(2005) 04 MP CK 0018

Madhya Pradesh High Court (Indore Bench)

Case No: Criminal Appeal No''s. 454, 455 and 459 of 1999

Kaliya and etc.	APPELLANT
Vs	
State of M.P.	RESPONDENT

Date of Decision: April 15, 2005

Acts Referred:

- Penal Code, 1860 (IPC) - Section 149, 300, 300(2), 302, 324

Citation: (2005) CriLJ 4690

Hon'ble Judges: S.L. Kochar, J; Ashok Kumar Tiwari, J

Bench: Division Bench

Advocate: Rekha Shrivastava, for the Appellant; Manoj Dwivedi, Government Advocate, for the Respondent

Judgement

S.L. Kochar, J.
All the aforesaid three appeals arise out of a common judgment delivered in one Sessions Trial, therefore, they are being decided by this common judgment.

2. Being dissatisfied by the judgment dated 16-2-1999 delivered in Sessions Trial No. 492/97 by the learned third Addl. Sessions Judge, Alirajpur thereby finding the appellants guilty of the offences punishable u/s 302/34, sentenced them each to suffer imprisonment for life, the appellants have preferred the aforesaid three appeals separately.

3. Briefly stated, the facts of the prosecution case as unfolded before the trial Court were that on 26-7-1997 at 3.30 p.m. in village Juwania forest, the complainant P.W. 1 Bhadu, deceased-Jaimalsingh s/o Bhadu and P.W. 2 Sardarsingh s/o Bhadu were ploughing the forest land admeasuring about 5 acres. At that juncture, the appellants reached over there. Appellant-Chhataria asked the complainant P.W. 1 Bhadu not to plough the said field because they had already ploughed the field earlier. On this the complainant P.W. 1 Bhadu told that he owned the land and he will plough the field. This was again objected to by appellant-Chhatariya and

thereafter, the appellant-Chhataria exhorted his son Kaliya and co-accused-Harlia by using the words "MARO SALON KO." The appellant-Harliya shot an arrow which pierced in the chest of complainant P.W. 1 Bhadu. The appellant-Kallya also shot arrow which pierced in the leg of his bullock. When the complainant started running away, the appellant-Harliya shot arrow which pierced arm pit of Jaimal Singh. The appellant-Kaliya again shot an arrow which pierced at the chest of de-ceased-Jaimal Singh. Appellant-Harliya again shot an arrow which hit at the arm of left hand. Deceased-Jaimalsingh ran up to some paces, but fell down on the ground. The complainant P.W. 1 Bhadu raised cries upon which the witness Juwansingh (P.W. 3), Malsingh (P.W. 4) and his daughter-Balibai reached over there. Seeing them, the appellants fled away from there. The complainant-Bhadu disclosed about the incident to the villagers Chandarsingh, Shankar, Sarpanch Malsingh, watchman of village Ramsingh and also reached at the Police Station Nanpur with them. First Information Report Ex. P/l was lodged by P.W. 1 Bhadu.

4. After lodging of the FIR, Investigating Officer Subhash Pawar commenced investigation. He sent the dead body and injured person for medical examination. Autopsy on the dead body was conducted by P.W. 7 Dr. R. Mandal. His report is Ex. P/7. P.W. 1 Bhadu was also medically examined, but his medical report has not been proved in the trial. The appellants were arrested and P.W. 6 Subhash Pawar, Investigating Officer seized the bows and arrows and Daratk (Falia) from the possession of the appellants. After requisite investigation, charge-sheet was filed against the appellants under Sections. 302 and 324 read with Section 34 of the Indian Penal Code against the appellants. The defence of the appellants was that their land was being cultivated illegally by the complainant-party. They requested the complainant party not to plough the field, whereupon they were prepared to shot arrow at that juncture, the appellants acted in right of private defence of person and property.

8. The learned Court below framed the charges u/s 302/34 and 324/34, Indian Penal Code against the appellants and put them on trial. The prosecution has examined six witnesses and got proved sixteen documents to prove its case against the appellants. The learned trial Court having held in para 14 of its judgment that even if the appellants would have ploughed the field and sown the crop, their crop was standing and even thereafter If the complainant party was again ploughing the field for sowing the crop, the appellants would not get right of private defence of property which is available to a person who is having title over the property and who could use the force in the right of private defence of a person or property because, the title as claimed by the appellants was also claimed by the complainant-party. Therefore, the appellants would not get right of private defence of property even though their crop was standing on the said field, convicted the appellants as indicated hereinabove.

6. "We have heard learned Counsel for the parties and also perused the entire record carefully.

