STATE OF RAJASTHAN A

v.

MANOJ KUMAR

(Criminal Appeal No. 885 of 2007)

APRIL 11, 2014 B

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 – s.304 Part I – Murder – Verbal altercation over ownership and possession of property led to the incident – Death caused due to gunshot injury – Three C *accused – Accused 'R' had fired the gunshot – All accused convicted by trial court u/s.302 r/w s.34 – High Court accepted plea relating to right of private defence but held that 'R' had exceeded the right of private defence, and converted his conviction u/s.302 to one u/s.304 Part-I – Justification – Held:* D *In the case at hand, the plea of right of private defence arose on the base of materials on record – As far as onus was concerned, there was ocular and documentary evidence to sustain the concept of preponderance of probability – There were altercations between the accused and the deceased and* E *there was threat that the informant and others would take over possession – There was threat to the property of 'R' and he made effort to drive away the informant and others – Act of the accused to be adjudged regard being had to the surrounding circumstances and not by way of microscopic* F *pedantic scrutiny – Though 'R' fired gunshot but it was really not with the intention to cause the death of the deceased – Prosecution did not bring any material on record that 'R was vindictive, or he had any malicious intention to cause the death – That being the position, the High Court rightly held* G *that 'R' had exceeded the right of private defence and correctly found him guilty u/s.304 Part I – Evidence Act, 1872 –s.105 – Arms Act – ss.25/27.*

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A *Penal Code, 1860 – s.34 – Murder – Common intention – Incident occurred pursuant to altercation over ownership and possession of property – Death caused due to gunshot injury – Three accused – Accused 'R' had fired the gunshot – All accused convicted by trial court u/s.302 r/w s.34 – High Court* B *converted conviction of 'R' to one u/s.304 Part-I – In regard to the other two accused, the High Court held that their conviction could not be sustained in aid of s.34, IPC, and acquitted them of all charges – Justifiability – Held: It is a case where right of private defence had only been exceeded* C *by 'R' – The other two accused had accompanied 'R' to defend the right of possession – In such a case, the guilt of each of the accused, who had exceeded the right of private defence, to be dealt with separately – The matter would have been totally different, had the right of private defence did not exist* D *at all or the accused persons had done any overt act – Constructive liability, as envisaged u/s.34 IPC, not attracted – Conclusion of High Court that s.34 IPC could not be attracted regard being had to the factual score, correct.*

The prosecution case was that dispute over E **ownership and possession of a plot of land led to verbal interaction between the parties, and eventually accused 'R' fired gunshot which led to the death of 'A'. There were two other accused - 'H' and 'M'. The trial court convicted 'R' under Section 302 IPC r/w Section 34 IPC and also** F **under Sections 25/27 of the Arms Act, while 'H' and 'M' were convicted under Section 302/34, IPC.**

In appeal, the High Court accepted the stand of all the accused persons relating to right of private defence. G **However, in case of 'R', the High Court held that he had exceeded the right of private defence, and accordingly converted his conviction under Section 302 IPC to one under Section 304 Part-I IPC; and further confirmed his conviction under Sections 25 and 27 of the Arms Act. As far as 'H' and 'M' were concerned, the High Court held**

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that their conviction could not be sustained in aid of Section 34, IPC, for in the obtaining facts and circumstances Section 34 IPC was not applicable. 'H' and 'M' were acquitted of all charges.

In the instant appeals filed by the State, two questions arose for consideration: (i) whether the High Court was justified in accepting the contention of right of private defence; and (ii) whether the conclusion of the High Court that Section 34 IPC could not be attracted regard being had to the factual score, was correct.

Dismissing the appeals, the Court

HELD:1. As noticed from the evidence on record, there can be no iota of doubt that 'R' fired the gunshot as a consequence of which 'A' breathed his last. It is also clear that there was a dispute over the land and the possession still remained with the accused persons. It is also borne out from the evidence that the accused persons were not parties to the suit. In such a situation, PW5 was trying to raise construction by collecting material at the site and, in fact, to take over possession, had sent his brother 'A' and other brothers. After the deceased and the others came at the site the accused persons, getting the information, had reached to the house of Risadiya and initially a verbal altercation took place and, eventually, a gunshot was fired. [Para 9] [591-E-G]

2.1. The counsel for the State submitted that the accused persons had not taken the plea of right of private defence in their statement under Section 313 CrPC and hence, the High Court could not have adverted to the same; and that even assuming the stand can be considered, in the case at hand the accused persons miserably failed to discharge the burden in establishing their right of private defence. However, in the case of

