Subramani And Ors vs State Of Tamil Nadu on 28 August, 2002

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Bench: N. Santosh Hegde, B.P. Singh

CASE NO.:
Appeal (crl.) 1225 of 2001

PETITIONER:
SUBRAMANI AND ORS.

Vs.

RESPONDENT:
STATE OF TAMIL NADU

DATE OF JUDGMENT: 28/08/2002

BENCH:
N. SANTOSH HEGDE & B.P. SINGH.

JUDGMENT:

B.P. Singh, J.

This appeal by special leave is directed against the judgment and order of the High Court of Judicature at Madras dated 17.04.2001 in Criminal Appeal No. 602 of 1992. There are four appellants in this appeal. Appellant No.1, Subramani is the father of the remaining appellants namely, Venkatesan (appellant No.2), Ganesan (appellant No.3) and Govindaraj (appellant No.4).

They have impugned the judgment and order of the High Court whereby while setting aside their conviction under Sections 302 and 302/34 I.P.C., the High Court found them guilty of having exceeded their right of self-defence and found them guilty of the offence punishable under Section 304 Part I read with Section 34 I.P.C. The High Court also found the appellants guilty variously of the offences under Section 324 and Section 326 I.P.C. However, the High Court acquitted them of the charge under Section 447 I.P.C. on a finding that the land in question was in their cultivating possession as tenants and therefore in the facts and circumstances of the case they could not be held guilty of the offence of criminal trespass. Apart from the appellants herein, two others namely accused Nos.5 and 6 were put up for trial before the Court of Sessions in Sessions Case No. 46 of 1992 charged variously of offences under Sections 302, 302/34, 324, 326 I.P.C. read with Section 149 I.P.C. as also under Sections 147, 148 and 447 I.P.C. The learned Sessions Judge, however, acquitted accused Nos. 5 and 6 finding no evidence against them, but found the appellants herein guilty and sentenced them to various terms of imprisonment under different Sections of the I.P.C. Appellants No.1 and 2 were convicted by the Trial Court for the offence under Section 302 I.P.C. and appellants No.3 and 4 for the offence under Sections 302/34 I.P.C., and sentenced to suffer imprisonment for life. All the appellants were also found guilty of the offence under Section 447 I.P.C. for which they were sentenced to three months rigorous imprisonment. Appellants 1 and 3 were found guilty of the offences under Sections 324 and 326 I.P.C and sentenced to rigorous imprisonment for 2 years and 5 years respectively under the aforesaid sections. Appellants No.2 and 4 were found guilty of the offence under Section 324 I.P.C. and sentenced to two years rigorous imprisonment.

The occurrence giving rise to this appeal is alleged to have taken place on 20th April, 1991. The case of the prosecution is that the deceased Jayavelu purchased 1.83 acres of land in Survey No.56/1 in Renukapuram from Murugesa Mudaliar and Savithri. However, appellant No.1 herein who was the cultivating tenant of the aforesaid land was obstructing delivery of possession of the land to the deceased who had purchased this land. Panchayat had been convened which had decided that half of the land should be retained by the deceased purchaser and the other half should be given to appellant No.1 who should pay the price thereof within three months. Appellant No.1 did not pay the price of half portion of the land, and continued in possession of the entire plot. On the evening of 19th April, 1991, the deceased attempted to plough the said plot which was in possession of appellant No.1, but the appellant No.1 protested, which compelled the deceased to stop ploughing that land. After this incident the deceased went away. However, at about 6.00 a.m. on 20th April, 1991, the deceased along with PWs. 1, 2, 3 and Sikamani again went to plough the land and commenced agricultural operations. PWs 2 and 3 were the daughters of the deceased while Sikamani (not examined) was his son. PW 1 is the husband of PW 2. When Sikamani was ploughing the land, PW 1 stood on the ridge and PWs 2 and 3 were manuring the land. On coming to know of this the appellants and accused 5 and 6 (since acquitted), came and protested against the ploughing of the land which was in possession of the appellants. The prosecution allegation is that appellants No.1 to 4 had carried spade, crowbar, knife etc. while accused 5 and 6 came unarmed. Appellant No.1 prevented the deceased from ploughing the land even though the deceased offered to pay the price of the land. The case of the prosecution is that thereafter appellant Nos.1 to 4 assaulted the deceased with their weapons while accused 5 and 6 gave him blows with their fists. When PWs 1, 2, 3 and Sikamani intervened to save the deceased they were also assaulted. Sikamani was assaulted by

