

(2015) 01 SC CK 0117

In the Supreme Court Of India

Case No : Criminal Appeal No. 2282 of 2014

Pathubha Govindji Rathod

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-01-2015

Acts Referred:

Arms Act, 1959 — Section 25(1), 27
Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2015) 2 ACR 1760 : AIR 2015 SC 1118 : (2015) 89 ALLCC 282 : (2015) 1 ALT(Cri) 471 : (2015) 1 CCR 372 : (2015) CriLJ 1413 : (2015) 3 Crimes 284 : (2015) GLH 1408 : (2015) 2 JCC 848 : (2015) 2 LW(Cri) 558 : (2015) 1 MLJ(Cri) 489 : (2015) 1 NCC 318 : (2015)

Hon'ble Judges : Prafulla C. Pant, J.; Dipak Misra, J.

Bench : Division Bench

Advocate : Meenakshi Arora, Senior Advocate, Tulika Prakash, Sheeba Khan and Vasav Anantharaman, for the Appellant; Jesal, Hemantika Wahi, Preeti Bhardwaj and Puja Singh, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal is directed against judgment and order dated 30.6.2014 passed by High Court of Gujarat whereby the said Court has partly allowed the criminal appeals arisen out of Sessions Case No. 85 of 2003 and the cross Sessions Case No. 53 of 2004, which were decided by two separate orders of the same date, i.e., 5.10.2007 by Additional Sessions Judge/Fast Track Court, Junagarh.

2. We have heard learned Counsel for the parties and perused the record.

3. Prosecution story, in brief, is that complainant Satish Jotva (PW-42) used to live with his family in Village Arena. On 2.9.2003 his uncle Bhurabhai Jivabhai (PW-46) was going to his field on a bicycle. At about 10.30 a.m., he was intercepted by Pathubha Govindji Rathod (Appellant No. 1) near bus stand.

Accused/Appellant No. 1 picked up a quarrel with Bhurabhai Jivabhai as to why he supported Natha Nagabhai (one of the deceased) in Gram Panchayat Election with whom the accused/Appellant No. 1 was not having cordial relations. Meanwhile Natha Nagabhai came there and joined Bhurabhai Jivabhai in the quarrel. This led heated exchange of words between both the sides, and crowd gathered there. Accused/Appellant No. 1 was joined by his other supporters (co-accused), who were armed with deadly weapons like swords, knives and sticks. Out of the accused persons, accused Pathubha Govindji was armed with revolver, and accused Bhavubhai Gagubhai, Bhuraji Gaguji, Kirit Jesing and Punjaji Muluji were armed with swords. Accused Mala Gaguji was armed with knife. Rest of the accused Gaguji Manji, Gomubha Halarwadi, Navalsinh Motisinh, Kanubha Jesangji, Dhiru Jesing, Kiritsinh Punjaji, Veraji Punjaji, Jayubha, Samatsinh, Sidharajsinh Manji, Bharat Manji, Kanu Bhai Devu bhai and accused/Appellant No. 2 Hemubha Govindji were armed with sticks. On hearing the noise, complainant Satish Jiva Jotva (PW-42) and his another uncle Bhimshi Jiva (PW-47), father of the complainant Hamir Nagabhai (another deceased), Malde Nagabhai (PW-43), Bhurabhai Jivabhai (PW-46), Punjabhai Bhimshibhai (PW-44), Jagmal Jivabhai (PW-45) and some other villagers also gathered there. When the quarrel further aggravated between the two sides, accused/Appellant No. 1 Pathubha Govindji exhorted his supporters to kill Natha Nagabhai and teach lesson to other supporters. Thereafter, accused/Appellant No. 1 Pathubha Govindji himself took out revolver from his pocket and fired at him. Natha Nagabhai suffered bullet injuries on the stomach and fell down. In the incident, Bhimshibhai who was attacked with sword suffered injury on his head. Bhavubhai Gagubhai assaulted Punja Bhimshi with sword in his hand, and he also suffered injury on his head. Punjaji gave blow to Bharat Jiva on his head, Gomubha Halarwala gave blow on the head of Jagmal Jiva. Accused/Appellant No. 2 Hemubha Govindji inflicted injury with sword on the head of Hamir Nagabhai. Accused Malde Nagabhai Jotva assaulted with stick to some other persons. Several persons suffered injuries in the incident on both sides. According to prosecution, after the incident complainant took his uncle Natha Nagabhai on his motor cycle to Mangrol Government Hospital, and other injured persons were also taken on rickshaw to said Hospital for medical treatment. Out of the injured Natha Nagabhai, Bhimshi Jivabhai, Hamir Nagabhai, Bhura Jivabhai, Malde Nagabhai, Punjabhai Bhimshibhai, Jagmal Jivabhai were shifted to Junagarh Hospital for further treatment. In the incident Natha Nagabhai and Hamir Nagabhai succumbed to the injuries and died.