A ***Munshi Ram,*** **it has been laid that even if an accused does not take the plea of private defence, it is open to the court to consider such a plea if the same arises from the material on record and burden to establish such a plea is on the accused and that burden can be discharged by**
B **showing preponderance of probabilities in favour of that plea on the basis of material on record. In *Salim Zia*, this Court observed that 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**
C **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-**
D **examination of prosecution witnesses or by adducing defence evidence. Similarly, in *Mohd. Ramzani*, it was held that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden**
E **which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt. [Para 11] [599-C-G; 600-A-B]**

2.2. In the case at hand, the plea of right of private
F **defence arises on the base of materials on record. As far as onus is concerned, there is ocular and documentary evidence to sustain the concept of preponderance of probability. It cannot be said that there is no material on record or scanty material to discard the plea. [Para 12]**
G **[600-C-D]**

Munshi Ram and others v. *Delhi Administration* **(1968) 2 SCR 455;** *Salim Zia* v. *State of Uttar Pradesh* **(1979) 2 SCC 648: 1979 (2) SCR 394 and** *Mohd. Ramzani* v. *State of Delhi*
H **1980 Supp SCC 215– relied on.**

3. There is material on record tnat there were altercations between the accused and the deceased on the one hand and the others and there was threat that the informant and others would take over possession. The High Court found that there was a threat to the property of 'R' and he had made an effort to drive away the informant and others. Though the prosecution has come out with the version that the accused persons were trying to take over possession, yet on a scrutiny of the evidence it becomes quite vivid that they were in a hurry to raise construction at the site and, accordingly, were taking steps. In this context, the act of the accused is to be adjudged. It has to be appreciated regard being had to the surrounding circumstances and not by way of microscopic pedantic scrutiny. True it is, he had fired a gunshot but it was really not with the intention to cause the death of the deceased. The prosecution has not brought any material on record that the said accused was vindictive, or he had any malicious intention to cause the death of the deceased. Had that been there, then it would have been totally contrary to the concept of right of private defence. That being the position, the High Court rightly accepted the submission that 'R' had exceeded the right of private defence and has correctly found him guilty under Section 304 Part I IPC. [Para 14] [601-E-G; 602-A-C]

Munshi Ram and others v. *Delhi Administration* **(1968) 2 SCR 455;** *Mohd. Ramzani* v. *State of Delhi* **1980 Supp SCC 215;** *Bhanwar Singh and others* v. *State of Madhya Pradesh* **(2008) 16 SCC 657: 2008 (9) SCR 1;** *Vidya Singh* v. *The State of Madhya Pradesh* **AIR 1971 SC 1857 and** *Sikandar Singh and others* v. *State of Bihar* **(2010) 7 SCC 477: 2010 (8) SCR 373 – relied on.**

4. In the present case, on a perusal of the evidence, it is found that accused 'M' and 'H' had accompanied accused 'R' to defend the right of possession. It is a case

where accused 'R' exceeded the right of private defence. The right of private defence had only been exceeded by 'R'. In such a case, the guilt of each of the accused, who had exceeded the right of private defence, has to be dealt with separately. The matter would have been totally different, had the right of private defence did not exist at all or the accused persons had done any overt act. Thus, in the constructive liability, as envisaged under Section 34 IPC, is not attracted. [Para 17] [603-F-G]

State of Bihar v. *Nathu Pandey and others* **(1969) 2 SCC 207: 1970 (1) SCR 358 and** *Joginder Ahir and others* v. *The State of Bihar* **(1971) 3 SCC 449: 1971 (0) Suppl. SCR 460 – relied on.**

Case Law Reference:

(1968) 2 SCR 455	**relied on**	**Para 11**
1979 (2) SCR 394	**relied on**	**Para 11**
2008 (9) SCR 1	**relied on**	**Para 13**
2010 (8) SCR 373	**referred to**	**Para 14**
1970 (1) SCR 358	**relied on**	**Para 15**
1971 (0) Suppl. SCR 460	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 885 of 2007.

From the Judgment and Order dated 14.02.2006 of the High Court of Rajasthan at Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 1011 of 2003.

WITH

C.A. No. 1073 of 2007

Milind Kumar for the Appellant.

