
(2006) 02 RAJ CK 0037
In the Rajasthan High Court

Raju @ Raj Kumar and Hemant Kumar	APPELLANT
Vs	
State of Rajasthan and Others	RESPONDENT

Date of Decision : 14-02-2006

Acts Referred:

Arms Act, 1959 — Section 25, 27, 3, 33
Penal Code, 1860 (IPC) — Section 103, 104, 149, 302, 304

Citation : (2006) 4 RLW 3409

Hon'ble Judges : Shiv Kumar Sharma, J;R.S. Chauhan, J

Bench : Division Bench

Judgement

R.S. Chauhan, J.—Arising out of the same incident, the two appellants Raju @ Raj Kumar and Hemant Kumar have been convicted vide judgment dated July 17, 2000 and the third appellant Manoj Kumar has been convicted vide judgment dated July 11, 2003. Since both the judgments under challenge deal with the same incident, they are being decided by this common judgment.

2. Vide judgment dated July 17, 2000, the appellant Raju @ Raj Kumar, has been convicted for offences u/s 302 IPC and Sections 3/25 & 3/27 of the Arms Act. For offence u/s 302, he has been sentenced to life imprisonment and imposed with a fine of Rs. 1,000/- and to further undergo a sentence of one month simple imprisonment in default thereof. For offence u/s 3/25, he has been sentenced to five years imprisonment and imposed with a fine of Rs. 1,000/-. For offence u/s 3/27, he has been convicted and sentenced to 7 years rigorous imprisonment and imposed with a fine of Rs. 1,000/-. In case of default in payment of fine for both the aforementioned offences, he has been further directed to undergo one months of simple imprisonment.

3. The appellant No. 2, Hemant Kumar, has been convicted for offence u/s 302/34 and has been sentenced to life imprisonment and has been imposed with a fine of Rs. 1,000/- and to further undergo a sentence of one month simple imprisonment in default thereof.

4. Vide judgment dated July 11, 2003 the appellant No. 3, Manoj Kumar has also

been convicted for offence u/s 302/34 IPC and has been sentenced to life imprisonment and imposed with a fine of Rs. 1,000/- and to further undergo for one month simple imprisonment in default thereof. Hence the appellants have challenged these two judgments before us.

5. The brief facts of the case are that statement of Anirudh (the deceased in this case) was recorded by the police at Sri Kalyan Hospital, Sikar on May 26, 1998. In his statement, he claimed that around 8.30 PM his brother Basant Mishra (PW. 4), Mahesh Kumar Saini (PW. 3) and he had gone to their plot situated in Lisadia ka Bas. Next to that plot is a house of Phool ji Lisadiya. At that time on the roof of Phoolji's house, the son of Ram Niwas and the children of Shanti Prasad were present. According to him, they first abused him and then opened fire. He was hit on the right side of his chest. His brother, Umesh Mishra, brought him to the Hospital. He further claimed that family of Ram Niwas and Shanti Prasad were inclined to take possession of their plot. Therefore, an animosity had arisen between them. He further claimed that he does not know the names of the children of Ram Niwas and Shanti Prasad. On the basis of the said statement, the police chalked out a formal FIR (FIR No. 243/1998) for offences under Sections 307 & 149 IPC. However, after the death of Anirudh, the offence u/s 302 IPC was also added and the investigation commenced. During the course of investigation, Raju and Hemant were arrested and Manoj was declared as an absconder. The charge sheet was filed against Raju and Hemant Kumar for offences, under Sections 302, 302/34 IPC and for offences under Sections 3/25, 3/27 & 3/33 of the Arms Act. After Manoj was arrested, a supplementary charge sheet was submitted against him for offence u/s 302/34 IPC. In order to prove its case in the first trial, the prosecution examined as many as 16 witnesses and submitted 37 documents. They also submitted 8 articles. In the second trial, the prosecution examined as many as 12 witnesses and submitted 37 documents. The defence produced a single witness and submitted 4 documents. After examining the oral and documentary evidence, vide judgment dated July 17, 2000 the appellants No. 1 & 2 were convicted and sentenced as aforesaid and vide judgment dated July 11, 2003, the appellant No. 32 as convicted and sentenced as aforementioned.

6. Mr. S.R. Bajwa, Senior Advocate, learned Counsel for the appellants, has initially argued that the parcha bayan of the deceased, Anirudh, could not even be recorded. According to the Bed Head Ticket (Ex. D-4), when Anirudh was brought to the hospital his blood pressure was unrecordable and he was already in shock. The Bed Head Ticket recorded at 9-10 PM clearly shows that neither the pulse nor blood pressure was recordable and by 9.45 PM, there was no pulse and no blood pressure. Since during this period of 35 minutes, the patient was in shock, the parcha bayan could not be recorded. Even Doctor who has signed the fitness certificate has not been examined by the prosecution. In the parcha bayan the deceased does not reveal the presence of his brother Anjani and Umesh at the time of death. However, the prosecution has presented both of them as eye witnesses of the incident. But during the course of arguments, Mr. S.R.