4. A complaint was given by Satish Jiva Jotva regarding the incident on the basis of which ICR No. 70 of 2003 was registered at Mangrol Police Station. A cross version of incident (ICR No. 71 of 2003) was also registered by the police. After investigation, charge sheets were filed by the police against both set of accused. Sessions Trial No. 85 of 2003 relates to the charge sheet filed against accused/Appellants Pathubha Govindji Rathod and Hemubha Govindji Rathod and eighteen others. After hearing the parties in the aforesaid sessions case, a

charge was framed by the trial court against all the twenty accused in respect of offences punishable Under Sections 147, 148, 302 r/w 149, 307 r/w 149, 326 r/w 149, 325 r/w 149, 324 r/w 149 and 506(2) r/w 149 of Indian Penal Code and Under Section 135 of the Bombay Police Act. Accused/Appellant No. 1 Pathubha Govindji was further charged in respect of offence punishable Under Section 25(1) (a) and Section 27 of Arms Act. All the accused pleaded not guilty and claimed to be tried.

5. On this, prosecution got examined PW-1 Dr. M.G. Satrodiya, PW-2 Dr. Linesh Makwana, PW-3 Dr. Anil Sakhiyani, PW-4 Naran Punja, PW-5 Desha Devshi, PW-6 Nasinghbhai Nensibhai, PW-7 Parsottambhai Savjibhai, PW-8 Ratibhai Khimjibhai, PW-9 Nagabhai Hirabhai, PW-10 Virambhai Kanabhai, PW-11 Hardas Desa, PW-12 Arjan Govindbhai, PW-13 Vikram Arjanbhai, PW-14 Bhikhabhai Virabhai, PW-15 Mansukh Amarsinh, PW-16 Lakhabhai Pethabhai, PW-17 Laxmanbhai Makwana, PW-18 Rasulkhan Gulamkhan, PW-19 Razak Ismail, PW-20 Hanif Ibrahim, PW-21 Ali Giga, PW-22 Ismail Hussain, PW-23 Gova Parbat, PW-24 Kanjibhai Karsanbhai, PW-25 Hasmukh Raja, PW-26 Karmanbhai Jethabhai, PW-27 Arjan Parbat, PW-28 Musabhai Allarakha, PW-29 Amadbhai Musabhai, PW-30 Dhirubhai Naranbhai, PW-31 Mohanlal Khimjibhai, PW-32 Mamadbhai Ismail, PW-33 Ibrahim Kasam, PW-34 Atul Prabhudas, PW-35 Dr. Jigna Dave, PW-36 Dr. Kartik Modha, PW-37 Bhanji Vashram, PW-38 Ranchhodbhai Rathod, PW-39 Dr. Bhalchandra Joshi, PW-40 Dr. Jitendra Gajera, PW-41 Dr. P.B. Nariyani, PW-42 Satishbhai Bhimsinh Jothwa (complainant), PW-43 Malde Naga (injured), PW-44 Punjabhai Bhimsinhbhai (injured), PW-45 Jagmal Jivabhai, PW-46 Bhurabhai Jivabhai (injured), PW-47 Bhimsinhbhai Jivabhai (injured), PW-48 Chandrakant Natwarlal, PW-49 Mahipatbhai Bhikhubha, PW-50 Ravjibhai Valjibhai, PW-51 Jayeshbhai Tapubhai, PW-52 Karsanbhai Gangabhai, PW-53 Subhashbhai Vadhera, PW-54 Hasmukhlal Aahir, PW-55 Arjanbhai Meraman, PW-56 Harishchandra Trivedi, PW-57 Bharatbhai Mistri, PW-58 Vishnukumar Vyas, PW-59 Manharlal Mehta (Investigating Officer), and PW-60 Kalekhan Kureshi (Investigating Officer).