appellant No.1 and accused Nos. 5 and

6. PW 2 was similarly assaulted by appellant Nos.1, 3 and 4 while appellants No.5 and 6 gave her fist blows. PW 3 was assaulted by appellants 1, 2 and 3 while PW 1 was assaulted by all the appellants and accused 5 and 6 since acquitted. As a result of the assault PWs 1, 2, 3 as well as Jayavelu (deceased) suffered bleeding injuries and fell down. PW 6, daughter of the deceased, who was a little away from the place of occurrence saw the accused running away with their respective weapons, and also saw the injured lying in the field with bleeding injuries. She, with the help of PW 4 and one other person, removed the injured to the Government hospital at Vellore.

The injured were examined at the Government hospital, Vellore by the Medical Officer, PW-12. He examined the deceased at about 9.15 a.m. and his report is Ex.P 13. PWs 1, 2 and 3 were also examined by him and their injury reports are Exs. P 22, P 17 and P 19 respectively. It is not disputed that Jayavelu died shortly after his admission. Upon his death, death intimation Ex. P 15 was sent to the police out-post and Sub-Inspector, PW 17 was accordingly informed who came to the hospital and recorded the statement of PW 1 (Ex.P 1), on the basis of which a formal FIR was drawn up as Ex.P 2 registering Crime No. 76/91.

It also appears that PW 17, the Sub-Inspector found accused No.2 in the same hospital, undergoing treatment. Appellant No.2 also got his complaint recorded by PW 17 and the same was registered as Crime No.77/91 for offences punishable under Sections 147 and 323 I.P.C.. PW 18, the Inspector of Police took up the investigation of the case and prepared the inquest report. The doctor, PW 13 performed the post mortem examination on the dead body of Jayavelu and the post mortem report is marked as Ex. P 24.

On 21.4.1991 at about 3.00 a.m. appellants No.3 and 4 and accused No. 5 and 6 (since acquitted) were arrested and it is stated that recoveries were made on the basis of the voluntary statements made by appellant No.3 and appellant No.4. It is the case of the prosecution that appellant No.1 on 25.4.1991 at about 10.00 a.m. made an extra judicial confession before PW 9, (Ex. P 11) and later at about 12 noon PW 9 produced him before the police. It is also not disputed that accused No.2 was sent on judicial remand from the hospital itself where he was being treated.

In the course of the investigation the objects recovered on the basis of the statements made by the accused as well as the prosecution witnesses were sent for chemical examination. It appears that the objects recovered at the instance of PW 1 and Sikamani were stained with human blood of "O" group. Similarly, the objects recovered at the instance of PW 3 had human blood of "B" group and those recovered at the instance of PW 2 had human blood of "O" group.

At the trial, appellant No.1 in his examination under Section 313 Cr.P.C. stated that the land in dispute had been in occupation and enjoyment of his family for the last 50 years. On coming to know that the deceased had purchased the land in question he had filed a Civil Suit being OS No.968/84 before the Court of Munsif at Vellore against deceased. An order of injunction was obtained, protecting his possession. So far as the Panchayat is concerned the case of appellant No.1 was that Jayavelu did not execute the sale deed even though the appellant No.1 had procured

non-judicial stamp papers etc. However, Jayavelu (deceased) attempted to cause damage not only to the lands but also the remaining crops. Upon protest by him Jayavelu (deceased) assaulted appellants No.2 to 4. Similar is the stand of appellants No.2 to 4.

The prosecution examined several witnesses to prove its case and the trial court accepting the evidence of PWs 1, 2 and 3 found the appellants guilty of having caused the death of Jayavelu and having assaulted prosecution witnesses 1, 2 and 3. Accordingly, it convicted and sentenced them to various terms of imprisonment as earlier noticed.