Bajwa argued that the plot did not belong to the complainant party. In fact, the possession of the plot was with the accused party. He drew our attention to both the judgments under consideration and claimed that since the possession of the plot was with the accused persons since the complainant party was trying to take the possession of the plot, therefore, in the right of private defence of the property, the incident had occurred. He further contended that Section 103 IPC enumerates the circumstances under which the right of private defence can be extended to causing of death. However, he fairly conceded that none of these circumstances existed in the present case. Therefore, according to him, the appellants had exceeded the right of private defence of the property. He has further argued that in case of right of private defence of the property, the common intention is not to commit an offence but the intention is to defend the property, which is under immediate danger. Therefore, according to him, the co-accused, Hemant and Manoj, cannot be held vicariously liable for the commission of an offence. Since Raju has exceeded the right of private defence, he cannot be convicted for offence u/s 302 IPC. At best he can be convicted for offence u/s 304 Part I IPC.

7. On the other hand, the learned public prosecutor, Mr. R.P. Kuldeep, has argued that it is a case of direct evidence, wherein Anjani Kumar (PW. 1), Mahesh Kumar (PW. 2), Basant Kumar (PW. 4) and Ramesh @ Umesh (PW. 5) are the eye witnesses. According to testimony of Ramesh @ Umesh (PW. 5), the said plot was bought on June 27, 1986 from Parsaram Lasadiya for Rs. 20,000/-. He also sought permission from the Municipality for construction of a house and in order to start the construction, he had sent a truck load of stones on the plot. He further argued that therefore, possession was with the complainant. Hence, the right of private defence of property cannot be taken by the accused. According to him, the accused were the aggressors. According to the eye witnesses, Raju had fired the single shot, which eventually killed Aniruth. Therefore, he has supported the impugned judgments.

8. We have heard both the learned Counsel for the parties and have critically examined the record and scanned the impugned judgments.

9. Death of Anirudh was undeniably homicidal in nature.

As per autopsy report (Ex. P. 24) the deceased sustained following antemortem injuries:

1. Lacerated perforating wound 3/4cm x 1/2 cm x deep in thoracic cavity obliquely, going inside, oval in shape, edges are inverted. Surrounding skin is reddish, edges are dark in colour just at chest anteriorly at anterior board of axilla at right side chest. Muscles are pink in colour, wound present in between 3rd and 4th costal margin.

2. Lacerated wound 1 1/2 cm x 1cm x Deep in thoracic cavity at chest right side posteriorly in between 10th and 11th rib near vertebral column edges are averted refused bleeding from wounds, wound No. 1 and 2 are (torn).

According to Dr. G.R. Tanwar (PW. 10) cause of death was shock due to excessive hemorrhage and injury to lung.

10. Coming to the prosecution evidence we notice that alleged eye witnesses examined by the prosecution viz. Anjani Kumar (PW. 1), Basant Kumar (PW. 4) and Ramesh @ Umesh (PW. 5) are real brothers of the deceased. In his deposition Anjani Kumar stated that on May 26, 1998 while he along with his brother Ramesh, Basant and Anirudh and one Mahesh Saini had been to his plot, appellants Hemant Manoj and Raj Kumar came over there around 8.45 PM and climbed on the roof of house of Phool Chand. Hemant was armed with rifle and bullet-belt. They started hurling abuses and threatened the informant and his brothers and asked them to leave the plot. Altercation took place. Thereafter Hemant handed over rifle to Raj Kumar who opened fire that hit Anirudh. In the cross examination he stated thus:

;g lgh gS fd Nr ij pdj gekjs dks tksj ls xkfy;ka nh fd fudy tkvksa ojuk tku ls ekj nsaxsA xksyh pyh mlls igys ikap lkr feuV rd oks gh tksj tksj ls cksyrs jgsA

Statements of Anjani Kumar gets corroboration from the testimony of Mahesh Saini (PW. 2), Basant Kumar (PW. 4) and Ramesh @ Umesh (PW. 5).