6. The trial court put oral evidence of above witnesses and documentary evidence including medical reports, inquest reports, post mortem reports of Natha Nagabhai and that of Hamirbhai Nagabhai, complaint, serologist report and chemical analyst report to the accused Under Section 313 of Code of Criminal Procedure. In reply to the prosecution evidence accused stated that evidence adduced against them is incorrect. It is also pleaded that it were the accused, who were attacked by the complainant and his supporters. In defence, it was brought on record that serious injury was caused by Hamir Naga (deceased) to accused/Appellant No. 1 Pathubha Govindji, with a knife. It is also brought on record that from the side of accused/Appellants, Gumansinh Motibha, Juvan Singh Gogubha, Punjaji Muluji, Navalsinh, Pathubha (present Appellant No. 1), and Punja Bhimshi suffered injuries. It is also established that in cross Sessions Case No. 53 of 2004, witnesses of present case, namely, Malde Nagabhai Jotva, Bhimshi Jivabhai Jotva, Jagmal Jivabhai Jotva, Bhurabhai

Jivabhai Jotva, Punjabhai Bhimshibhai Jotva are accused, who assaulted the accused of the present case. Due to death of Hamir Naga, his name did not figure in charge-sheet as an accused in the said sessions case.

7. After hearing the parties, learned Sessions Judge decided both the sessions trials by two separate orders of the same date and recorded conviction against the accused in both the cross cases. In Sessions Case No. 53 of 2004 the five accused, namely, Malde Nagabhai Jotva, Bhimshi Jivabhai Jotva, Jagmal Jivabhai Jotva, Bhurabhai Jivabhai Jotva, Punjabhai Bhimshibhai Jotva were convicted by the trial court Under Sections 323, 324, 325, 147, 148 all read with Section 149 of Indian Penal Code and Under Section 135 of the Bombay Police Act. Each one of accused in said Sessions Case No. 53 of 2004 was sentenced to undergo five years" simple imprisonment and to pay a fine of Rs. 2500/- Under Section 326 r/w Section 149 Indian Penal Code, simple imprisonment for a period of one month and to pay a fine of Rs. 1000/- Under Section 324 r/w Section 149 Indian Penal Code, simple imprisonment for a period of three months and to pay a fine of Rs. 500/- Under Section 147 r/w Section 149 Indian Penal Code, simple imprisonment for a period of one year and to pay a fine of Rs. 1000/- Under Section 325 r/w Section 149 Indian Penal Code, simple imprisonment for a period of one year and to pay a fine of Rs. 1000/- Under Section 148 r/w Section 149 Indian Penal Code.

8. On the other hand, in Sessions Case No. 85 of 2005 in which the present Appellants were accused, the trial court convicted and sentenced each of the twenty accused Under Sections 302, 307, 326, 325, and 324 all r/w Section 149 Indian Penal Code, to undergo imprisonment for life and to pay a fine of Rs. 5000/- Under Section 302 r/w Section 149 Indian Penal Code, imprisonment for seven years and directed to pay a fine of Rs. 2500/- Under Section 307 r/w Section 149 Indian Penal Code, imprisonment for a period of five years and directed to pay a fine of Rs. 2500/- Under Section 326 r/w Section 149 Indian Penal Code. Similar sentence was passed against each of them Under Section 325 r/w Section 149 Indian Penal Code. As to the offence Under Section 324 r/w Section 149 Indian Penal Code each one was sentenced to imprisonment for one year and directed to pay a fine of Rs. 1000/-. Similar sentence was passed Under Section 147 r/w Section 149 Indian Penal Code. On the count of charge of offence punishable Under Section 148 r/w Section 149 Indian Penal Code each one of twenty accused was sentenced to imprisonment for a period of one year and directed to pay fine of Rs. 1000/-. Under Section 506 r/w Section 149 Indian Penal Code, the trial court sentenced each convict to imprisonment for a period of seven years and directed to pay a fine of Rs. 1000/-. The trial Court further convicted accused/Appellant No. 1 Pathubha Govindji Under Section 27 of Arms Act, and sentenced him to imprisonment for a period of three years and directed to pay a fine of Rs. 2500/-.

