

(1977) 01 MP CK 0028

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 460 of 1970

State of Madhya Pradesh

APPELLANT

Vs

Salikram Manbodh and others

RESPONDENT

Date of Decision : 17-01-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 100, 302, 304, 324, 34

Citation : (1978) ILR (MP) 1061 : (1977) JLJ 808

Hon'ble Judges : N.C. Dwivedi, J;C.P. Sen, J

Bench : Division Bench

Advocate : M.V. Tamaskar, Govt, for the Appellant; Rajendra Singh, for the Respondent

Judgement

N.C. Dwivedi, J.—In this appeal, the State of M.P. has challenged the order of acquittal of the respondents Salikram, Milau and Khilau u/s 302/34 of the Indian Penal Code and that of Milau u/s 324, Indian Penal Code recorded by the First Additional Sessions Judge, Bilaspur, in sessions trial No. 158 of 1969, decided on 31-1-1970.

2. The prosecution case is this: The deceased Sahorik was the elder brother of the respondent Salikram. Respondents Milau and Khilau are the sons of the respondent Salikram. Salikram (P.W. 1) is the son, Mst. Chandra-kali (P.W. 14) the widow and Mst. Fulkunwar (P.W. 15) the mother-in-law of the deceased. Sonudas (P.W. 3) is the Kotwar of the village. In the year 1953, a partition took place between the deceased and the respondent Salikram in which the field known as "Bandhiyawala" fell to the share of the respondent Salikram. Though in the revenue records, names of the deceased and the respondent Salikram continued, yet the respondent Salikram was in its possession and was cultivating it.

3. On 21-6-1969, Sitaram (P.W. 1) and Vedprasad (P.W. 2) his servant went to the Bandhiyawala field for ploughing it and thereafter sowing it. They had ploughs with them which were driven by Sitaram and Vedprasad. The deceased

was sowing seeds. The three respondents, duly armed, went to the Bandhiyawala field and asked the deceased Sahorik and Sitaram (P.W. 1) to desist from ploughing the field which was not agreed to by them. The respondent Milau then attacked Sitaram (P.W. 1) with an axe. Seeing this, the deceased Sahorik rushed to save his son, but the respondent Salikram gave repeated blows to him with Kudali. The other two respondents Milau and Khilau also attacked Sahorik with axe and lathi. Seeing this, Sitaram (P.W. 1) rushed to the village for help and informed Sonudas Kotwar (P.W. 3). The village people collected there and saw Sahorik lying dead in the field. Sitaram went to the police station and lodged the F. I. R. Ex. P-1 at 1.15 p. m. the same day.

4. The three respondents, duly armed, returned back to the village and informed the village people that they had killed Sahorik. respondent Salikram slapped Mst. Fulkunwar (P.W. 15) and respondent Milau dealt a lathi blow on the waist of Mst. Chandrakali (P.W. 14).

5. An inquest was held over the dead body of Sahorik as per panchnama Ex. P-5.

6. Dr. T.S. Singh (P.W. 16) performed the post mortem examination on the dead body of Sahorik on 23-6-1969 and as per report Ex. P-26, found the following marks of external injuries on the body of the deceased:

(i) Compound fracture of left fibula and tibia in their middle caused by hard and blunt object.

(ii) Lacerated wound 1" x 1/2" skin deep on the right leg in its upper third on the outer aspect caused by hard and blunt object.

(iii) Lacerated wound 1 1/4" x 1/2" x skin deep at the back of elbow joint caused by hard and blunt object.

(iv) Lacerated wound 2" X 1/2"x bone deep on the back of left palm, caused by hard and blunt object.

Dr. Singh stated that the body was highly decomposed and skin peeled off. Therefore, no other external marks of injuries could be detected. He further found fracture of 5th to 9th ribs on the left side of chest. Pleura of left side was punctured and left lung was also punctured. In his opinion, the death occurred due to shock and haemorrhage as a result of puncture of left lung and fracture of the ribs, tibia and fibula.