It was urged before the High Court, as it has been urged before us, that it was the prosecution party which was the aggressor and which sought to dispossess the appellants of the lands of which they were in possession as cultivating tenants for over 50 years. On the previous evening the prosecution party had attempted to dispossess them, but on their protest they went away. On the day of the incident they again attempted to dispossess the appellants by ploughing the land in question upon which the appellants protested. This provoked the prosecution party to assault the appellants to whom injuries were caused on vital parts of their body. Apprehending danger to their life the appellants defended themselves with whatever they had in their hands in exercise of their right of private defence of person and property. There was no question of criminal trespass, since the land in question was in possession of the appellants and in fact it was the prosecution party which had trespassed upon their land. Moreover, the prosecution was guilty of suppressing material facts of the case. It has failed to explain the injuries suffered by three of the appellants on vital parts of their body, and sought to give an impression to the Court that only the appellants had assaulted them, and that they had not caused injuries to anyone. In fact the manner of occurrence disclosed by the prosecution was a distorted version calculated to support the fake case of the prosecution. It was therefore submitted that the appellants are entitled to acquittal.

The High Court at the threshold noticed the fact that Sikamani who is said to be an eye witness and was also injured in the incident, was not examined as a witness. The High Court, therefore, set aside the conviction of the appellants No.1 and 4 under Section 324 I.P.C. so for as it related to the assault by them on Sikamani.

The High Court noticed that PWs 1 and 2 had one grievous injury each but the injury suffered by PW 3 was only a simple injury. However, it was convinced that the appellants had caused injuries to PW 1 to 3 who had deposed consistently on this aspect of the prosecution case. It therefore sustained their convictions and sentences under Sections 324 and 326 I.P.C.

The High court, however, found that the charge under Section 447 I.P.C namely, criminal trespass, had not been proved. On the contrary, the High Court found that the appellants were in cultivating possession of land as tenants for a long period. There was also a civil litigation between the parties and the appellants had in their favour an order of injunction. The documents produced by the appellants established beyond doubt that till the year 1985 they were certainly in possession of the land in question as cultivating tenants. In view of these findings, the High Court acquitted the appellants of the charge under Section 447 I.P.C. since the prosecution failed to establish that Jayavelu (deceased) was in possession of any part of the land purchased by him.

Regarding the charge under Section 302 and 302/34 I.P.C, the High Court held that appellant No.1 was in possession of the entire extent of land purchased by Jayavelu from Murugesa Mudaliar and Savithri. On the day prior to the date of occurrence the deceased had attempted to plough the land in question which was successfully prevented by the appellants. The decision of the Panchayat was not acted upon by appellant No.1 and the evidence on record disclosed that both parties blamed each other for not executing the sale deed. There was no evidence to show that the land measuring 1.83 acres was ever divided by metes and bounds and any portion allotted to the deceased. The appellants were therefore in possession of the entire plot of land measuring 1.83 acres. After retreating on the first day on protest being raised by the appellants, the deceased again attempted to take possession on the morning of 20th April, 1991. He went to the land in question along with PWs 1 to 3 and started agricultural operations. The appellants protested against the ploughing of their land by the members of the prosecution party. It was in this background that the occurrence took place in which members of both prosecution and the defence party, were injured.

On a consideration of the evidence on record the High Court has recorded a categorical finding that the accused were trying to defend possession of their property when the occurrence took place. It also found that the appellants No.2 to 4 sustained injuries as was evident from the injury reports prepared by PW 12. Appellant No.3 had suffered a lacerated injury on the right parietal region and a contusion on his left leg. Similarly, appellant No.2 had suffered a lacerated injury on the left frontal region. Appellant No.4 had suffered an injury on his right rib back.

The High Court also found that the prosecution had failed to explain the injuries found on appellants No.2 and 4. Not only this the Sub-Inspector , PW 17, who registered the complaint made by appellant No.2 on the same day on which the complaint of PW 1 was registered, did not even get the complaint marked as an Exhibit before the Court of Sessions. The High Court adversely commented on the fairness of the investigation done by PW 18. It observed that he would have done better by placing the entire records relating to the investigation before the Court. The High Court, therefore, observed that the investigating agency was guilty of withholding material records which if placed before the Court may tilt the scale in favour of the accused, and therefore an adverse inference could be drawn against the State for withholding material records.

