

MADAN AND ORS.

v.

STATE OF MADHYA PRADESH
(Criminal Appeal No.1058 of 2008)

JULY 11, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Penal Code, 1860: s.302 r.w. s.149 – Evidence Act, 1872 – ss.97 to 105 – Right of private defence – Appellants entered the house of the deceased at night – Assaulted him with lathis resulting in his death – Trial Court convicted them under ss.302 r.w. s.149 and sentenced to life imprisonment – High Court turned down the plea of right of private defence, however altered the finding of trial Court that appellants were injured in the same incident in which the deceased and injured witnesses were assaulted – On appeal, Held: Evidence show that the appellants were up to some stage exercising the right to protect and defend their properties – But thereafter they exceeded the right – Therefore, conviction altered to one u/ s.304 Part I – In the interest of justice, sentence reduced to 10 years.

Evidence Act, 1872 – ss.97 to 105 – Right of private defence – Exercise of, when available.

The prosecution case was that on the fateful night the deceased, his wife PW-2 and his daughter PW-1 were sleeping inside their house. The appellants along with other 2 accused broke open the wooden door and while abusing the inmates, reached inside the courtyard. They told deceased that they would not allow him to take his buffallows from their field and asked as to why deceased made a complaint in Tehsil Court. They also threatened to eliminate him. Thereafter they assaulted deceased with lathi. When PW-1 and PW-2 tried to save the deceased, they were also assaulted. The deceased fell unconscious

A and died on way to Police Station. The Trial Court, convicted them under s.302 IPC r.w. s.149 and s.323 r.w. s.149 IPC and sentenced to life imprisonment. On appeal, High Court turned down the stand of appellants that they exercised right of private defence. High Court however altered the finding of trial Court that appellants were injured in the same incident in which the deceased and injured witnesses were assaulted. Hence the present appeal.

Partly allowing the appeal, the Court

C HELD: 1. 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. [Para 6] [859-G, 860-A,B]

E *Jai Dev v. State of Punjab* AIR (1963) SC 612; *Rizan and Anr. v. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur, Chhattisgarh* (2003) 2 SCC 661; *Sucha Singh and Anr. v. State of Punjab* (2003) 7 SCC 643; *Raj Pal and Ors. v. The State of Haryana* (2006) 9 SCC 678 – relied on.

F 2. The High Court has in part accepted the stand of the appellants that they were exercising the right of private defence, but at the same time the evidence also shows that the appellants committed criminal trespass. Therefore, they cannot claim the benefit of exception of having acted in exercise of right of private defence. On a combined reading of the judgments of the trial Court and the High Court it is clear that the evidence is to the effect that the accused appellants were upto some stage exercising the right to protect and defend their properties. But thereafter they exceeded the right. Therefore, this appears

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to be a case where instead of convicting the appellants under s.302 IPC it would be proper to convict the appellants for offence punishable under s. 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice. [Paras 9,10] [861-C,D,E]

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CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 1058 of 2008

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From the final Judgment and Order dated 18.5.2007 of the High Court of Madhya Pradesh, bench at Indore in CrI. Appeal No. 1246 of 1997

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Navin Kumar Singh and Aruneshwar Gupta for the Appellants.

Dr. N.M. Ghatate, C.D. Singh, Merusagar Samantaray and Sunny Chowdhary for the Respondent.

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The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of Madhya Pradesh High Court, Indore Bench upholding the conviction of the appellants for offence punishable under Section 302 read with Section 149 and Section 323 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Each of the appellants was sentenced to undergo RI for life and to pay a fine of Rs.1,000/- with default stipulation.

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3. The prosecution case as unfolded during trial is as follows:

In the intervening night of 3rd and 4th July, 1991 at about 12.00 in village Khandakhedi Kishanlal (hereinafter referred to as the 'deceased'), his wife Sampatbai and daughter Prematabai were sleeping inside their house. At that moment appellants and deceased accused Jalu @ Jalamsingh and juvenile accused Jeevan reached at their house. They broke open the wooden door, while abusing the inmates and reached in the