7. Dr. Balkrishna Tiwari (P.W. 19) examined the respondent Salikram and as per report Ex. P-31, found a swelling over the index and middle finger of right hand. The injury was simple in nature and could be caused by hard and blunt object. He had advised X-ray to exclude fracture.

8. Dr. R.P. Awasthi (P.W. 25) examined Sitaram (P.W.1) on 21-6-1969 and found two incised wounds on his nose and over the left ear which could be caused by sharp edged weapon like an axe. (Vide Ex. P-37). He also examined Mst. Chandrakali (P.W. 14) and found a contusion over the left buttock caused by hard

and blunt object. (Vide Ex. P-38). He also examined Mst. Fulkunwar (P.W. 15), but. found no external injury on her person. (Vide Ex. P-39).

9. Head Constable Suryadatta (P.W. 26), on the memorandums of the respondents, seized Kudali, lathi and axe. Vide Exhibits P-7, P-9, P-10, P-11, P-12 and P-22). He also seized clothes from the person of the respondents and the deceased. He also seized the written Panch Faisla Ex. P-14.

10. The respondents asserted that they were in continuous possession of the Bandhiyawala field on the basis of the Panch Faisla. On that day, Sitaram (P.W. 1) and Vedprasad (P.W. 2) were ploughing the field and did not desist from ploughing it inspite of their protests. On this, the respondent Milan unyoked their bullocks, Sitaram (P.W. 1) dealt an axe blow on the respondent Milau which gave way and injured him. Deceased Sahorik rushed at them with a lathi and assaulted respondent Salikram with the result that his hand was fractured and in defence of person, they attacked Sahorik.

11. The Additional Sessions Judge, after scrutiny of the prosecution evidence, recorded the following findings:

(i) It has been established beyond doubt that Sahorik died on 21-6-1969.

(ii) It has been proved beyond reasonable doubt that death of Sahorik was homicidal in nature.

(iii) The prosecution evidence clearly established that the respondent Salikram was in possession of the Bandhiyawala field since long upto the date of occurrence.

(iv) The act of deceased Sahorik, Sitaram (P.W.1) and Vedprasad (P.W. 2) in going to the Bandhiyawala field for ploughing it, would amount to criminal trespass.

(v) It has not been established beyond reasonable doubt that the respondents belaboured the deceased after he had fallen down.

(vi) The prosecution failed to explain the injury, on the, person of respondent Salikram and this failure on the part of the prosecution shows that the evidence of the prosecution witnesses is not true, or at any rate, wholly true.

(vii) The act of the respondent Milau in causing hurt to Sitaram (P.W. 1) is wholly covered by right of private defence of property because at that time the criminal trespass continued.

(viii) Non-explanation of the injuries on the person of respondent Salikram, considered along with the fact that the, deceased, had also gone to the field with the lathi (Article D), probalised that the deceased had given a blow on the hand of the respondent Salikram.

(ix) The defence of the respondents that they acted in exercise of right of defence of person and property. has been probalised, because the deceased

was not in possession of the Bandhiyawala field and had gone there armed to plough it.

(x) The injury on the person of Salikram and the bullying nature of the deceased brought the act of the respondents squarely within the four corners of section 100 of the Indian Penal Code.

(xi) The respondents did not exceed the right of defence of person or of property.

12. On the aforesaid findings, the Additional Sessions Judge held that the respondents were protected in their action because they assaulted Sitaram (P.W. 1) and deceased Sahorik in exercise of right of defence of person and property and thus committed no offence. These findings resulted in the order of acquittal of the respondents u/s 302/34 of the Indian Penal Code. The State of M.P., feeling aggrieved, has filed this appeal.

13. Before us, Shri Tamaskar, Govt. Advocate for the State, strenuously contended that the deceased Sahorik and his son Sitaram (P.W. 1) were in possession of the Bandhiyawala field on 21-6-1969. He, however, could not point out the material in support of his contention.

