V. Subramani And Anr vs State Of Tamil Nadu on 3 March, 2005

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (crl.)  378 of 2005

PETITIONER:
V. Subramani and Anr.

RESPONDENT:
State of Tamil Nadu

DATE OF JUDGMENT: 03/03/2005

BENCH:
Arijit Pasayat & S.H. Kapadia

JUDGMENT:
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JUDGMENT ARIJIT PASAYAT, J.

Leave granted.

Appellants call in question legality of the judgment rendered by a Division Bench of the Madras High Court affirming their conviction and sentence for alleged commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the `IPC'). Seven persons faced trial for allegedly having committed homicidal death of one Vadivel (hereinafter referred to as the `deceased') and causing injuries on various persons in furtherance of their common intention after forming themselves into an unlawful assembly. It was alleged that they had committed rioting, assaulted some of the witnesses causing injuries in addition to causing death of the deceased. They were charged for commission of offences punishable under Sections 147, 148, 323, 307, 302 read with Section 109, Section 302 read with Section 149 and 307 read with Section 149 IPC. The trial Court found that in respect of three persons (hereinafter described as A-4, A-6 and A-7) no offence was made out and, therefore, they were acquitted.

Two of the accused persons before the Trial Court i.e. A-1 and A-2 were convicted of offence punishable under Section 324 IPC. The present appellants who were A-3 and A-5 were convicted in terms of Section 302 IPC. Though the prosecution had contended that all the accused persons acted in furtherance of common object being members of unlawful assembly and committed the crime, the trial Court did not accept the version. Considering the individual overt acts the learned Trial Judge had recorded conviction as afore-noted. So far as the present appellants are concerned, they were sentenced to undergo rigorous imprisonment for life.

Prosecution version as unfolded during trial is as follows:

Thiru Vadivel (hereinafter referred to as the `deceased') was the father of Elango (PW-1), Ravi (PW-3) and Anbazhagan (PW-5). Selvam (PW-2) is the cousin brother of PW-1. Manjula (PW-4) is the wife of PW-5 and daughter-in- law of the deceased. PW-6 Krishna Pillai was the brother of the deceased. The accused A-2 and A-7 are the sons of A-6 and others are their relatives. All are residing in a village called Kollumedu.

On 21.12.1993 one Siva, sister's son of Ravi Kumar (A-1) was grazing the buffalos of A-1 in the lands belonging to PW-1's family. On seeing this, PW-5 assaulted him which was reported to A-1, who questioned the conduct of PW-5 in assaulting him. On hearing this news, deceased and Krishnapillai intervened and they were also assaulted, thereby straining the relationship.

On 22.12.1993 at about 8.00 a.m., PWs 1 and 2 were brushing their teeth near the common well of their village, Kollumedu. At the time, they noticed that Ravikumar (A-1) was passing nearby. On seeing him, PW-1 questioned him as to whether it was fair on his part to assault PW-5 having grazed the buffalos in their land. A-1 took exception to this questioning by PW-1, threatened to assault him. Thereafter, there was a wordy altercation between A-1 and PW-1 in the presence of PW-2. A-1 became furious, went inside the house of A-6 which is very near to the common well and brought a stick, beat PW-1 on his back. Aggrieved by this conduct of A-1, PW-1 and his brother PW-2 chased him. A-1 took shelter in the house of A-6.

PWs 1 and 2 unable to retaliate and assault A-1, became unrestrained and were shouting in front of the house of A-6. A-3, Subramani hearing the threatening calls of PWs 1 and 2, yelled, that PWs. 1 and 2 should be assaulted, even if a murder takes place since they had stepped into their house and shouted. Encouraged by the support, when PW-1 was standing in front of the house of A-6, A-2 came there with a weapon, assaulted PW-1 over his head. A-4 assaulted PW-1 by a reaper M.O.3. At the same time, A-1 assaulted him with an iron rod over the head. A-2 assaulted PW-2 and caused injuries. On seeing this incident, PW-3 also went there to their rescue. A-2 attacked Ravi causing stab injuries. The father of PWs 1, 3 and 5 i.e. the deceased hearing this news, rushed to the scene of occurrence in their support. On seeing the deceased, A-3 and A-5 assaulted him over his head with yokes (M.O.5 and M.O.6), while A-6 caught hold of him, causing bleeding injuries of serious nature. PW-1 chased the accused, taking a stick available from the scene of occurrence. PW-6 on hearing the incident that his brother was assaulted came there, saw the injured and chased the accused away and in that process A-1 also sustained injuries. This incident was witnessed by Muthukrishnan, Venupillai and Nagappan.

