Dilawar Khan Pathan and Others Vs State of Maharashtra

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Dec. 10, 1987

Acts Referred: Penal Code, 1860 (IPC) â€" Section 304A

Citation: (1988) 3 BomCR 121 : (1988) MhLj 259

Hon'ble Judges: V.P. Salve, J; S.N. Khatri, J

Bench: Division Bench

Advocate: G.R. Ghuge, P.R. Deshmukh and S.V. Chandole, for the Appellant; V.B. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

S.N. Khatri, J.
This judgment disposes of (i) accused'' Criminal Appeal No. 1221/80 (ii) Criminal Revision Application No. 136/81

registered on the basis of the show cause notice issued by Raja Bhonsale, J., for enhancements of sentence and (iii) State''s Criminal Appeal No.

161/81 for enhancement of the sentence.

2. The present nine appellants (accused Nos. 1 to 9) and one Sk. Hakim (original accused No. 10) were tried before Shri V.N. Nimbalkar,

Additional Sessions Judge, Aurangabad inter alia on charges under sections 302, 323, 324 and 149, Indian Penal Code. The learned Judge

acquitted accused No. 10 outright. He has convicted accused Nos. 1 to 9 on various counts, including under sections 304-A, 324 and 323 read

with section 149. It is not necessary to mention the details of sentences imposed on all counts. Suffice is to say that so far as the main counts under

sections 304-A, 324-A and 323 read with section 149 are concerned, he has besides fines imposed uniform concurrent sentences of six months

R.I., 2 years R.I. and six months R.I. respectively. The State''s appeal before us is only for enhancement of sentences. It may be mentioned that it

had also preferred one more appeal, being Appeal No. 160/81, for raising the conviction u/s 304-A to one u/s 302 Indian Penal Code. However,

the same was summarily dismissed by Deshpande, S.J. and Khandekar, JJ., at the admission stage itself.

3. The material facts are : One Vazirkhan who died about 1970 had two wives, Ayeshabi and Riyazbi. The murdered person is his son

Samsherkhan from Ayeshabi. Vazirkhan had five sons from Riyatbi. They are accused Nos. 1 to 5 (Dilawarkhan, Ramzankhan, Razzakhan,

Afzalkhan and Yakubkhan). Accused No. 6 Mukhtyar is the son of accused No. 1. The deceased Samsherkhan has five sons namely complainant

Afzalkhan, Anwarkhan, Noorkhan Nawazkhan (P.W. 7) and Gulzarkhan (P.W. 8). It appears that about 1 acre and 4 gunthas situated in the

extreme south of Survey No. 1/1 of village Mudegaon was granted to Riyazbi for her maintenance during her life time. She died sometime about

1976, that is about six years after Vazirkhan''s death. Even after 1976, her sons (accused Nos. 1 to 5) continued to be in possession of this area.

For the sake of convenience we shall generally refer to it as ""the disputed area"".

4. The prosecution case in substance was that accused persons had no legal right whatever to continue to remain in possession of the disputed area

after Riyazbi''s death because under the original terms and settlement, it was to revert to the deceased on her death. In fact, the deceased''s son

Noorkhan had initiated proceedings under the Land Revenue Code for mutation of this area in the name of the deceased. Final orders were,

however, admittedly not passed till the day of the unfortunate incident, which is 28th June, 1979.

5. The prosecution alleged that on the day of the incident, at about 2.30 p.m. the deceased accompanied by his five sons proceeded to the

disputed area for sowing operations. The prosecution have not filed or proved any map of the scene of offence. On directions of this Court (Deo

and Salve, JJ.), the accused have filed a map, which, though not admitted by the prosecution, will assist us in understanding the relative situations of

the various lands. On the south of the disputed area adjoins Survey No. 1/3. The northern half of survey No. 1/3 admittedly belongs to accused

No. 1 and has all along been in possession. The southern half belongs to one Jamalkhan and is in his actual possession. It will be thus seen that

apart from the disputed area, the accused No. 1 was also in actual possession of the northern half of Survey No. 1/3.