14. The oral evidence adduced in this case conclusively established that in the partition as per Ex. P-14, Bandhiyawala field fell to the share of the respondent Salikram. Besides other evidence, the evidence of Santram Patwari (P.W. 18) is conclusive to establish that in the Sanshodhan Panji, Kh. No. 457/1 was recorded in the name of respondent Salikram and he was in possession thereof. The revenue entries Exhibits P-42 to P-44 also record the respondent Salikram in possession of Khasra No. 457/1.

15. The contention of some of the prosecution witnesses that Sahorik entered into possession because of failure of the respondent Salikram to pay rent has no substance. Similarly we find that the entry of Gangaram into possession of half of the disputed field is also of no consequence. The oral evidence is overwhelming to establish the possession of the respondent Salikram over the Bandhiyawala field and the Panch Faisla Ex. P-14 re-inforced that possession. We are in total agreement with the finding of the Additional Sessions Judge that the respondents were in continuous and cultivating possession of the Bandhiyawala field till the date of incident. In view of this, the attempt of Sitaram (P.W. 1), Vedprasad (P.W. 2) and the deceased Sahorik in going to the field with ploughs and their attempt to plough or sow it, was definitely wrongful.

16. We will now scrutinise the prosecution evidence keeping in view the finding that the respondents were in continuous and cultivating possession of the Bandhiyawala field and that the deceased Sahorik, with Sitaram (P.W. 1) and Vedprasad (P.W. 2), had gone to forcibly plough and disturb the respondents' possession.

18. According to the prosecution, the two respondents Milau and Khilau asked Sitaram and his servant Vedprakash to desist from ploughing the field, but they

were adamant and were not agreeable to stop the ploughing. In the circumstances, the respondent Milau gave an axe blow to Sitaram. The evidence of Dr. R.P. Awasthi (P.W. 25) shows that Sitaram had sustained an incised wound over the bridge of his nose and a linear incised wound over his left ear. These injuries could be caused by an axe. The evidence of Dr. Awasthi shows that the injuries were caused by a very light pressure like a slipping stroke.

19. Thus the prosecution evidence, together with the opinion of Dr. Awasthi (P.W. 25), shows that the respondent Milau first requested Sitaram and his servant to desist from ploughing the field, which was admittedly in his possession and on their refusal to do so, gave only a light blow with an axe. Since the respondents were in possession of the Bandhiyawala field and since Sitaram and his servant had gone there to forcibly disturb their possession, they were entitled to resist the dispossession and used force less of grievous hurt or death and, therefore, from the facts and circumstances of the case, we find that the action of the respondents Milau and Khilau in resisting the possession and in causing a minor injury to Sitaram (P.W. 1) was definitely protected by the right of exercise of defence of property.

20. We will now scrutinise the case of the three respondents in regard to deceased Sahorik. The prosecution version was that the deceased had gone to save his son Sitaram who was attacked and was felled down by the respondents Milau and Khilau. Though the prosecution has alleged that Sahorik was unarmed, we find on the evidence of Sitaram (P.W. 1, para 5) and Vedprasad (P.W. 2, para 8) that Sahorik had gone with a lathi. The prosecution evidence, however, does not disclose that Sahorik had used the lathi on the respondents. We find overwhelming evidence that the respondent Salik had dealt repeated Kudali blows on Sahorik. No doubt the prosecution evidence further shows that the two respondents Milau and Khilau had also participated in the attack on Sahorik, but we do not find that the evidence is convincing. In para 10, Vedprasad had to admit that there is omission in Exhibits D-2 to D-4 that the three respondents had assaulted Sahorik after he had fallen down.

21. The evidence of Anjori (P. W. 9) is also not convincing that the two respondents had also attacked Sahorik. In para 6, he was unable to say on what part of the body the axe of Milau fell on Sahorik. He also could not say on what part of the body of Sahorik fell the tutari blow of Khilau. In the F.I. R. (Ex. P-I), there is no mention that the respondents Milau and Khilau took part in assaulting Sahorik after he had fallen down. We are, therefore, not inclined to accept that the two respondents Milau and Khilau had taken part in assaulting the deceased Sahorik along with their father Salik or after the deceased had fallen down.