7. P.W. 1 Bhadu has deposed that on the date of incident, he, his sop deceased-Jaimalsingh and another son P.W. 2 Sardar went to the barren Government forest land for ploughing the field and sowing the crop. When they all the three were ploughing the field from three different places in the noon at about 2.00 or 2.30 p.m., the appellant-Chhatariya came over there at that juncture. He was having a Dharia with him. Chhataria was accompanied by a boy whose name was not known to this witness. The appellant-Chhatariya told these witnesses not to plough the field and the crop sown in the field would be harvested by him. The witness replied Chhaitariya that they Were cultivating the lands from before and now will also cultivate the same. On this reply, the appellant-Chhatariya used the words that MARRO-DAUDO.'' Hearing call of Chhatariya the app''ellant-Hariya rushed at the spot followed by appellant-Kaliya, on the forest land (field) in dispute. Both were having bows and arrows. Appellant-Hariya shot arrow and caused injury on the left side chest of this witness P.W. 1 Bhadu. Thereafter, the appellant-Kalia shot arrow which hit at the leg of the bullock. This witness P.W. 1 tried to run away. At that time, his son deceased-Jaimalsingh asked the appellants as to why they were shooting arrows at his father, on which the appellants-Hariya alias Harsingh again shot arrow which pierced below the chest and appellant-Kalu also shot arrow which caused injury on the finger of right hand of deceased-Jaimalsingh. After receiving arrow injuries, Jaimalsingh ran up to some paces, but fell down on the said land. It is further stated by this witness that the appellant-Harisingh also shot arrow on the deceased when he fell on the ground. This witness raised alarm which attracted Juwansingh, Malsingh and Balibai. He also proved Ex. P/1 lodged by him.

7-A. In cross-examination, the suggestion of the appellants regarding ploughing the field and sowing the maize-crop (Makka) by the appellants prior to one arid a half months from the date of incident and the crop was also grown, was denied by this witness. In para 7, this witness has admitted the fact that on the said field he and his sons reached for the first time to harvest the crop and ploughing the field. Prior to that, they did not plough the field and sow the crop because the land was stony. He has denied the possession of the appellants over the said land since about five years. In cross-examination, some omission, contradictions and improvements have been brought on record by the defence, but they are of minor nature.

8. The next witness relied upon by the trial Court is P.W. 2 Sardar. He has also narrated almost all the same story in his, examination-in-chief, but in the cross-examination para 4, he has narrated the new fact about title and possession over the disputed land. According to him, they were having lease of the said land and the land was leased land and not the forest land. They had handed over the lease deed, copy of the land records and Khata-book to the police. He has also stated that they were calling the said land as ''Mudni Maal.'' He was not knowing its

survey number. He was paying Rs. 10/- as land revenue (Lagan). In para 4, he has admitted that when they reached on the disputed land with plough and bullock, the same was already ploughed and seeds of maize (Makka) were sown before one and a half months while it was raising. He also admitted that on the said land maize-crop had grown up to the height of 6" and on the said grown up crop, he and his father, P.W. 1 Bhadu and deceased-Jaimalsingh were ploughing. Seeing this, the appellant-Chhatariya reached over there and asked them not to plough the field. He also admitted that the request of the appellant was refuted by his father and his father told him that they will plough the field and will also sow the Urad crop. Saying so, all the three continued to plough the field. He further admitted that again the appellant Chhatariya asked them not to plough the field on which they replied that if he will obstruct them, they will assault him. Thereafter, Chhatariya raised cry "DAUDO DAUDO MARTE HAIN." Hearing the cries of Chhatariya, co-accused-Harliya and Kalia rushed from their house towards the disputed field. On seeing Harliya and Kaliya, this witness Sardar (P.W. 2), his father P.W. 2 Bhadu and brother deceased-Jaimalsingh picked up their bows and arrows. At that time, the appellant-Harliya and Kaliya shot arrows.

9. The prosecution has also examined P.W. 3 Juwansingh who is the nephew of P.W. 1 Bhadu and P.W. 4. Malsingh who reached after hearing the cries of Bhadu. P.W. 4 Malsingh has also admitted in para 6 of his deposition that when the complainant party was ploughing the field, at that time. Maize-crop was already standing. In cross-examination, both the witnesses were contradicted with their previous statements on material particulars. That shows that in fact; they had not seen the actual beginning of the dispute between the appellants and the complainant and when they reached on the field where the deceased was lying on the ground, the appellants had already run away. P.W. 5 Shankar posed himself as an eye-witness of the incident. He was declared hostile and in para 9 he admitted that he did riot disclose before the police about witnessing of the incident and causing injuries to the deceased and P.W. 1 Bhadu by the appellants. P.W. 1 Bhadu is the cousin brother of this witness.

10. The injury report of P.W. 1 Bhadu has not been proved by the prosecution because of which the learned trial Court has acquitted the appellants from the charges u/s 324 read with Section 34, Indian Penal Code.