6. According to the prosecution, while on the day of the incident, the deceased and his associates were on their way to the disputed area for

sowing, the ten accused and one Jainekhan (since absconding), confronted them in the land of Jamalkhan and started assaulting them. During the

course of assault, the deceased received two injuries on the head. Guljar Khan P.W. 8 and Nawazkhan P.W. 7 were also injured. The

prosecution alleged that on hearing the commotion, Raosaheb P.W. 2, Akbar P.W. 4, one Kader and Kader''s two sons Gafoor and Jafar also

came to their rescue. Out of these, Raosaheb and Akbar also received injuries at the hands of the accused persons. Here we may mention that

three of the accused''s party - accused Nos. 3, 4 and 5 - have also been injured during the said incident. In fact, a cross case was filed against the

deceased and his ten associates. However, that has ended in acquittal, which has not been challenged in appeal.

7. The deceased and the injured persons were removed to Ambad which is about 14 miles away from Mudegaon. There the complainant is said to

have lodged his F.I.R. Ex. 18 at the police station at about midnight. Earlier accused No. 1 had also lodged his F.I.R. at about 11.30 p.m. It is Ex.

64. Dr. Bhise P.W. 3 Medical Officer, Ambad, examined the deceased and the injured persons belonging to both sides. As the condition of the

deceased was precarious, he was asked to be removed to the Civil Hospital, Aurangabad. On his way, he breathed his last. After the investigation

was over, the ten accused were tried on various charges, as indicated in the opening paragraph of this judgement.

8. All the accused naturally pleaded not guilty. The pith of their defence is that they were in settled possession of the disputed area and that the

deceased and his associates tried to take forcible possession. The accused claimed to have resisted this attempt in exercise of their right of private

defence of property as well as body. After considering the evidence on record, the learned Sessions Judge, negatived this plea for the reason that

the accused had no right to retain the disputed area with themselves after the death of their mother. He further held that the accused were the

aggressors and on this ground also they were not entitled to the right of private defence. In the alternative, he held that they had exceeded that

right. In his opinion, the prosecution had duly proved the formation of unlawful assembly and also the common object, namely, to prevent the

deceased and his associates for taking possession of the disputed area, to which they were legally entitled. So far as the death of the deceased was

concerned, the learned Judge noted that only two blow were dealt on his had. In his view, the prosecution had failed to prove that the culprits had

the intention to cause his death or even that they had knowledge that their action will result in his death. Accordingly, he held that the offence fell u/s

304-A/149 only. He also held that in the prosecution of the common object of the assembly, hurt was caused to Raosahed P.W. 2 and Akbar

P.W. 4. Eventually, he convicted and sentenced accused Nos. 1 to 9 on various counts as mentioned in the opening paragraph of the judgment.

Accused No. 10 came to be acquitted, because his membership of the unlawful assembly was not duly established.

9. Before coming to the merits of the questions involved in the appeals, we feel ourselves constrained to mention the unusual approach of the

learned Sessions Judge. He categorically holds that the deceased had met a homicidal death, as a result of the two injuries inflicted by the accused

Nos. 1,4 and 8 on the occipital and the right parietal regions. Thereafter, by a curious process of reasoning he proceeds to hold that the accused

would be liable u/s 304-A. As this process is not easy to comprehend, we reproduce the particular part of the judgement in his own words.

61. I will now consider the actions of the accused. The accused No. 1 Dilawarkhan, accused No. 4 Afzal and accused No. 3 Nizam were armed

with axes. Jainekhan was armed with spear and these persons had assaulted, injured and murdered Samsherkhan. From the above discussions it

would mean that he blows which were given to cause these fractures were also very light. Thus even these blows cannot be attributed to have been

caused with such an intention that it would result in death. Thus, these injuries cannot be said to be caused with intention or with knowledge that

death would result in normal course of nature. I, therefore, hold that the offence does not come u/s 302 or that the accused had no intention of

murdering Samsherkhan while giving these blows. They only had intention to cause injury to Samsherkhan. They were rash because they have hit

out on the head. They had given two blows on the head and hence the offence would come u/s 304-A of the Indian Penal Code, and the accused

No. 1 Dilawarkhan, accused No. 8 Nizam and accused No. 4 Afzal are responsible for these injuries.