11. Ramesh (PW. 5) however deposed that he had purchased the plot through registered sale deed from Paras Ram but after the execution of sale deed dispute arose between Paras Ram and Phool Chand and civil suit was instituted which came to be decided in favour of Paras Ram on September 17, 1997. On October 20, 1997 he moved application in the Municipal Council seeking permission to make construction over the plot. On May 26, 1998 he had apprehension that Shanti Prasad and his sons would have taken possession of the plot therefore he had sent Basant and Anirudh to take care of the plot. In the cross examination he admitted that in 1997 when he purchased the plot, permission to make construction over the plot was not accorded to him. It was only prior to four days of the incident, that the permission was granted in his favour. In the Municipal Council two three persons raised objections and opposed granting of permission in his favour. He admitted that he is the brother of Ghanshyam Tiwari, who was the Vice President of the State Organisation of ruling party. He denied this suggestion that he was involved in unauthorised work of making possession of the properties. He also denied this fact that plot belonged to Phool Chand who mortgaged it with Shanti Kumar (father of appellants). He admitted that the accused did not have any talk with the deceased. He stated thus:

;g lgh gS fd eqyfteku ds Nr ij vkus ds ckn tks Hkh ckr gqbZ og esjs o clUr ls gqbZ vfu;) ls mldh dksbZ ckrphr ugha gqbZa

12. Bhagwan Singh, Investigating Officer (PW. 12) stated in the cross examination thus:

;g lgh gS fd esjh rQrh?k esa ;g vk;k Fkk fd ;g >xM+k fdLh IyKV ds fookn dks ysdj gqvK gSA

13. Factual situation emerges from the material on record may be summarised thus:

(i) Incident occurred in the night around 8.45 PM and there is nothing on record to show that there was any source of light at the place of incident.

(ii) The parties were litigating in the court claiming ownership and possession over plot in dispute.

(iii) Just before the four days of the incident, Municipal Council granted permission for raising construction over the plot in favour of complainant party.

(iv) In order to raise construction over the plot the complainant party got empty a truck loaded with stones over the said plot, a few days prior to the incident.

(v) On the date of incident complainant party had apprehension that the accused party would take possession of the plot, therefore, the deceased with his brothers had gone to the plot to restrain the complainant party from entering the plot.

(vi) Before accused Raj Kumar opened fire, altercation took place between the complainant party and the accused party.

(vii) Contention of the accused party before the trial court was that original owner of the plot Phool Chand had mortgaged the said plot to Shanti Kumar, the father of the accused. Since they were in possession of the plot, they had right to defend their property and in order to oust the complainant party from the plot Raj Kumar opened fire that unfortunately hit the deceased.

14. Section 97 IPC recognises the right of a person not only to defend his own or another's body but to defend his own or another's property even against an attempt to inflict any offensive act as against the property. It is now well settled that if a man's property is in imminent danger of being impaired or attacked he has the right to resort to such measures as would be reasonably necessary to thwart the attempt, to protect his property. 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 in 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 ensure, 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.

15. In the case on hand the complainant party appears to have dispossessed the accused persons from the plot which according to accused persons was in their possession being mortgaged by the original owner in the name of their father. The act of complainant party amounted to mischief in the eye of accused persons and to thwart the same one of the accused persons viz. Raj Kumar who gunned-down one of the mischief-makers in the course of exercise of right of private defence of the property obviously acted far in excess of the right of private defence and is guilty of committing offence punishable u/s 304 Part I IPC.

16. The question that arises at this juncture is whether appellants Hemant Kumar and Manoj Kumar could be convicted u/s 302/34 IPC. As already noticed by us the object of the appellants was not to kill the deceased but to protect their property. 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.

17. In the instant case since the object of all the three appellants was not to kill the deceased but to protect their property and appellant Raj Kumar obviously acted far in excess of the right of private defence, he can be held individually responsible and the conviction of co-appellants Hemant Kumar and Manoj Kumar with the said of Section 34 IPC cannot be sustained.

18. In the ultimate analysis appellant Raju @ Raj Kumar is found guilty under Sections 304 Part IPC and 3/25 Arms Act. He stands acquitted of the charge u/s 3/27 Arms Act. Appellants Hemant Kumar and Manoj Kumar are not found guilty u/s 302/34 IPC.

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

(i) We allow the appeals of appellants Hemant Kumar and Manoj Kumar and set

aside their conviction and sentence u/s 302/34 IPC and acquit them of the said charge. They are on bail, they need not surrender and their bail bonds stand discharged.

(ii) We partly allowed the appeal of appellant Raju @ Raj Kumar and instead of Section 302 IPC we convict him u/s 304 Part I IPC and sentence him to suffer rigorous imprisonment for ten years and fine of Rs. 500/- in default to further suffer six months rigorous imprisonment. The conviction and sentence of appellant Raju @ Raj Kumar u/s 3/25 Arms Act however stand confirmed. Substantive sentences shall run concurrently.

(iii) The impugned judgments of learned trial Court stand modified as indicated above.