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A courtyard. They told deceased Kishanlal that they would not permit him to take his she-buffallows from their field and asked as to why deceased made a complaint in Tehsil/Revenue Court. They also threatened to eliminate him. While saying all these, appellants Madan and Kamal caught hold both the hands of
B Kishanlal and threw him near the wall, thereafter assaulted him by lathi. Sampatbai, wife of deceased Kishanlal (PW-2) cried for help. She and her daughter Premlata (PW-1) tried to save deceased but both were assaulted by lathi. Umraobai (PW-3) was assaulted by the deceased accused Jalu @ Jalamsingh
C when she tried to rescue the deceased. Babulal (PW-7) after hearing the cry reached over there and he was also assaulted by accused persons. When Ramsingh (PW-8) and Premsingh (PW-9) arrived, appellants fled away. The deceased fell unconscious and died on the way to police station. Premlata (PW-1),
D Sampatbai, Umraobai, Babulal, Premsingh alongwith village Chowkidar Anarsingh reached at the police station at 4.00 a.m. and lodged the report (Ex.P-1) which was recorded by SHO (PW-12) Nandlal. The injured persons were sent for medical examination and treatment. Their medical reports are Ex.P-24 to P-28. After preparation of inquest report (Ex.P-11) dead body
E of Kishanlal was sent to hospital and postmortem was conducted by Dr. A.S. Rana (PW-13) who issued postmortem report (Ex.P-29). Investigating Officer prepared spot map (Ex.P-2) and also effected seizure of blood stained earth, controller earth, pieces of sticks vide Ex.P-3 from the spot. Through seizure
F memo (Ex.P-4) pieces of bangles, pieces of glass of watch and roof tiles were seized. Patvari Govindram (PW-6) prepared the spot map (Ex.P-10). After arrest, on disclosure statement of the accused persons lathis were seized and seized articles were sent with covering letter (Ex.P-23) to FSL, Sagar. Dr. Rana also
G gave report (Ex.P-30) after examination of lathis seized from the accused persons. On completion of the investigation charge sheet was filed before the learned JMFC, Sanwer against the appellants and deceased accused Jalu @ Jalam and juvenile
H accused Jeevan was produced and charge sheeted before the juvenile Court as directed by the trial Court because he was

found below 16 years of age. During the course of trial, accused Jalu @ Jalamsingh died, therefore, case against him was closed.

The appellants denied the charges and pleaded innocence. They examined three witnesses in defence whereas prosecution examined 15 witnesses and adduced 31 documents in evidence. The trial Court found the appellants guilty, convicted them as aforementioned.

Before the High Court the stand taken was to the exercise of the right of private defence. It was pointed out that the deceased and prosecution witnesses were aggressors. In any event, when the appellants had assaulted, then in right of private defence they are entitled to get the benefit of exception in terms of Sections 96 and 97 IPC. The High Court turned down the stand and upheld the conviction.

4: In support of the appeal, learned counsel for the appellants submitted that most of the injuries were on non vital parts. It has been established that injuries have been sustained by the appellants in the same incident. The High Court had exercised the appellate power under Section 386 (b)(ii) of the Code of Criminal Procedure, 1973 (in short the 'Code') and had altered the finding of the trial Court in para 27 that the appellants were injured in the same incident in which the deceased and injured witnesses were assaulted and it was held that as per own saying by the defence the appellants sustained injuries at the house of the appellant-Kamal. In essence, it was pointed out that the trial Court and the High Court should have accepted the plea of exercise of right of private defence.

5. Learned counsel for the respondent-State on the other hand submitted that there was injury on the head though there was no fracture and the rest were on non vital parts of the body. Nevertheless, even according to own saying of the accused appellants, there was no question of exercise of right of private defence.

A 6. 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
B defence is available to an accused, the entire incident must be
examined with care and viewed in its proper setting. Section
97 IPC deals with the subject-matter of right of private defence.
The plea of right comprises the body or property (i) of the per-
son exercising the right; or (ii) of any other person; and the right
C 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 prop-
erty. Section 99 IPC lays down the limits of the right of private
defence. Sections 96 and 98 IPC give a right of private de-
fence against certain offences and acts. The right given under
D Sections 96 to 98 and 100 to 106 IPC is controlled by Section
99 IPC. To claim a right of private defence extending to volun-
tary causing of death, the accused must show that there were
circumstances giving rise to reasonable grounds for apprehend-
ing that either death or grievous hurt would be caused to him.
E 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.

F 7. Sections 102 and 105, IPC deal with commencement
and continuance of the right of private defence of body and prop-
erty respectively. The right commences, as soon as a reason-
able apprehension of danger to the body arises from an attempt,
or threat, or commit the offence, although the offence may not
G have been committed but not until that there is that reasonable
apprehension. The right lasts so long as the reasonable appre-
hension 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
H threat has either been destroyed or has been put to route, there

can be no occasion to exercise the right of private defence. A

8. The above position was highlighted in *Rizan and Another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur, Chhattisgarh* (2003 (2) SCC 661), and *Sucha Singh and Anr. v. State of Punjab* (2003 (7) SCC 643) and *Raj Pal and Ors. v. The State of Haryana* (2006 (9) SCC 678). B

9. The High Court observed that according to the appellants incident occurred in two different places in different phases and in the incident of assault to the deceased and the witnesses they were not present and they sustained injuries caused by the deceased and some of the injured witnesses at the house of Kamal. The High Court has in part accepted the stand of the appellants that they were exercising the right of private defence, but at the same time the evidence also shows that the appellants committed criminal trespass. Therefore, they cannot claim the benefit of exception of having acted in exercise of right of private defence. C D

10. On a combined reading of the judgments of the trial Court and the High Court it is clear that the evidence is to the effect that the accused appellants were upto some stage exercising the right to protect and defend their properties. But thereafter they exceeded the right. Therefore, this appears to be a case where instead of convicting the appellants under Section 302 IPC it would be proper to convict the appellants for offence punishable under Section 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice. E F

11. The appeal is allowed to the aforesaid extent.

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Appeal partly allowed.