22. We find the prosecution evidence reliable to the extent that the respondent Salik had given repeated Kudali blows to the deceased Sahorik. In this connection, there is overwhelming evidence of number of eye-witnesses that while the respondents were returning to their houses, the respondent Salik admitted that he had killed Sahorik. We find the evidence of extra judicial

confession made by respondent Salik fully reliable. In fact this has not been denied by Salik who admitted that he had attacked Sahorik with bansi and kudali. His contention was that Sahorik had attacked him with a lathi which fractured his finger and, therefore, in defence of person, he had attacked him.

23. We will scrutinise the evidence with a view to find out whether the respondent Salik had the right of defence of person or property and whether he was totally protected by the exercise of these rights or whether he had exceeded the right of defence of person. In this connection we will first quote the following observations from Puran Singh and Others Vs. The State of Punjab, :

The right of private defence of person or property is to be exercised under the the following limitations:

- (i) that if there is sufficient time for recourse to the public authorities, the right is not available;
- (ii) that more harm than necessary should not be caused; and
- (iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned."

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"The right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation."

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"The question whether a person having a right of private defence has used more force than is necessary, would depend on the facts and circumstances of a particular case.

24. In view of the above, the respondents definitely had a right of defence of property and they were entitled to use force short of grievous hurt or death. However, in this case there has been the death of Sahorik and the medical evidence shows that he had suffered number of injuries including number of fractures. Shri Rajendrasingh Advocate for the respondents, however, contended that since injury marks were not found on the subcutaneous tissues and muscles, this indicated absence of injuries on the body of the deceased. (See Dr. T.S. Singh P.W. 16, para 12). Dr. Singh stated that the body was highly decomposed and skin had peeled off and hence no other external mark of injury could be detected. His evidence as a whole, shows that marks of injuries internally could not be detected because of the high state of decomposition of the body. Therefore, absence of external injuries over the ribs, pleura of left side and puncture of left lung could not negative the prosecution case that no external

injury was caused over these parts. We find no substance in the contention that these injuries could be caused by a fall and no such suggestion was made to the Doctor. Even otherwise, number of fractures with puncture of the pleura of left lung could not be caused by a simple fall. We are, therefore, of the view that the injuries found on the person of the deceased Sahorik with fractures were caused by blows inflicted by the assailants.

25. Shri rajendrasingh for the respondents contended that the fractures could not be attributed to the respondent Salik, because there is no clear evidence that the injuries over these parts were inflicted by the respondent. There is positive evidence that the injuries were inflicted over the back and below the arm-pit. Sitaram (P.W. 1) stated that the respondent Salik had given a Kudali blow on the back. In para. 14, he stated that the blows fell on the back and near the arm. Vedprasad (P.W. 2) stated that the respondent's stroke fell on the back and below it. Anjori (P.W. 9) stated that the Kudali stroke fell below the neck and the second stroke below the back portion. Thus the prosecution witnesses have stated that the Kudali blows fell below the neck and on the back and, therefore, by these strokes with a Kudali having a pointed long blade, pleura and lung could definitely be injured.

26. We are, therefore, of the view that the injuries found on the person of Sahorik were caused by the Kudali strokes given by the respondent Salik and this is further established by his extra judicial confession made before number of persons that he had killed Sahorik. In view of the serious injuries found on Sahorik which in the medical opinion were responsible for his death, the question is whether the respondent Salik had apprehension of grievous hurt or death and whether he was fully protected by exercise of right of defence of person.

27. We will mention that Dr. Balkrishna Tiwari (P.W. 19) examined Salik and found a swelling over the index and middle finger of right hand. The respondent stated that he had suffered a fracture. Though X-ray was advised, no X-ray was taken and, therefore, Shri Rajendrasingh contended that the respondent Salik's statement that he had suffered a fracture, should be accepted. We are not in agreement with this approach because the evidence of Dr. Bal-krishna Tiwari is definite that the movements were normal and the injury was simple. In para 3, he made a definite statement that the injury was superficial. There is possibility that such an injury could be caused by wielding of the Kudali and this is supported by the evidence of Dr. Balkrishna Tiwari.

