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ABID

v.

STATE OF U. P.

(Criminal Appeal No. 785 of 2004 and Ors.)

JULY 7, 2009

B

[V.S. SIRPURKAR AND R. M. LODHA, JJ.]

Penal Code, 1860 – s.302 r/w s.149 and s. 149 – Murderous assault by accused armed with weapons – Death C *of victims on the spot – Incident witnessed by close relatives of victims – Conviction u/s.302/149 and s. 149 by courts below – Interference with – Held: Not called for – Accused formed unlawful assembly and shared common object of committing murder – They were armed with deadly weapons* D *and inflicted large number of injuries – Accused were aggressors – Victims were unarmed when the incident occurred – Plea of private defence not available to accused – Evidence of eye-witnesses-close relative trustworthy – Failure to assign specific injuries to each accused by them* E *not fatal.*

According to the prosecution case, D 1 and D 2 purchased certain agricultural land from G along with the crops. On the fateful day, they found that A1 to A7 were harvesting the crop from their land. On being asked, A1 F **and A2 replied that they had purchased the said land from G. Thereafter, A1 to A6 armed with ballam, gandasa and lathi caused fatal injuries to D1 and D2. D1's son-PW 1 and his nephew-PW 2 came to the scene of occurrence. Trial court convicted the accused u/s. 302 rw s. 149 IPC** G **and sentenced them to life imprisonment; and also u/s. 149 and imposed nine months rigorous imprisonment. During pendency of the appeal, A6 and A7 died. High Court upheld conviction of A1 to A5. Hence the present**

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appeals. A

Dismissing the appeals, the Court

HELD: 1.1. The post mortem reports as well as the evidence of PW-3 and PW-5 leave no manner of doubt that the death of D-1 and D-2 was homicidal. The deadly B weapons with which appellants were armed and large number of injuries inflicted on D-1 and D-2 clearly show that the appellants shared common object of committing murder. That the accused persons were more than five and formed unlawful assembly is amply established. D-1 C and D-2 died on the spot. The conviction of the accused under section 302 read with 149 IPC does not suffer from any legal flaw. [Paras 15 and 26] [331-E; 337-E-F]

1.2. PW-1 and PW-2 are closely related to D-1 and D- D 2. PW-1 deposed regarding the occurrence of incident. He was cross-examined at quite some length and except few minor contradictions, there is nothing that is sufficient to discredit his testimony. Merely, because he made no effort to save D-1 and D-2 from attack, it cannot E be said that he was not present. His presence few paces away from the place of incident does not seem to be unnatural at all. PW-2 also deposed about the incident. PW-2 has not at all been shaken in the cross-examination. It is true that PW-1 and PW-2 are related to D-1 and D-2 F but they would not let real culprits go scot free. It does not sound to reason that they would have spared the actual assailants and falsely implicated the accused appellants. When as many as seven persons armed with deadly weapons attacked D-1 and D-2, it would not have G been possible for PW-1 or PW-2 to attribute specific injuries to each accused. Thus, the trial court and the High Court did not commit any error in accepting the evidence of PW-1 and PW-2. [Paras 16, 17, 18, 19 and 20] [331-E-F; 332-A-E-F-G; 333-D]

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A *Anna Reddy Sambasiva Reddy and Ors. vs. State of Andhra Pradesh* **JT 2009 (5) SC 617, referred to.**

1.3. It is for the accused to establish plea of private defence. The plea of self-defence is not required to be proved by the accused beyond reasonable doubt. What is required of the Court is to examine the probabilities in appreciating such a plea. Nevertheless, the accused has to probablise the defence set up by it. In the instant case, the accused has miserably failed to establish much less probablise, right of private defence. The evidence on record shows that the accused persons were aggressors. D-1 and D-2 were unarmed when they asked accused persons as to why they had harvested the standing crop. Assuming that the accused persons had purchased the agricultural land from G by registered sale deed and they were in possession but there was no justifiable reason for them to attack D-1 and D-2 with deadly weapons like ballam, gandasa and lathis, even if D1 and D2 questioned them about harvesting the crop. In the facts and circumstances of the case, there is no scope for any right of private defence as D-1 and D-2 had neither put the person nor the property of the accused in peril. Thus, the trial court as well as the High Court cannot be said to have committed any error in not accepting the plea of private defence. [Paras 24 and 25] **[336-G-H; 337-A-F]**

Rajinder and Others vs. State of Haryana 1995 (5) SCC 187; *A. C. Gangadhar vs. State of Karnataka* 1998 SCC (Cri) 1477, referred to.