9. Criminal Appeal No. 1391 of 2007 and Criminal Appeal No. 1394 of 2007 were filed by the convicts of Sessions Case No. 85 of 2003, and Criminal Appeal No.

1244 of 2007 was filed by the convicts of Sessions Case No. 53 of 2004, before the High Court. All the three appeals were decided by the High Court by common judgment challenged before us. The High Court decided three appeals with following directions:

26. For the foregoing reasons, the following order is passed;

(I) All the three appeals are partly allowed.

(II) Insofar as Criminal Appeal No. 1391/2007 and 1394/2007 are concerned, the judgment and order passed by the Court of learned Addl. Sessions Judge, Junagadh in Sessions Case No. 85/2003 dated 05.10.2007 is modified to the extent that original accused No. 1 Pathubha is convicted for the offence punishable Under Section 302 Indian Penal Code and is sentenced to undergo imprisonment for life. The order regarding fine and default sentence is not disturbed qua original accused No. 1. It is also clarified that punishment of imprisonment for life imposed upon original accused No. 1 shall not mean imprisonment till last breath and that the State may grant the accused benefit of remission at the appropriate time. His conviction and sentence Under Section 27 of the Arms Act is also confirmed.

Insofar as original accused No. 2 Hemubha is concerned, his conviction is altered to one punishable Under Section 304 Part 1 Indian Penal Code instead of Section 307 r/w. Section 149 Indian Penal Code. For conviction Under Section 304 Part 1 Indian Penal Code, original accused No. 2 is sentenced to undergo imprisonment for Ten years. The order regarding fine and default sentence is not disturbed qua original accused No. 2. The jail report shows that original accused No. 2 is on bail. His bail bonds stand cancelled and he is ordered to surrender to custody within a period of Ten Weeks from today.

Out of original accused No. 3 to 20, original accused No. 5, original accused No. 13 and original accused No. 16 have expired. Therefore, the appeals stand abated qua the said three accused persons.

Insofar as the remaining accused persons are concerned, viz. original accused No. 3, 4, 6 to 9, 11 to 12 and 14, 15 and 17 to 20, their conviction is altered to one punishable Under Section 323 Indian Penal Code without the aid of Section 149 Indian Penal Code. For conviction Under Section 323 Indian Penal Code, the sentence already undergone by each of the accused persons is ordered to be treated as sufficient sentence and each of the accused is ordered to pay fine of Rs. 2500/-. None of the accused person is required to undergo any further sentence in respect of the offence in question. The above accused persons are on bail and hence, their bail bonds stand cancelled and surety, if any, stands discharged.

Rest of the impugned judgment and order remains unaltered.

(III) Insofar as Criminal Appeal No. 1244/2007 is concerned, the judgment and order passed by the Court of learned Addl. Sessions Judge and Fast Track Court,

Junagadh in Sessions Case No. 53/2004 dated 05.10.2007 is modified whereby, each of the five accused persons, viz. original accused No. 1 to 5, is convicted Under Section 323 Indian Penal Code without the aid of Section 149 Indian Penal Code. Their conviction, accordingly, stands altered to one punishable Under Section 323 Indian Penal Code. For conviction Under Section 323 Indian Penal Code, the sentence already undergone by each of the five accused persons is ordered to be treated as sufficient sentence and each of the accused is ordered to pay fine of Rs. 2500/-. None of the accused person is required to undergo further sentence in respect of the offence in question. The above accused persons are on bail and hence, their bail bonds stand cancelled and surety, if any, stands discharged.

Rest of the impugned judgment and order remains unaltered.

10. The present appeal has been filed before us by way of Special Leave Petition, by two of the above convicts, namely, Pathubha Govindji Rathod and Hemubha Govindji Rathod.