It is not necessary for us to say anything further on this aspect of the matter. The fact remains that appellant No.2 was being treated in the Government hospital at Vellore at the same time when the injured prosecution witnesses were admitted in the hospital. PW 17 recorded the statement of PW 1 and thereafter recorded the statement of appellant No.2. These facts leave no room for doubt that the members of the prosecution as well as the defence party were injured in the course of the same incident. However, the prosecution witnesses denied any knowledge about the circumstances in which appellants No.2 to 4 sustained injuries. The case made out by the prosecution witnesses is that the appellants assaulted them and there is not even a whisper as to whether they had acted in retaliation. On these facts, the High Court held that the requirements of Exceptions 2 and 4 were established. The High Court then concluded that though the appellants are entitled to the benefit of Exception 2, but the materials available on record made it clear that they acted in excess of their right of self-defence. Therefore, their acts fell within the parameters of Section 304 I.P.C.

Accordingly, the High Court set aside the conviction of the appellants herein under Section 302 and 302/34 I.P.C. but instead found them guilty of the offence punishable under Section 304 Part 1 read with Section 34 I.P.C. The High Court took the view that on the material placed on record it was apparent that a common intention arose at the spur of the moment among the four appellants and in furtherance of that common intention, the deceased and the witnesses came to be attacked. Considering the fact that appellant No.1 was 70 years old in the year 1992, the High Court sentenced him to undergo rigorous imprisonment for three years under Section 304 Part 1 read with Section 34 I.P.C. and further sentenced him to pay a fine of Rs.25,000/- and in default to undergo 9 months rigorous imprisonment. Appellants 2 to 4 were also convicted for the offence under Section 304 Part 1 read with 34 I.P.C. and sentenced to undergo 7 years rigorous imprisonment. It upheld the conviction recorded by the trial court under Sections 324 and 326 I.P.C. but reduced the sentence to two years rigorous imprisonment wherever the sentence was in excess of two years. The sentences were directed to run concurrently.

We observe that the State has not preferred any appeal against the acquittal of the appellants of the charge under Sections 302 and 302/34 IPC. The High Court on a finding that the appellants had exceeded their right of private defence of property, convicted and sentenced them under Section 304 Part I read with Section 34 IPC. Counsel for the appellants rightly submitted that the conviction of the appellants, in the facts of this case, under Section 304 Part I read with Section 34 IPC is clearly illegal. The High Court having found that the appellants acted in exercise of their right of private defence, the conviction of all the appellants with the aid of Section 34 was unwarranted. In our view the submission has force and must be accepted.

It is well settled that once it is held that the accused had the right of private defence and reasonably apprehended that death or grievous bodily hurt would be the consequence if the right of private defence was not exercised, the right of private defence of property extended under Section 103 IPC to voluntarily causing the death of the aggressor subject to restrictions mentioned in Section 99 IPC. In this case, 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 IPC makes it abundantly clear that nothing is an offence which is done in the exercise of the right of private defence. They did not intend to 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. In some what similar circumstances in State of Bihar vs. Mathu Pandey and others :

> SCR 1970 (1) 358 this Court considered the question as to whether the accused could be convicted under Section 302 read with either Section 149 or Section 34 IPC. It observed :-
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> "In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly. Under the fourth clause of Section 141 an

> assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 to 106 dealing with the right of private defence. Under Section 96 nothing is an offence which is done in the exercise of the right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression "to enforce any right or supposed right" in the fourth clause of Section 141."

It, therefore, follows that intention of the appellants was not to cause the death of Jayavelu but they had acted in exercise of their right of private defence. While acting in exercise of 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.

The question still arises whether the appellants can be convicted for having exceeded their right of private defence. In the instant case we are inclined to hold that the appellants had initially acted in exercise of their right of private defence of property, and later in exercise of right of private defence of person. It has been found that three of the appellants were also injured in the same incident. Two of the appellants, namely appellants 2 and 3 had injuries on their head, a vital part of the body. Luckily the injuries did not prove to be fatal because if inflicted with more force, it may have resulted in the fracture of the skull and proved fatal. What is, however, apparent is the fact that the assault on them was not directed on non vital parts of the body, but directed on a vital part of the body such as the head. In these circumstances it is reasonable to infer that the appellants entertained a reasonable apprehension that death or grievous injury may be the consequence of such assault. Their right of private defence, therefore, extended to the voluntarily causing of the death of the assailants.