Case Law Reference :

JT 2009 (5) SC 617	Referred to	Para 19
1995 (5) SCC 187	Referred to	Para 22
1998 SCC (Cri) 1477	Referred to	Para 23

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 785 of 2004. A

From the Judgment & Order dated 23.10.2003 of the High Court of Allhabad, Lucknow Bench in Criminal Appeal No. 488 of 1982. B

WITH

Criminal Appeal No. 786 of 2004.

Shakil Ahmed Syed for the Appellant. C

Prashant Chaudhary, Bharat Ram and Praveen Swarup for the Respondents.

The Judgment of the Court was delivered by

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R.M. LODHA, J. 1. These two appeals by special leave arise out of one and the same judgment rendered by the High Court of Judicature at Allahabad whereby the criminal appeal preferred by the present appellants came to be dismissed.

2. Seven persons were sent up for trial to the 1st Additional Sessions Judge, Bahraich under Sections 147 and 302 read with 149 IPC. The trial court convicted all of them under Section 302 read with 149 IPC and sentenced them to life imprisonment. The trial court also convicted the accused for the offence punishable under Section 147 IPC and sentenced them to suffer nine months rigorous imprisonment. E F

3. The prosecution version is as follows:

Gheesey, Chhotey and Tojey are brothers. They resided in village Bahbolia, Police Station Sonwa, district Bahraich. The three brothers acquired about 15 bighas of agricultural land from one Smt. Prana. They have divided the aforesaid land in share of 5 bigha each and came into possession of their respective share. Sattar Khan (since deceased and hereinafter referred to as 'D-1') and Sabir Khan (since deceased and G H

A hereinafter referred to as 'D-2') claimed to have purchased from Gheesey his share in the agricultural land in the month of January, 1980 alongwith the crops sown thereon. On March 21, 1980, at about 8.00 A.M., D-1 and D-2 visited the said agricultural land and found that Aggi (A-1), Jaijai (A-2), Lakhan B Pasi (A-3), Abid(A-4), Maqsood(A 5), Khalil (A-6) and Ghulam (A-7) were harvesting the Arhar crop from that land. D-1 and D-2 asked them as to why they were harvesting the crop. A-1 and A-2 replied that they had purchased the agricultural land from Gheesey and being owners of that land, they were entitled C to harvest the crop. Then A-1and A-5 armed with 'ballam', A-3 and A-7 armed with 'gadasa' and A-2, A-4 and A-6 armed with 'lathi' started attacking D-1 and D-2 with respective weapons. D-1 and D-2 raised alarm. Peer Mohammad Khan (PW-1) and Maqsood Khan (PW-2) who were few paces away from the D scene rushed to the spot and found that as a result of attack by A-1 to A-7, D-1 and D-2 sustained fatal injuries and died on the spot. The accused, having seen PW-1 and PW-2 , fled away.

4. PW-1 immediately, went to Police Station, Sonwa and lodged the first information report at 11.30 A.M.. Sub-Inspector E Sukh Sagar Singh took up the investigation. He prepared the inquest report and sent the bodies of D-1 and D-2 for post mortem. Dr. P.C. Misra (PW-3) conducted post mortem on the body of D-2 on March 22, 1980. The post mortem of dead body of D-1 was conducted by Dr. M. Shamim (PW-5) at about 4.30 F P.M. on March 22, 1980.

