time and the petitioner warded off the attack by using the rifle as a shield.

(iii) That the front hand guard of the SLR had a cut mark required an inference to be drawn that it was struck by considerable force by a sharp edged object.

(iv) A Dah (Chopper) found near the dead body required an inference to be drawn that the deceased was armed with a Dah.

(v) From the fact that the shirt of the petitioner was torn and buttons were broken an inference had to be drawn that there was a scuffle preceding the act of petitioner resorting to firing a single shot from his SLR.

(vi) With reference to the post-mortem of the deceased and the opinion of the doctor who conducted the same i.e. PW-13, the shot being fired from a distance of about 2 feet was suggestive of the close proximity of the deceased and the petitioner corroborative of the fact that the deceased directed two blows with a Chopper (Dah) at the petitioner, one causing a small cut on the cheek and the other warded off when petitioner used the SLR as a shield, followed by a scuffle evidenced by petitioner's shirt being torn and buttons broken, followed by a shot being fired.

(vii) The past instances of BSF jawans being fired upon by militants would be in the mind of the petitioner when he saw 5 or 6 persons in a suspicious circumstances in late evening, the time being 19:30 hours (and we have to keep in mind that the place of incident was the Eastern part of India where even in summer by 07:30 PM it is pitch dark) and as he challenged them, one, armed with a Chopper (Dah) assaulted the petitioner.

14. Further, it was the duty of the Law Officer to point out that in view of the law that Section 96 to Section 106 of the Indian Penal Code deal with the right of private defence and briefly stated, vide Section 96 of the Penal Code, nothing would be an offence which is done in the exercise of the right of private defence. Vide Section 97, subject to the restrictions contained in Section 99, every person has a right to defend his own body against any offence affecting the human body. The exception u/s 99 pertains to acts in relation to public servants acting in good faith and under colour of office. Section 100 of the Code illustrates the circumstances and situations where a killing is justified. In a nutshell, Section 100 of the Code justifies the killing of an aggressor when apprehension of a crime against the accused is likely, as enumerated in the 6 clauses of Section 100. The first clause applies to cases where there is reasonable apprehension of death; the second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in a grievous hurt. In that event, the person apprehending assault can go to the extent of causing the latter's death in the exercise of the right of private defence, even though the latter may not have inflicted any blow or injury on him. Further, he had to draw the attention of the Court as held by the Supreme Court in the judgment reported as Darshan Singh Vs. State of Punjab and Another, ., vide para 23, in order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that

he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. He had to further instruct the Court that the question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no straitjacket formula can be prescribed in this regard. The only guiding objective facts would be, the weapon used, the manner and nature of assault and other surrounding circumstances wherefrom it can be evaluated whether the apprehension was justified or not. It was his duty to further instruct the Court that it has to be kept in mind that where the opposite party is proved to be the aggressor, the reaction of the accused has not to be weighed in scales of gold and it has to be kept in mind that the accused had no time to ponder over and take a reasoned decision as to how much force must he use in retaliation. The issue of force used in retaliation has to be broadly considered in view of the attendant circumstances.

15. It is apparent that the petitioner has been strongly prejudiced at the trial by the Law Officer not properly instructing the Court by highlighting the nuances of the legal position as discussed above and the critically facts to be taken note of as adumbrated in paragraph 14 above.

16. With the statement of law noted above, which is our guiding star, not repeating the evidence and the critical features thereof discussed by us, the only logical conclusion which one can infer is that the petitioner not only acted in self defence but the circumstances under which he so acted were of a kind that it cannot be said that he exceeded the right of private defence; after all the reaction of the petitioner has not to be weighed in scales of gold and it has to be kept in mind that he had no time to ponder over and take a reasoned decision as to how much force must he used in retaliation. The issue of force used in retaliation when considered broadly in view of the attendant circumstances lead to the conclusion which we have drawn.

17. Ordinarily we would have set aside the verdict and directed the court to reconvene and focused its attention on the legal position on the subject of use of force while acting in private defence and the critical evidence which we have noted above, unfortunately not brought to the notice of the Court when the verdict was pronounced, but we are not doing so because the petitioner has regrettably undergone the sentence of RI for ten years. We have thus deem it fit to reason with the law and apply the evidence to reach a judicial conclusion.

18. Since the verdict is that the petitioner is not guilty and that while exercising right of private evidence he did not exceed the same, we discharge the accused by acquitting him honourably and directing he to be reinstated with full back wages and continuity of service for purposes of increments and pensionary benefits.

19. Compliance be made within 6 weeks from today. There shall be no orders as to costs.