11. P.W. 7 Dr. R. Mandal noticed while conducting the autopsy on the dead body of Jaimalsingh in total four penetrating wounds, one on the left chest, second on left side chest, near injury No. 1, the third on left palm and the fourth on right arm pit. On internal examination, pleura was found cut and there was damage to the left ventricle having injury admeasuring 11/2 x l/4." Pericardium was full of blood and both the chambers of heart were empty. The lungs were damaged. According to him, the injury No. 1 on the chest was sufficient in the ordinary course of nature to cause death. The injuries were ante-mortem. In his opinion, the person died

because of shock and syncope due to excessive bleeding. The death was homicidal. This witness proved the report Ex. P/16.

12. We feel no necessity to discuss the evidence of P.W. 6 Subhash Pawar regarding arrest and seizure of weapons from the possession of the appellants because though the seized property was sent to the Forensic Science Laboratory, but, its report was not filed and proved by the prosecution. This witness in para 3 has stated that he prepared the spot map at, the instance of P.W. 1 Bhadu, but the spot map has not been got exhibited by the prosecution by this witness. This witness has not stated anything about possession of the land and sowing of the crop as well as presence of grown up maize crop on the land. It appears that on this issue no investigation was done by the Investigating Officer. The prosecution has also not examined Patwari to prove the nature of the land and who was in possession of the land and whether the crop was in possession of the land and whether the crop was standing on the date of incident or not. Therefore, we are left with the statement of P.W. 1 Bhadu, P.W. 2 Sardar, P.W. 3 Juwansingh and P.W. 4 Malsingh. Out of these four witnesses, P.W. 2 Sardar and P.W. 4 Malsingh admitted the fact of cultivation of the field by the appellant prior to one and half months of the date of incident and presence of grown up crop of maize on the field. The positive admission of P.W. 2 Sardar who is the real brother of the deceased-Jaimalsingh and son of P.W. 1 Bhadu about sowing of crop and presence of grown up maize crop and also the possession of the appellants on the land in dispute as well as he with his father P.W. 1 Bhadu and deceased-Jaimalsingh went On the field for the first time on that day for ploughing the field and sowing the crop. In spite of the objection being raised by the appellant-Chhatariya, they continued to plough the field and also replied that they will sow Urad (horse-bean) crop. When Chhatariya called appellant-Harlia and Kaliya, the complainant-party also picked up their bows and arrows and at that juncture the appellants used for and caused injury by shooting arrows at the deceased. 13. In view of this positive admission of I P.W. 2 Sardar and P.W. 4 Malsingh about presence of grow-up maize crop on the disputed field, are of the opinion that appellants were having right of private defence of property and reasonable apprehension of grievous injuries or death because the complainant-party also picked up bows and arrows. Learned trial Court has committed an error in holding that the appellants were not having any title over the land and there was no apprehension to them for receiving any grievous injury/hurt from the complainant-party. Therefore, they were not entitled to get right of private defence of person and property. The right of private defence of person and property is even available to the trespasser who is having the settled possession over the property. For exercise of right of private defence of property the title is not necessary.

14. The Supreme Court in the case of Puran Singh and Others Vs. The State of Punjab, has dealt with exhaustively in paras 11, 18 and 20 in the following terms :--

"The nature of possession which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes :

(i) the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of animus pos-sidendi. The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv) one of the usual tests to determine the quality of settled possession in the case of cultivable land, would be whether or not the trespasser, after having taken possession, had grown any crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence.

The expression ''settled possession'' has been used in Munshi Ram and Others Vs. Delhi Administration, to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner.

Where the accused persons after having forcibly taken possession of the disputed land a month before the occurrence had grown wheat crop on it and the complainant party tried to re-enter the land and destroy the crops grown by the accused.

Held that the finding of the High Court that the accused were not in settled possession of the land in order to give them a right of private defence was erroneous in law."

The Supreme Court further observed that:

''The right of private defence of person or property is to be exercised under the following limitations ;

(i) that if there is sufficient time for recourse to the public authorities the right is not available.

(ii) that more harm than necessary should not be caused.

(iii) that there must be reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned.

It is not the law that a person when called upon to face an assault must run away to the police station and not protect himself or when his property has been the subject matter of trespass and mischief he should allow the aggressor to take possession of the property while he should run to the public authorities. Where there is an element of invasion or aggression on the property by a person who has no right to possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force if necessary. The right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing 6f death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation.

The question whether a person having a right of private defence has used more force than is necessary would depend on the facts and circumstances of a particular case.

The prosecution party was the aggressor in the sense that they went armed with gun and deadly weapons on the disputed land and in possession of the accused who had grown wheat crop thereon, with the devout object of destroying the wheat crop and taking back possession of the land forcibly from the accused-party who Were similarly armed, with the result that a mutual fight ensued in which two of the accused received injuries and two persons of the prosecution party died and others were injured. The prosecution however did not explain how the accused persons received the injuries.