5. It appears that investigation into the crime changed hands number of times. After initial investigation done by Sukh Sagar Singh, the investigation then was handled by Mohammad G Yunus Khan. Thereafter, the investigation was taken up by Rana Pratap Singh. After Rana Pratap Singh, the investigation was conducted by Sheonath Ram and on his transfer, investigation was further carried by Sarju Ram (PW-6). Initially a police report under Section 173 Cr.P.C. was filed but on reinvestigation, a chargesheet against all the seven accused persons under H

sections 147 and 302 read with 149 IPC was filed. A

6. The matter having been committed to the Court of Sessions, the accused were charged under Sections 147 and 302 read with 149 IPC.

7. The prosecution in support of its case examined six witnesses, namely, Peer Mohammad (PW-1), Maqsood Khan (PW-2), Dr. P.C. Misra (PW-3), Syed Hasan Jafar (PW-4), Dr. M. Shamim (PW-5) and S.O. Sarju Ram (PW-6). Of the six witnesses tendered, PW-1 and PW-2 were examined as eye witnesses. B C

8. A-1 and A-2 set up the defence that while they were harvesting the crop in their agricultural field, D-1 and D-2 came there with few others and attempted to take away the harvested crop. On alarm being raised by them, the villagers came and assaulted D-1 and D-2. As a result of which D-1 and D-2 died. A-1 also set up the plea that Gheesey had sold his agricultural land by registered sale deed in his favour and other family members and that they are in possession of the subject land as purchasers. D E

9. A-3, A-4, A-5, A-6 and A-7 denied to have participated in the assault at all. They set up the defence that they have been falsely implicated at the instance of one Mulayee with whom they were on inimical terms.

10. The trial court accepted the evidence of PW-1 and PW-2 and held that the prosecution has been able to establish beyond all reasonable doubt the involvement of the accused persons in the murder of D-1 and D-2. The trial court was not persuaded by the plea of private defence. F G

11. During the pendency of appeal before the High Court, A-6 and A-7 died and, accordingly, appeal on their behalf stood abated. As regards the remaining appellants, A-1 to A-5, High Court did not find any justifiable ground to upset the judgment of the trial court. H

12. The post mortem of D-1 was conducted by Dr. M. Shamim (PW-5) and he found the following ante mortem injuries:

"1. Lacerated wound 7cm x 1.5cm x bone deep on the left side of scalp (skull) parietal to occipital region.

2. Lacerated wound 5cm x 1.5cm x bone deep 1cm below injury no. 1 on the left side parietal to occipital region.

3. Lacerated wound 6cm x 2cm x bone deep on left parietal region 6cm above left ear underneath bones (temporal of left side) was fractured.

4. Abrasion 4cm x 1.5cm on the left temporal region 4cm above left ear.

5. Abraded contusion 6cm x 2cm on the right temporal region 5cm above right ear.

6. Multiple contusions in all areas of 14cm x 10cm on the upper right side back 4cm below right shoulder.

7. Abrasion 3cm x 2cm on the back of right elbow joint.

8. Multiple contusions in all areas of 10cm x 6cm on the lower middle back.

9. Abrasion 3cm x 2cm on right knee outer part front.

The fracture of occipital parietal and temporal bones on left side of head."

According to PW-5, the injuries Nos. 1,2 and 3 in the ordinary course of nature were sufficient to cause death of D-1.

13. Dr. P.C. Misra (PW-3) conducted the autopsy of the

body of D-2 and found the following ante mortem injuries:

" (1) Incised wound 9cm x 2cm x bone deep over left side of head 7cm above from left ear.

(2) Lacerated wound 6.5cm x 1.5cm x bone deep over right side of head 8cm above from right ear.

(3) Contusion 3cm x 2cm over nose underneath bone fractured.

(4) Abraded contusion 2.5cm x 1.5cm over left temple starting from lateral end of left eye-brow.

(5) Abraded contusion 8cm x 5cm over left cheek.

(6) Incised wound 2cm x 0.5cm muscle deep over left side of cheek starting from angle of mouth.