11. The only point pressed and argued before us in this appeal is that the courts below have erred in law in not accepting the plea of private defence taken by Appellant No. 1. It is argued that the accused/Appellant No. 1 was assaulted with a knife and suffered the injury on the vital part, as such he has a right of private defence to save his person. It is further contended that charge relating to causing death of Natha Bhai with a fire arm, even if proved, is covered by Exception 2 of Section 300 Indian Penal Code.

12. We have considered the submissions of the learned Counsel for the Appellants. Exception 2 to Section 300 Indian Penal Code reads as under:

Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

13. It is not disputed in the present case that there are cross versions of the incident, and cross complaints were lodged with the police. It is also not disputed that in both the cases police submitted charge sheets against both set of accused. It is also evident from the record that both Sessions Case No. 85 of 2003 and Sessions Case No. 53 of 2004 resulted in conviction on conclusion of trial by Additional Sessions Judge, Junagarh. Considering the number of persons involved in the incident it can be safely said that it is a case of free fight between two groups of people. It is settled principle of law that in the cases of free fights accused are to be fastened with individual liability taking into consideration the specific role assigned to each one of them, and normally right of private defence is not available in such cases unless circumstances in a given case warrant so.

14. A person faced with injury with a deadly weapon to his life cannot be

expected to weigh in balance the precise force needed to avoid danger. Referring to case of Bhanwar Singh and Others Vs. State of M.P., , this Court, in State of Rajasthan Vs. Manoj Kumar, , has observed as under:

15.3. In Bhanwar Singh v. State of M.P., it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death; and if the court were to reject the said plea, there are two possible ways in which this may be done i.e. on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2 Indian Penal Code.

15. In Dr. Mohammad Khalil Chisti Vs. State of Rajasthan and Others, , this Court has observed in para 42 as follows:

42. The analysis of the materials clearly shows that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Though the accused would have the benefit of such situation and the counsel appearing for the Appellants prayed for acquittal of the Appellants of all the charges, in view of the principles which we have already discussed, we are of the view that each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In other words, both sides can be convicted for their individual acts and normally no right of private defence is available to either party and they will be guilty of their respective acts.

16. No doubt normally the right of private defence is not available to either of the parties in incidents of group fighting, but that is not a rule without exception. In the case at hand, we have a special circumstance where the injured person (Appellant No. 1) who was given 2cm x 2cm x 1.5cm deep knife blow on his back (scapular region) has retorted by using licensed firearm, and killed one of his rivals in the same incident. Accused/Appellant Pathubha Govindji has taken plea of private defence right from beginning of the trial. From the judgment of the trial court also, it is clear that the plea of private defence was taken by the Appellant No. 1. Considering the facts and circumstances of the present case and evidence on record, it is evident that accused/Appellant No. 1 Pathubha Govindji Rathod who suffered knife injury in the incident has caused death of one of the deceased by firing several shots thereby exceeding right of private defence. Injuries suffered by both the sides are on record.

17. In the above circumstances, from the evidence, as discussed above, we are inclined to accept the argument that it is a case of culpable homicide not

amounting to murder covered under Exception 2 of Section 300 of Indian Penal Code. Therefore, after weighing the submissions of learned Counsel for the parties and going through the papers on record, we are of the opinion that appeal of the accused/Appellant No. 1 deserves to be allowed partly. Accordingly, the appeal is partly allowed and the conviction and sentence recorded against accused/Appellant No. 1 Under Section 302 Indian Penal Code read with Section 149 Indian Penal Code is set aside. Instead he (accused/Appellant No. 1 Pathubha Govindji Rathod) is convicted Under Section 304 Part-I Indian Penal Code and sentenced to imprisonment for a period of ten years and directed to pay fine of Rs. 5000/-, in default of payment of fine he shall undergo simple imprisonment for a further period of six months. He is reported to have undergone nine years and six months of imprisonment. He shall serve out unserved part of the sentence. The conviction and sentence recorded against accused/Appellant No. 2 Hemubha Govindji Rathod Under Section 304 Part I read with Section 149 Indian Penal Code, does not require any interference.

18. The appeal stands disposed of.