Sushil Kumar Jain, Puneet Jain, Christi Jain, Anurag Gohil, Ruchika Gohil, Pratibha Jain for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeals, by special leave, have been preferred against the common judgment and order dated 14.2.2006 passed by the High Court of Judicature for Rajasthan, Jaipur Bench at Jaipur in D.B. Criminal Appeal No. 396 of 2000 and D.B. Criminal Appeal No. 1011 of 2003, wherein the High Court has partly allowed the appeal of Raju @ Rajkumar by converting his conviction under Section 302 IPC to one under Section 304 Part I of IPC and further confirming his conviction under Sections 25 and 27 of the Arms Act and sentencing him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.500/-, in default of payment of fine, to suffer further six months rigorous imprisonment. Hemant Kumar, a co-accused along with Raju and Manoj Kumar, who had preferred an independent appeal, has been acquitted of all charges.

2. At the very outset we may state that Raju @ Rajkumar has expired on 8.3.2012 and in proof thereof a death certificate has been brought on record. In view of the same, the Criminal Appeal No. 1073 of 2007 would stand abated as far as Raju @ Rajkumar is concerned and would only survive against the accused Hemant Kumar.

3. The prosecution case, in brief, is that the police recorded the statement of deceased Anirudh Mishra at Sri Kalyan Hospital Sikar on May 26, 1998 who had stated that around 8:30 p.m. on that day he along with his brother Basant Mishra, PW 4, and Mahesh Kumar Saini, PW 3, had gone to the vacant plot belonging to him and his brother situated at Lisadia ka Bas being apprehensive that that sons of Ram Niwas and Shanti Prasad would take possession of the plot. At that point of time sons of Ram Niwas and Shanti Prasad were present at the house of Phoolji Lisadiya situate adjacent to the plot. As per his version, they first abused him and thereafter opened fire as a result of which he had sustained a gun shot injury on the right side of his chest and his brother

A Ramesh @ Umesh, PW 5, had brought him to the hospital. On the basis of his statement the concerned police officer registered FIR No. 243 of 1998 for the offences punishable under sections 307 and 149 of IPC. However, after the death of Anirudh, the offence was converted to one under section 302
B IPC and investigation commenced. During the course of investigation, Raju and Hemant were arrested and Manoj was declared as an absconder. A charge sheet was filed against Raju and Hemant for the offences under sections 302, 302/34 IPC and for offences under Section 3/25, 3/27 and 3/33 of the
C Arms Act and it became the subject matter of S.C. No. 34 of 1998. After Manoj was arrested, a charge sheet was submitted against him for the offence under Section 302/34 of IPC and he faced a separate trial in S.C. No. 8 of 2002.

4. The accused persons abjured their guilt and pleaded
D false implication because of property dispute and animosity. In order to prove its case the prosecution in the first trial examined as many as sixteen witnesses and got marked thirty-seven documents and also brought eight articles on record. In the second trial, the prosecution examined as many as twelve
E witnesses and similar numbers of documents were exhibited. In the second trial the defence produced one witness and tendered four documents in support of its plea.

5. The witnesses in both the trials are common and the
F prime witnesses, as mentioned in first trial are, Anjani Kumar, PW 1, brother of the deceased, Mahesh Kumar Saini, PW 2 an eye witness, Basant Kumar, PW-4, brother of the deceased, PW 5, Ramesh @ Umesh, another brother of the deceased, Dr. V.K. Soni, PW 6, who had examined the deceased and
G prepared the x-ray report, Dr. G.R. Tanwar, PW 10, who had conducted the post-mortem and Bhagwan Singh, PW 12, the Investigating Officer. After examining the oral and documentary evidence the learned trial Judge convicted Raj Kumar under section 302 read with Section 34 IPC and also under Sections
H 25/27 of the Arms Act, and Hemant for the offences under

Section 302/34 IPC. In the second trial, accused Manoj was convicted under Section 302/34, IPC. A

6. The accused persons preferred two separate appeals and the High Court in its common judgment and order accepted the stand of all the accused persons relating to right of private defence. However, as the accused Raju has exceeded the right of private defence, the High Court converted his conviction to one under Section 304 Part-I IPC and sentenced him as stated hereinbefore. As far as accused Hemant and Manoj are concerned, it opined that their conviction could not be sustained in aid of Section 34, IPC, for in the obtaining facts and circumstances Section 34 was not applicable. B C

7. We have heard Mr. Milind Kumar, learned counsel appearing for the State and Mr. Sushil Kumar Jain, learned counsel appearing for the respondent. D

8. Two questions that emerge for consideration in these appeals, are (i) whether the High Court was justified in accepting the contention of right of private defence; and (ii) whether the conclusion of the High Court that Section 34 IPC could not be attracted regard being had to the factual score, is correct. E