(7) Abraded contusion (multiple) in area of 20cm x 8cm over left side of neck and adjoining area of front of left shoulder and chest.

(8) Multiple contusion in area of 40cm x 14cm over left side of back.

(9) Multiple contusion in area of 24cm x 10cm over right scapular region of back.

(10) Multiple contusion (16cm x 10cm in area) over right side of back 7cm below from scapula.

(11) Abraded contusion 6cm x 1.5cm over back of left arm 7cm above from elbow joint.

(12) Contusion 18cm x 8cm over inner and front of left arm starting from elbow joint.

(13) Multiple abrasion in area of 10cm x 8cm over back and middle of left forearm.

A (14) Abraded contusion 2cm x 1cm over dorsum of proximal phalanx of middle finger of left hand with underneath bone fracture.

(15) Abraded contusion 5cm x 7.5cm over back of right arm 6cm above from elbow joint.
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(16) Abrasion 1.5cm x 0.5cm over back of right elbow joint.

(17) Penetrating wound 2.5cm x 1cm bone deep over
C under aspect of right forearm 8cm above from wrists.

(18) Abrasion 2cm x 5cm over back of right forearm 5cm above from wrist.

D (19) Multiple abrasions in area of 10cm x 8cm over dorsum of right hand with fracture proximal phalanx of little finger of right hand.

(20) Multiple abraded contusion 28cm over front of right
E thigh 4cm above from knee joint.

(21) Abrasion 6cm x 2cm over front of right knee.

(22) Incised wound 8cm x 0.75cm muscle deep over inner aspect of right leg 12cm below from knee.
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(23) Two penetrating wound 1.5cm situated apart over middle aspect of right leg 10cm above from medial malleolus each measuring 1cm x 0.5cm bone deep.

(24) Contusion 9cm x 2cm over inner and front of right
G leg just below from injury no. 23 with fracture of tibia and fibula.

(25) Penetrating wound 2cm x 0.75cm bones deep over medial aspect of right leg 3cm above from medial
H malleolus.

(26) Incised wound 3cm x 0.5cm muscle deep over back of right leg 4cm above from ankle.

(27) Multiple contusion in area of 28cm x 9cm over outer aspect of left thigh (upper part).

(28) Multiple contusion in area of 26cm x 8cm over outer aspect of lower third of left thigh and adjoining area of upper part of leg.

(29) Incised wound 7cm x 2cm muscle deep over front of middle left leg."

14. In his deposition, PW-3 stated that he found that both the sides of skull were fractured, brain was congested, 6th, 7th and 8th rib of left side were fractured and the lung was punctured. He also opined that penetrating injuries were caused by piercing instrument like spear; incised wounds were caused by weapon like gadasa and lacerated wounds and contusion were caused by blunt weapon like lathi. In the opinion of PW-3, cause of death of D-2 was aforesaid injuries.

15. The post mortem reports as well as the evidence of PW-3 and PW-5 leave no manner of doubt that the death of D-1 and D-2 was homicidal.

16. PW-1 is the son of D-1 and PW-2 is his nephew. PW-1 and PW-2 are, thus, closely related to D-1 and D-2. Being evidence of close relative, their evidence needs a deeper scrutiny and thorough scan to rule out false implication.

17. PW-1 deposed that on the date of incident, in the morning, he had gone to see his other land. When he reached Narsing Diha, he heard the noise of his father(D-1) and D-2 that the accused persons were beating them. He heard the noise from a distance of about 60-70 paces. He rushed towards the place from where the noise was coming and he saw from the distance of about 15-20 paces that the accused persons were attacking his father and D-2. He deposed that A-1 and

A A-5 were armed with 'Ballam', A-3 and A-7 armed with 'Gadasa' and A-2, A-4 and A-6 were armed with 'lathi'. When the accused persons saw him and PW-2, they fled away. He went near his father and found him dead. D-2 was also dead. He has been cross-examined at quite some length and except B few minor contradictions, there is nothing that is sufficient to discredit his testimony. Merely, because he made no effort to save D-1 and D-2 from attack, it cannot be said that he was not present. His presence few paces away from the place of incident does not seem to be unnatural at all.