While it is true that in exercise of the right of private defence only such force may be used as may be necessary, but it is equally well settled that at a time when a person is faced with imminent peril of life and limb of himself or other, he is not expected to weigh in golden scales the precise force needed to repel the danger. Even if he, in the heat of the moment, carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruflled mind, the law makes due allowance for it. (See Mohd. Ramzani vs. State of Delhi : 1980 Suppl. SCC 215).

Mr. Balakrishnan, Senior Advocate appearing for the State, sought to support the conviction of the appellants contending that the members of the prosecution party had already trespassed on the plot of land in question and, therefore, trespass was complete. The appellants, therefore, could not be said to be in possession of the plot in question. Having regard to the facts of this case the submission must be rejected. It was held in Munshi Ram and others vs. Delhi Administration : AIR 1968 SC 702 thus :

> " It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in due course of law he is entitled to defend his possession

> even against the rightful owner. But stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to remove the obstruction even by using necessary force."

The same principle was reiterated in Puran Singh and others vs. The State of Punjab : (1975) 4 SCC 518.

In the instant case the facts found by the High Court are that the appellants were in possession of the plot in question for over 50 years. On the previous evening the prosecution party had attempted to dispossess the appellants but on the protest of the appellants they gave up their plan and retreated. On the following morning they again attempted to take possession of the land by plouging the same and exercising right of ownership. It was at this stage that the appellants appeared on the scene and protested, which ultimately resulted in an assault on them by the members of the prosecution party. In these facts, having regard to the principle aforesaid, it cannot be contended that the members of the prosecution party were in possession of the land in question or that the appellants had no right to evict the trespassers and to assert their right to possess the land. Certainly the prosecution party was not in "settled possession".

Mr. Balakrishnan then submitted that it is not clear as to who started the assault. The prosecution chose to suppress the genesis and the origin of the occurrence and presented a distorted version before the court. The prosecution feigned ignorance about the injuries suffered by the appellants. It is well settled that the onus which rests on the accused person under Section 105 Evidence Act to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt. In the instant case though the appellants had suffered injuries on vital parts of the body, even though simple, the prosecution failed to give any explanation for such injuries. We are not persuaded to accept the submission of learned counsel for the State that the injuries being simple, the prosecution was not obliged to give any explanation for the same. Having regard to the facts of the case the omission on the part of the prosecution to explain the injuries on the person of the accused may give rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence and had thus not presented the true version. It may well be that the prosecution witnesses were lying on a material point and, therefore, render themselves unreliable, or it may be that the defence version explaining the injuries on the person of the accused is probably the true version of the occurrence which certainly throw a serious doubt on the prosecution case. In these circumstances and having regard to the findings recorded by the High Court we are satisfied that the appellants were fully justified in defending their possession as well as their person, having

regard to the fact that they were assaulted by the members of the prosecution party who were the aggressors and who had trespassed upon the land which had been in continuous possession of the appellants for over 50 years. They had not exceeded their right of private defence of property and person because the facts and circumstances justify their entertaining a reasonable apprehension that grievous hurt may be caused to them, if not death, by the assailants.

It was then submitted by Mr. Balakrishnan that the appellants could have taken recourse to move the authorities, in the facts and circumstances of the case. His submission is that they did not at all have the right of private defence. This submission must be rejected in view of the clear finding recorded by the High Court that the appellants had acted in exercise of their right of private defence, but exceeded that right. Unfortunately the High Court did not consider which of the appellants, if any, exceeded the right of private defence. Moreover the right of private defence must be liberally construed. It was observed in Munshi Ram vs. Delhi Administration (supra) :

> ".Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than to run away in the face of peril."

We have earlier held that their conviction with the aid of Section 34 IPC is not warranted in law. In the absence of any finding by the High Court as to which of the appellants had exceeded his right of private defence, the benefit must go to all.

Once it is held that the appellants did not exceed their right of private defence, it must logically follow that they cannot be convicted of the lesser offences under Sections 324 and 326 IPC, because in the same transaction and in exercise of their right of private defence they had caused injuries to some of the prosecution witnesses.

In the result this appeal is allowed and the appellants are acquitted of all the charges levelled against them. The appellants shall be released forthwith unless required in any other matter.