9. On a perusal of the judgment of the learned trial Judge, it is demonstrable that he has set out in detail that a dispute existed between the parties over the possession of land in question. He has arrived at the conclusion that as per the evidence brought on record, both ocular and documentary, Parasram Lisadiya had sold the plot to Ramesh Kumar, the elder brother of the deceased, Anirudh Mishra, vide Registered Sale-deed, Ex.P-9. It has been brought on record that a dispute in regard to the plot was in existence between Parasram Lisadiya and Phool Chand Lisadiya and it has led Parasram to file the civil suit No. 131 of 1986 for permanent injunction wherein it was alleged that on 11.7.1986 Phool Chand had obstructed Parasram from commencing the construction on the F G H

A plot. On 17.9.1997 the suit for permanent injunction was decreed ex-parte against Phool Chand restraining him from interfering with the possession of Parasram over the land in question. It is also reflectible from Ex.P-9 that by the time the suit was decided in favour of the plaintiff, Parasram had already
B sold the plot vide Registered Sale-deed, Ex.P-9, to Ramesh Mishra, who had obtained sanction for construction vide Ex.P-12 and the site plan vide Ex.P-14. The events happened in quick succession and Ramesh, after obtaining necessary sanction, had started collecting material for construction. It has
C come in the evidence of Ramesh, PW-5, that the dispute existed between Parasram and Phool Chand over the possession even after the sale-deed was executed. It has also come on record that sanction for construction was obtained only four days prior to the incident; and that a cavil existed in regard
D to the plot between the informant and the accused persons as the original owner, Phool Chand had mortgaged the said plot to Shanti Prasad, father of the accused and they were in possession. As we notice from the evidence on record, there can be no iota of doubt that Rajkumar has fired the gunshot as
E a consequence of which Anirudh breathed his last. It is also clear that there was a dispute over the land and the possession still remained with the accused persons. It is also borne out from the evidence that the accused persons were not parties to the suit. In such a situation, Ramesh was trying to raise construction by collecting material at the site and, in fact, to take over
F possession, had sent his brother Anirudh and other brothers. After the deceased and the others came at the site the accused persons, getting the information, had reached to the house of Risadiya and initially a verbal altercation took place and, eventually, a gunshot was fired.

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10. The High Court has taken into consideration various aspects, namely, there was dispute with regard to the ownership and possession over the plot in dispute; that the informant and others had gathered the materials for construction of the plinth
H few days before the incident; that the municipal council has

granted sanction only four days prior to the incident; that Ramesh, PW-5, and others were apprehensive that they would lose possession; that an affirmative plea relating to possession by the accused persons had been taken; and that the accused Rajkumar with the intention to defend the possession of the property and to drive away the deceased and others had opened the fire, but, unfortunately, it hit the deceased. On the aforesaid analysis of the evidence, the High Court was persuaded to hold that the accused Rajkumar had exceeded his right of private defence.

11. Mr. Milind Kumar, learned counsel for the State, has submitted that the accused persons had not taken the plea of right of private defence in their statement under Section 313 of the Code of Criminal Procedure and hence, the High Court could not have adverted to the same. It is further put forth that even assuming the stand can be considered, in the case at hand the accused persons have miserably failed to discharge the burden in establishing their right of private defence. In this context, we may refer with profit to the pronouncement in *Munshi Ram and others* v. *Delhi Administration*[1] wherein it has been laid that even if an accused does not take the plea of private defence, it is open to the court to consider such a plea if the same arises from the material on record and burden to establish such a plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record. In *Salim Zia* v. *State of Uttar Pradesh*[2] the observation made by this Court to the effect that 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

1. (1968) 2 SCR 455.
2. (1979) 2 SCC 648.

A of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. Similarly, in *Mohd. Ramzani* v. *State of Delhi*[3], it has been held that it is trite that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea
B 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.

12. In the case at hand, the plea of right of private defence
C arises on the base of materials on record. As far as onus is concerned, we find that there is ocular and documentary evidence to sustain the concept of preponderance of probability. It can not be said that there is no material on record or scanty material to discard the plea. Thus, the aforesaid submission
D being unacceptable, are hereby repelled.

13. Learned counsel for the State next contended that when the accused persons had exceeded their right of private defence and caused the death of the deceased, all of them
E should have been convicted under Section 302/34 IPC. In this regard, we may refer with profit to certain authorities before we advert to the facts unfurled in the case at hand. In *Munshi Ram* (supra), while dealing with right to private defence, this Court has observed that law does not require a person whose
F property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities, for the right of private defence serves a social purpose and that right should be liberally construed. The Court further stated that such a right not only will be a restraining influence on bad characters but it
G will encourage the right spirit in a free citizen, because there is nothing more degrading to the human spirit than to run away in the face of peril. In *Mohd. Ramzani* (supra) the Court has observed that it is further well-established that a person faced with imminent peril of life and limb of himself or another, is not

H 3. (1980) Supp SCC 215.