10. The italic portion effects the confusion in the mind of the learned Judge. Section 304-A does not apply to a case in which there has been a

voluntary commission of an offence against a person. If a man intentionally commits such an offence, and consequences beyond his immediate

purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual

result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not

take the character of rashness, because its consequences have been unfortunate. Acts which are offences in themselves must be judged with regard

to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character. In

other words, where the act is in its nature criminal, section 304 simply does not come into operation. Thus we could have appreciated, if the

learned Sessions Judge had held that the mens rea requisite for conviction u/s 302 was not established. In that case it would have been perfectly in

order for him to convict the offender/s under sections 304, 326, 324 or even 323. However, it was obviously wrong to convict u/s 304-A. This

offence and those under sections 336, 337 or 338 belong to an altogether different category, which involves an independent genus of mens rea,

namely negligence or rashness. We leave this aspect here.

11. The second seriously wrong approach was with regard to the comprehension and application of the law of right of private defence. Here again

there is little scope for multiple opinions. In para 40 of his judgement, the learned Judge has recorded a categorical finding that the accused persons

were in actual possession of the disputed area. The learned Judge has committed an error in reaching this finding on the basis of a police statement.

All the same the finding is correct on merits. Police Patil Gulam Rasool P.W. 6 has been the Police Patil of the village since January, 1963. He

affirms that ever since he has seen the accused persons in possession of the disputed area. The veracity of this witness is not in doubt. His evidence

can be safely accepted on this aspect. Indeed even the F.I.R. Ex. 18 of the complainant and the 7/12 extracts on the record clearly bear out this

position.

12. The learned Judge proceeds to analyse the concept of the right of private defence in respect of property in paragraphs 38 to 40 of his

judgement. He has no doubt that under the old settlement the mother of the accused person was entitled to retain possession of the disputed area

by way of maintenance. He also concedes that till her death the accused were in possession of that land. Thereafter, the learned Judge observes

that the legal position materially changed, in that the accused persons were not entitled to hold possession of the disputed area, which reverted

back to the deceased. In other words, the accused persons are trespassers. Having reached this conclusion, he propounds, ""if the accused are to

be treated as trespassers they have no right to defend against the complainant, deceased, etc., as complainant and deceased are the legal owners

of this land.

13. Now this final conclusion reached by the learned Judge on the legal position is obviously to the law as propounded by the Supreme Court in

the leading case AIR 1968 S.C. 702 Munsiram v. Delhi Administration. This is the ratio:

14. .... .. no one including the true owners has a right to dispossess the trespassers by force if the trespasser is in settled possession of the land

and in such a case unless he is evicted in due course of law he is entitled to defend his possession even against the rightful owner ..... The

possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period

and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The

rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a

resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has

not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to

remove the obstruction even by using necessary force.

14. Now in the present case, uninterrupted and effective possession of the accused has been proved at least since January, 1963, that is, for more

than 16 years preceding the date of the incident. Even the death of Riyazbi had occurred more than 3 years before the incident. During that period,

the deceased had not made any effort to secure actual possession of the disputed area, except that his son had moved the revenue authorities for

mutation of the name of the deceased in the 7/12 extract. Final order was yet to be passed in those proceedings. Even if the orders were passed,

that would not have had the effect of putting the deceased in actual effective physical possession of the disputed area. On these facts the only

conclusion permissible is that the accused were very much in settled possession of the disputed area on the date of the incident. In that case,

although technically they might be trespassers in the eye of law, they had very much the right of defending their possession. The learned Judge''s

approach on this aspect is pulpably wrong.

15. Now merit of the case. The facts are not disputed that the death of the deceased was homicidal and that apart from, him, his associates

Raosaheb P.W. 2, Akbar P.W. 4, Nawazkhan P.W. 7 and Guljarkhan P.W. 8 also sustained injuries during the incident. So also it is not disputed

before us that on the side of the accused persons, Nos. 3, 4 and 5 sustained injuries, during the same incident. The question then is, which of the

two sides were the aggressors. The learned Sessions Judge has branded the accused''s party as the aggressors. For this, he mainly relies upon the

comparative injuries sustained by both sides. This approach is no doubt right. However, it is difficult to endorse his view that accused No. 4 who

has sustained as many as 7 injuries, did so by a fall on some agricultural implement. There is no basis in the evidence for such inference. As

conceded by the learned Judge even suggestions were not made to the Medical Officer on that line. Indeed, the prosecution have not led any

evidence to explain the circumstances in which the three accused came to sustain the injuries. This is a serious lacuna in the prosecution case, which

makes their case suspect. The learned Judge ought not to have relied on his imagination alone to infer that accused No. 4 had sustained the multiple

injuries by the possible fall on an agricultural implement.