Held on the facts and circumstances of the case the accused were fully justified in causing the death of two persons from the complainant''s party and had not in any event exceeded the right of private defence of person and property. They were, therefore, protected by the right of private defence. If the prosecution did not come out with the true version of the nature and origin of the occurrence, they cannot blame the Court if the entire version presented by them is rejected. In any event the prosecution case had not been proved beyond reasonable doubt.

-x- -x- -x-

15. For exercising right of private defence of body mere apprehension of grievous hurt or death is sufficient. There is no necessity of actual receiving of grievous hurt by the accused. But, at the same time apprehension must be real and not imaginary and colourable. In the instant case when the complainant party, after commission of criminal trespass on the land in settled possession of the appellants, picked-up bows and arrows only thereafter the appellants caused injuries by arrow shot so they were having real apprehension of causing or receiving grievous injury. See Partap Vs. The State of Uttar Pradesh, and Vajrapu Sambayya Naidu and Others Vs. State of

A.P. and Others, .

16. It is trite law that when there are more than one accused, and any of the accused is exceeding right of private defence, he alone would be guilty of commission of culpable homicide not amounting to murder by exceeding right of private defence of person or property falling under exception (2) of Section 300 IPC. The other accused persons cannot be held responsible vicariously with the aid of Section 34 or 149 of the Indian Penal Code. All the appellants did not reach on the spot together having deadly weapons in their possession. Force was used by appellant Harisingh and Kalia when their crop was being damaged by the complainant party. Therefore, it cannot be said that there was pre-meeting of mind, premeditation or pre-plan to commit murder of deceased Jaimalsing and acted in furtherance of such common intention.

17. It is now well settled legal position" that when the act falls within any of the exceptions of Section 300 Indian Penal Code, the accused cannot be convicted with the help of Section 34 or 149 Indian Penal Code. Therefore, we are of the opinion that the appellant''s should be convicted for their individual act. (See : Mariadasan and Others Vs. State of Tamil Nadu, , State of Bihar Vs. Nathu Pandey and Others, , Vajrapu Sambayya Naidu and Others Vs. State of A.P. and Others, and Kanchadilal v. State of M. P. 1991 Jab LJ 6).

18. In view of the law laid down by the Supreme Court in the case of Puransingh (1975 Cri LJ 1479) (supra) we are of the opinion that the appellants were having settled possession on the field which was not even owned by the complainant party and admittedly it was the forest land and the appellants had already plouged it and sown the maize crop one and a half month prior to the date of incident and on the grown-up crop, the complainant party was ploughing the field and destroying the crop. The assault was made by the appellants when they had reasonable apprehension of use of bow and arrow by the complainant party. Therefore, it is very easy to discern that the appellants were having apprehension of causing of grievous hurt or even death. But when first injury was caused by arrow-shot by appellant Hariya alias Harisingh to PW-1 Bhadu and second shot by appellant Kaliya, causing injury to bullock thereafter deceased Jaimalsingh was caused four injuries by arrow shot. Whereas the first injury caused by Harisingh by arrow-shot which pierced on the chest of the deceased. The deceased fell down on the ground. Thereafter again Harisingh caused arrow shot causing injury below the chest i.e. on the ribs which were not required because the deceased fell down on the ground in seriously injured condition and PW-1 Bhadu and PW-2 Sardar were already on their heels. Therefore, the appellant Hariya alias Harisingh exceeded the right of private defence of person and property. The other appellants acted well within the four corners of available right of private defence of person and property both.

19. As a result of the discussion as aforesaid and the legal position, the appeals of appellants Kaliya and Chhatariya (Cri. A. No. 454/99 and 455/99 respectively) are

allowed. The appellant Chhattariya is on bail. His bail and surety bonds shall stand discharged. The trial Court is directed to release the appellant Kaliya forthwith if not required in any other case.

20. The appeal of appellant Harlia alias Hariya alias Harisingh is allowed in part. The conviction and sentence of the appellant Harisingh for the offence u/s 302/34, Indian Penal Code are set aside. Instead, he is convicted u/s 304 (Part I) Indian Penal Code for commission of culpable homicide not amounting to murder by exceeding right of private defence of body and "property falling within exception (2) of Section 300, Indian Penal code and is sentenced to rigorous imprisonment for ten (10) years. We do not impose any fine looking to his poor condition and he comes from tribal community i.e. Bhilala of Jhabua District.

21. Let a copy of this judgment be transmitted along with the record to the trial Court for immediate compliance. A copy each be placed in the record of Cri. A. No. 454/99 and 455/99 while the original shall be retained in Cr. A. No. 459/99.