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18. Insofar as PW-2 is concerned, he deposed that on the date of incident at about 8.00 A.M. he was weeding out grass on the boundary between his land and the land of Chhadan Chowkidar. He saw that A-1 to A-7 were harvesting arhar crop from the subject land. When they had harvested about half the D crop from the west side, then D-1 and D-2 came and asked the accused persons as to why they were harvesting the crop. The accused told them that they have purchased the land from Gheesey and they started attacking D-1 and D-2 by Ballam, Gadasa and lathis. PW-2 also deposed that A-1 and A-5 were E armed with ballam, A-3 and A-7 were armed with gadasa and , A-2, A-4 and A-6 were having lathis in their hands. On the alarm being raised by D-1 and D-2, he and PW-1 ran towards the place of occurrence. The accused saw them and fled away. D-1 and D-2 died on the spot. PW-2 has not at all been shaken F in the cross-examination. It is true that PW-1 and PW-2 are related to D-1 and D-2, witnesses but why should they let real culprits go scot free? It does not sound to reason that they would have spared the actual assailants and falsely implicated the accused appellants.

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19. When as many as seven persons armed with deadly weapons attacked D-1 and D-2, it would not have been possible for PW-1 or PW-2 to attribute specific injuries to each accused. In the case of *Anna Reddy Sambasiva Reddy and Ors. v. State of Andhra Pradesh1*, while dealing with the

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evidence of eye witnesses who failed to assign specific injuries or specific overt acts attributed to the accused individually , this Court observed:

> "How could it be possible for any person to recount with meticulous exactitude the various individual acts done by each assailant ? Had they stated so, their testimony would have been criticized as highly improbable and unnatural. The testimony of eye-witnesses carries with it the criticism of being tutored if they give graphic details of the incident and their evidence would be assailed as unspecific, vague and general if they fail to speak with precision. The golden principle is not to weigh such testimony in golden scales but to view it from the cogent standards that lend assurance about its trustfulness."

20. Having considered the evidence of PW-1 and PW-2 carefully, we are of the view that the trial court and the High Court did not commit any error in accepting the evidence of PW-1 and PW-2.

21. The learned counsel for the appellants submitted that High Court as well as trial court failed to consider, in right perspective, the right of private defence set up by the accused persons. The learned counsel submitted that prior to the alleged purchase of the agricultural land by D-1 and D-2 from Gheesey, the accused persons had purchased that land from Gheesey by registered sale deed and mutation was also effected in favour of the accused party. The learned counsel would submit that in the civil litigation in respect of the disputed land between the parties, an injunction order in favour of the accused persons was operative and in the proceedings under Section 145 Cr.P.C. also, the possession of A-1 and A-2 has been prima facie found. The learned counsel would, thus, submit that the accused persons had a right to harvest the crop and when the deceased tried to take away the harvested crop, the incident occurred in exercise of right of private defence of property and accused persons could not have been convicted under Section

A 302 read with Section 149 IPC.

22. In *Rajinder and Others vs. State of Haryana2,* this Court while dealing with the right of private defence as provided in Sections 96 to 106 IPC held thus:

B "19. Having drawn the above inferences we have now to ascertain whether the unauthorised entry of the complainant party in the disputed land, which according to the trial court was in settled possession of the accused party legally entitled the latter to exercise their right of C private defence and, if so, to what extent. The fascicle of Sections 96 to 106 IPC codify the entire law relating to right of private defence of person and property including the extent of and the limitation to exercise of such right. Section 96 provides that nothing is an offence which is done in the D exercise of the right of private defence and Section 97 which defines the area of such exercise reads as under :

"97. Every person has a right, subject to the restrictions contained in Section 99, to defend —

E First.— His own body, and the body of any other person, *against any offence affecting the human body;*

Secondly.— The property, whether moveable or immovable, of himself or of any other person, *against any* F *act which is an offence falling under the definition of theft,* robbery, mischief or *criminal trespass,* or which is an attempt to commit theft, robbery, mischief or criminal trespass." (emphasis supplied)

G 20. On a plain reading of the above section it is patently clear that the right of private defence, be it to defend person or property, is available against an offence. To put it conversely, there is no right of private defence against any act which is not an offence. In the facts of the instant case the accused party was entitled, in view of Section 97 and, H of course, subject to the limitation of Section 99, to

exercise their right of private defence of property only if the unauthorised entry of the complainant party in the disputed land amounted to "criminal trespass", as defined under Section 441 IPC. The said section reads as follows:

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property.