16. We give the details of the injuries sustained by the two sides in a tabular form :

(1) Injuries sustained by the members of the deceased''s party.

a) Deceased Samsherkhan

1) lacerated wound occiput 1"" x 1/2"" x 1/2

2) swelling behind Rt.ear 3""x 2

b) Gulzarkhan

1)contusion Rt. Side fractured 1/2"" x 1/2"" simple

c) Nawazkhan

1)contusion Back of Rt.foream 1/2"" x 1/2

2)lacerated injury occiput 2 "" x 1/2"" x 1/4

d) Akbarkhan

1)contusion left back 2"" x 1/2

2)contusion front of left arm 2"" x 1/2

3)abrasion back of left index 1/4"" x 1/4

4) lacerated injury occiput 1 "" x 1/2"" x 1/2

e) Raosaheb

1)sharp cut left shoulder 5"" x 2"" x 1/2

2)sharp cut Rt. wrist 1"" x 1/2"" x 1/4

3)abrasion front forehead 1""x 1/2

4)contusion Rt. side of abdomen 1/2

(II)Injuries sustained by the accused Nos. 3.5 and 5.

a) Accused No. 3.

1)swelling back of left palm 3""x 2

2)contusion left axillaryarea 3""x 1/2

b) Accused No. 4.

1)Lac. injury center of skull 4"" x 1/2"" x 1/4

2)swelling left elbow joint 4"" x 3

3)swelling left wrist joint 3""x 2

4)abrasion back of left index

fingures 1/2"" x 1/4

5)abrasion back of left forearm 1"" x 1/2

6)fractures (two) upper 1/3rd & lower complete

1/3rd of left ulna fractures

c) Accused No. 5.

1)swelling back of left palm 3"" x 2

2)contusion left axillary area 3"" x 1/2

17. There are thus in all five injured persons on the side of the deceased and three on the side of the accused. The deceased was dealt two blows

on the head, resulting in his unfortunate death. His four associates received in all ten injuries, none of which admittedly is grievous. As against this,

there are three injured persons on the side of the accused and in all they have received eleven injuries. Out of these, accused No. 4 has sustained

as many as seven injuries, including two fractures of the upper and lower 1/3rd of the left unla. As already stated, the learned Judge has concluded

that the intention of the accused persons was not to kill the deceased. Indeed, according to him, they did not even have the knowledge that the

injuries caused by them would result in his death. It appears that the deceased was an old man over 60 years, it was really unfortunate that he

succumbed to the injuries. Thus on a fair comparison of the injuries sustained by the members of the two sides, it cannot be said that the accused''s

party had taken the lead in perpetrating the assault. All the three have received injuries on the dorsum of their palms. Accused No. 4 has in

addition received injuries on the dorsum of his forearm also. It would not be unreasonable to infer that these injuries were sustained by these

accused persons in an attempt to defend themselves. The accused had been in settled possession of the disputed area for more than sixteen years

before the incident. There was thus no provocation for them to take preemptive action. As against this, the deceased and his associates were

anxious to rest possession of the land somehow. It is more probable they were the aggressors.

18. The learned Public Prosecutor for the State faintly contends that the proper course for the accused persons was to take recourse to the public

authorities instead of resorting to long arm tactics. In first place there is no material on the record except a defence suggestion to Akbar P.W. 4

that he had given a threat to the accused No. 5 that the party of the deceased would forcibly take possession of the accused No. 5 that the party

of the deceased would forcibly take possession of the disputed area on that day and that the accused persons should desist from obstructing them.