PW-1 and others took the deceased in an injured condition to Dindivanam Hospital at about 11.30 a.m. Doctor (PW-8) attended on him and declared that he was dead at

about 12.10 p.m. on 22.12.1993. Information was lodged at the police station. Investigation was undertaken and on completion thereof charge sheet was placed. The accused persons pleaded innocence and, therefore, the trial was conducted. After placing reliance on the evidence of the witnesses, more particularly, the injured eye witnesses PWs 1, 2 and 3 the trial Court found the accused persons guilty as aforesaid. The accused persons took the plea before the trial Court that they had also suffered injuries. The wife of A-6, namely, Nagammal and Padma mother of PW-4 were also injured. It is on record that the deceased and others had assaulted Nagammal and Padma and, therefore, in exercise of right of private defence the accused persons may have inflicted some injuries in the process of defending their life and property. The trial Court did not accept the plea. The conclusions of the trial Court were affirmed by the High Court by the impugned judgment.

In support of the appeal, Mr. Ranjit Kumar, learned senior counsel submitted that the evidence on record clearly shows that ladies were assaulted first and to protect them under the apprehension of likely assault on them the accused persons in the process of protecting their lives and properties have made assaults, even if prosecution version is accepted in toto. Since the accused persons had exercised the right of private defence, the conclusions of the courts below cannot be maintained. The evidence on record establishes a free fight and the members of the complainant party were the aggressor. The accused persons have also suffered injuries in exercise of right of private defence.

In response, learned counsel for the respondent-State submitted that this is not a case where plea of right of private defence can be pressed into service. Merely because some of the accused persons have suffered some injuries which were superficial in nature, there is no question of interference with the well-reasoned and well-discussed judgment of the courts below.

Only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression `right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short `the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by

reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and Ors. v. Delhi Administration, AIR (1968) SC 702), State of Gujarat v. Bai Fatima, AIR (1975) SC 1478, State of U.P. v. Mohd. Musheer Khan, AIR (1977) SC 2226 and Mohinder Pal Jolly v. State of Punjab, AIR (1979) SC 577. Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P., AIR (1979) SC 391), runs as follows:

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence...."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar, AIR (1976) SC 2263]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising

the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev. v. State of Punjab, AIR (1963) SC 612, it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar, AIR (1975) SC 87. (See: Wassan Singh v. State of Punjab, [1996] 1 SCC 458 and Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N. [2002] 8 SCC 354.

As noted in Butta Singh v. The State of Punjab, AIR (1991) SC 1316, a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self- preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (See Vidhya Singh v. State of M.P., AIR (1971) SC 1857. Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

In the illuminating words of Russel (Russel on Crime, 11th Edition Volume I at page 49) :

> "....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

Considering the background facts as highlighted above when tested in the backdrop of the legal principles noted supra the inevitable conclusion is that the accused persons had not established that they were exercising right of private defence. The residual plea is that only a single blow was given by a wooden yoke of very light weight. Though it cannot be laid down as a rule of universal application that whenever death occurs on account of a single blow, Section 302 IPC is ruled out, the fact situation has to be considered in each case. It appears from the records, as noted above, that a single blow was given on the head of the deceased by a small wooden yoke. Considering the background facts as noted above, it would be proper to alter the conviction from Section 302 IPC to Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice.

The appeal is accordingly disposed of.