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit 'criminal trespass'."

21. It is evident from the above provision that unauthorised entry into or upon property in the possession of another or unlawfully remaining there after lawful entry can answer the definition of criminal trespass if, and only if, such entry or unlawful remaining is with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed. Needless to say, such an intention has to be gathered from the facts and circumstances of a given case. Judged in the light of the above principles it cannot be said that the complainant party committed the offence of "criminal trespass" for they had unauthorisedly entered into the disputed land, which was in possession of the accused party, only to persuade the latter to withdraw thereupon and not with any intention to commit any offence or to insult, intimidate or annoy them. Indeed there is not an iota of material on record to infer any such intention. That necessarily means that the accused party had no right of private defence to property entitling them to launch the murderous attack. On the

A contrary, such murderous attack not only gave the complainant party the right to strike back in self-defence but disentitled the accused to even claim the right of private defence of person.

B 22. We hasten to add, that even if we had found that the complainant party had criminally trespassed into the land entitling the accused party to exercise their right of private defence we would not have been justified in disturbing the convictions under Section 302 read with Section 149 IPC, for Section 104 IPC expressly provides that right of private C defence against "criminal trespass" does not extend to the voluntary causing of death and Exception 2 to Section 300 IPC has no manner of application here as the attack by the accused party was premeditated and with an intention of doing more harm than was necessary for the purpose D of private defence, which is evident from the injuries sustained by the three dece ased, both regarding severity and number as compared to those received by the four accused persons. However, in that case we might have persuaded ourselves to set aside the convictions for the E minor offences only, but then that would have been, needless to say, a poor solace to the appellants"

23. In the case of *A.C. Gangadhar vs. State of Karnataka*3, this Court held:

F "Both the courts have come to the conclusion that the accused and his companions were the aggressors and had started the assault on the deceased and his children and that too, because they protested against the accused cutting the tree. Therefore, there was no scope for giving G any benefit of right of private defence to the appellant."

24. That it is for the accused to establish plea of private defence is well settled. The plea of self-defence, is not required to be proved by the accused beyond reasonable doubt. What H is required of the Court is to examine the probabilities in

appreciating such a plea. Nevertheless, the accused has to probablise the defence set up by it. In the present case, the accused has miserably failed to establish, much less probablise, right of private defence. As a matter of fact, the evidence on record shows that the accused persons were aggressors. D-1 and D-2 were unarmed when they asked accused persons as to why they had harvested the standing crop. Assuming that the accused persons had purchased the agricultural land from Gheesey by registered sale deed and they were in possession but there was no justifiable reason for them to attack D-1 and D-2 with deadly weapons like ballam, gadasa and lathis, even if D-1 and D-2 questioned them about harvesting the crop. In the facts and circumstances of the case, there is no scope for any right of private defence as D-1 and D-2 had neither put the person nor the property of the accused in peril.

25. In our considered view, the trial court as well as the High Court cannot be said to have committed any error in not accepting the plea of private defence.

26. The deadly weapons with which appellants were armed and large number of injuries inflicted on D-1 and D-2 clearly show that the appellants shared common object of committing murder. That the accused persons were more than five and formed unlawful assembly is amply established. D-1 and D-2 died on the spot. The conviction of the accused under Section 302 read with 149 IPC does not suffer from any legal flaw.

27. The result of the foregoing discussion is that both appeals must fail and are dismissed.

N.J. Appeals dismissed.