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 unruffled mind, the law makes due allowance for it. In *Bhanwar Singh and others* v. *State of Madhya Pradesh*[4] it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death and if the court were to reject the said plea, there are two possible ways in which this may be done, i.e., on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2.

14. On the touchstone of the aforesaid principles, the evidence brought on record and the conclusion arrived at by the High Court have to be tested. There is material on record that there were altercations between the accused and the deceased on the one hand and the others and there was threat that the informant and others would take over possession. The High Court has found that there was a threat to the property of Raj Kumar and he had made an effort to drive away the informant and others. Though the prosecution has come out with the version that the accused persons were trying to take over possession, yet on a scrutiny of the evidence it becomes quite vivid that they were in a hurry to raise construction at the site and, accordingly, were taking steps. In this context, the act of the accused is to be adjudged. It has to be appreciated regard being had to the surrounding circumstances and not by way of microscopic pedantic scrutiny, as has been held in *Vidya Singh* v. *The State of Madhya Pradesh*[5] and *Sikandar Singh*

4. (2008) 16 SCC 657.
5. AIR 1971 SC 1857.

A *and others* v. *State of Bihar*[6]. True it is, he had fired a gunshot but it was really not with the intention to cause the death of the deceased. The prosecution has not brought any material on record that the said accused was vindictive, or he had any malicious intention to cause the death of the deceased. Had B that been there, then it would have been totally contrary to the concept of right of private defence. That being the position, the High Court has rightly accepted the submission that Raj Kumar had exceeded the right of private defence and has correctly found him guilty under Section 304 Part I IPC.

C 15. Presently, we shall advert to the facet of justifiability of the acquittal of the accused persons who had accompanied the accused who had fired the gunshot. Learned counsel for the State would urge that as they had come to the spot with the accused Raj Kumar and they had the common intention. Even D if there was no prior intention, submits Mr. Milind Kumar, learned counsel for the State, it developed on the spot. On a perusal of the evidence, we find that accused Manoj Kumar and Hemant Kumar had accompanied accused Rajkumar to defend the right of possession. It is a case where accused E Rajkumar exceeded the right of private defence. A three-Judge Bench in *State of Bihar* v. *Nathu Pandey and others*[7], while accepting the reasoning of the High Court that some of the accused persons had exceeded the right of private defence, opined that when it is not possible to say that all the accused F persons have the common object to commit murder and only those, who exceeded the right of private defence, would be held responsible for their murders.

16. In *Joginder Ahir and others* v. *The State of Bihar*[8], the Court referred to the decision in *Nathu Pandey and others* G (supra) and dealing with the applicability of Section 34 IPC, taking into consideration almost similar findings, opined that

6. (2010) 7 SCC 77.

7. (1969) 2 SCC 648.

H 8. (1971) 3 SCC 449.

there was no common intention on the part of all the accused persons to commit the crime. In the said case, the High Court had convicted the accused-appellants therein under Section 304 Part II in aid of Section 34 IPC. Dealing with the same it has been held as follows: -

> "We are unable to concur with the view of the High Court that any such common intention could be attributed to the appellants on the facts and in the circumstances of the case. They certainly had the common intention of defending the invasion of the right to property. While doing so if one or two out of them took it into his or their heads to inflict more bodily harm than was necessary, the others could not be attributed the common intention of inflicting the injuries which resulted in the death of the deceased. Section 34 can only be applied when a criminal act is done by several persons in furtherance of the common intention of all. No overt-act had been proved or established on the part of the appellants which showed that they shared the intention of the person or persons who inflicted the injury or injuries on the head of the deceased which led to his death. They cannot, therefore, possibly be held guilty of an offence under Section 304, Part II, read with Section 34 of the Indian Penal Code."

17. The facts in the present case, as we understand, are similar to the factual score in the aforesaid case because the right of private defence had only been exceeded by Rajkumar. In such a case, the guilt of each of the accused, who had exceeded the right of private defence, has to be dealt with separately. The matter would have been totally different, had the right of private defence did not exist at all or the accused persons had done any overt act. Thus, in our considered opinion, the constructive liability, as envisaged under Section 34 IPC, is not attracted.

18. In view of our aforesaid analysis, we do not perceive any merit in these appeals and, accordingly, they are dismissed.

Bibhuti Bhushan Bose Appeals dismissed.