28. We will, however, examine the case of respondent Salik in regard to right of defence of person taking it for granted that he had received a lathi stroke from the deceased Sahorik. Before we examine this aspect, we will refer to State of Gujarat Vs. Bai Fatima and Another, wherein it has been held that in a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(i) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

(ii) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(iii) It does not affect the prosecution case at all.

29. Shri Rajendrasingh's main contention was that failure of the prosecution witnesses to explain the injury on the person of the respondent Salik probalised the right of defence of person of the respondent. The injury was superficial and on no account could it raise an apprehension of grievous hurt or death. Dr. Balkrishna (P.W. 19) was definite that the injury was simple and superficial and he had only advised X-ray to exclude fracture. Clinically, therefore, no fracture was detected and, therefore, failure of the prosecution to furnish the X-ray could not establish the presence of a fracture on the person of respondent Salik. In the circumstances, firstly the deceased came to save and intervene in the fight between his son Sitaram (P.W. 1) and the respondent Milau and secondly, even if he is held to have used a lathi, he caused such a minor injury which could, under no circumstances, raise any apprehension of grievous hurt or of death.

30. The injuries inflicted on the deceased Sahorik are four externally with fracture of 5th, 6th, 7th and 9th ribs of the chest. Pleura on the left side was punctured and left lung was also punctured. Looking to the superficial nature of the injury of the respondent, it could be said that he (Salik) used excessive force than was necessary either to ward off the attack on him to the property. In both the cases, i. e. of defence of person and property, the respondent Salik could have ousted the deceased by using minimum force of by dealing a Kudali blow on the lathi of the deceased, thus disarming him,

31. As stated above, the deceased had no right to disturb the possession of the respondents and they had every light to oust him by using minimum force. Secondly with the injury on the person of respondent Salik which was of a superficial nature, the apprehension could not be of grievous hurt or hurt or death of the respondent Salik and he definitely exceeded the right both in respect of property and person. The prosecution evidence is sufficient to hold that the respondent Salik was armed with a Kudali, that he used the same repeatedly and his extra judicial confession which was voluntary, also connected him with the Kudali attack on the deceased.

32. The evidence of Dr. T.S. Singh (P.W. 16) established that death of Sahorik occurred as a result of puncture of left lung and fracture of the ribs, tibia and fibula. In the circumstances of the case, even holding that there was right of defence of person and property, failure of the prosecution witnesses to explain the injury on the person of the respondent Salik, we are of the view that the prosecution case remains unaffected and the act of the respondent Salik was

definitely disproportionate to the occasion. Therefore, the respondent Salik will be held to have exceeded the right of defence of person and property and would be liable to be convicted.

33. In view of the above, the order of acquittal of the respondents Milau and Khilau is justified as their action is fully covered by the observations made in *Puran Singh and others. v. State of Punjab* (cited supra). The order of acquittal of the respondent Salik does not appear to be justified and the views of the Additional Sessions Judge appear to be erroneous in so far as they relate to him. respondent Salik is liable to be convicted u/s 304, Part I of the Indian Penal Code.

34. In regard to sentence, the entire incident came of because the deceased and his son had gone to dispossess the respondents who were in continuous possession of the field. Though the respondent Salik had the right of person and property, he should not have inflicted such serious injuries causing the death of Sahorik, his own elder brother. We find that sentence of five years" rigorous imprisonment would meet the ends of justice.

35. For the reasons given above, the appeal preferred by the State of M.P. challenging the order of acquittal of respondents Milau and Khilau fails and is hereby dismissed. The order of acquittal of the two respondents Milau and Khilau u/s 302/34 of the Indian Penal Code and that of respondent Milau u/s 324 of the Indian Penal Code is confirmed.

36. The appeal of the State of M.P. challenging the order of acquittal of the respondent Salik u/s 302/34 of the Indian Penal Code is partly allowed. The order of acquittal of the respondent Salik is set aside and he is convicted u/s 304, Part I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years.