This suggestion has been firmly denied by the witness. There is thus no ground to hold that the accused had definite information that the deceased

and his associates would try to take forcible possession. Even otherwise the law did not expect the accused persons to run down to the Police at

Ambad - 14 miles away form the village, leaving the field behind for the deceased to grab. The Supreme Court observes in Munsiram :

18. ....

...Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the

authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a

restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than

to run away in the face of peril.

19. There is thus no substance in the plea that the accused should have taken resort to the assistance of public authorities.

20. Next it is submitted that the actual incident took place not in the disputed area, but in the land of one Jamalkhan and as such the accused could

not claim right of private defence. Now this Jamalkhan''s land forms the southern half of Survey No. 1/3. As we have already mentioned above, on

the north of Jamalkhan''s area, adjoins the northern half of survey No. 1/3 which belongs to and has been in actual possession of accused No. 1,

Dilawarkhan. Complaint''s learned Counsel Shri Ghuge concedes that the deceased did not lay any claim to Survey No. 1/3. The prosecution has

not placed any map on record. One the directions of our predecessor Bench, the accused have filed a plan of the disputed area and other

adjoining lands, before us at the commencement of the hearing. It shows one Khandu''s hut situated close to the west of the dividing line between

the two of Survey No. 1/3. The panchanama of scene of offence, Ex. 54, dose not give any definite idea about the location of the place of the

assault. However, it mentions that the place in seven paces away from this Khandu''s hut. Thus at the best for the prosecution, the place of incident

could be in the extreme north-west corner of Jamalkhan''s land. New it is the prosecution case itself, that the deceased and his associates were to

proceed to the disputed area after crossing the northern half of survey No. 1/3, belonging to accused No. 1. They had no right under Law to

repass through the land of accused No. 1 without obtaining his permission. The latter had every right in law to prevent them from doing so.

Therefore, the right of private defence of property would ensure in favour of the accused persons, not only in respect of the disputed area (the

southernmost part of survey No. 1/1), but also in respect of northern half of survey No. 1/3. Therefore, it is not necessary to determine the precise

location of the scene of offence. The same result would follow, whether the occurrence took place in the north western corner of Jamalkhan''s land

or in northern half of Survey No. 1/3 or in the disputed area itself proper.

21. The above discussion leaves no doubt that the accused''s party had the right to defend their property. We had also held above that in all

probability the deceased''s party were the aggressors. Resultantly the accused persons also got the right to defend their body. Thus they had the

dual right to defend against the deceased and his party.

22. This takes us the last question whether the accused exceeded their right of private defence. The learned Public Prosecutor drew our attention

to the provisions of sections 103 and 104 Indian Penal Code. He contends that trespass in respect of field (the disputed area) would not amount to

house trespass and as such the right of the accused did not extend to accusing death. This technical contention has no merit in view of the admitted

position that the object of the party of the deceased was to accomplish sowing operations in the disputed area after taking its possession. Carrying

out operations for sowing would amount to "mischief" within the meaning of section 425 Indian penal Code. Further we have held above that the

accused had the right to defend their body also. In that context , the contention of the State becomes irrelevant. The party of the deceased had

actually caused two fractures of the ulna of accused No. 1 They had thus created reasonable apprehension in the minds of the accused that they

would be caused grievous hurt. Thus their right did extend to causing death.

23. This apart, while deciding the question whether the defender has exceeded his legitimate right, we ought not to weigh the facts in golden scales.

The Supreme Court observes in the leading case reported Jai Dev Vs. The State of Punjab, :

In judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the

relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind

some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his

property and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow,

he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is

necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so

natural in a Court room, for instance long after the incident has taken place. The means which a threatened person adopts or the force which he

uses should not be weighed in golden scales. To begin with, the persons exercising a right of private defence must consider whether the treat to his

person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to

exercised his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as

the threat lasts and right of private defence can be legitimately exercised, it would not be fair to require that ""he should moderate his defence step

by step, according to the attack, before there is reason to believe the attack is over"". The law of private defence does not require that the person

assaulted or facing an apprehension of an assault must run away for safety. As soon as the cause for the reasonable apprehension has disappeared

and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is

continuing the right is there, if the danger or the apprehension about it has ceased to exist there is no longer the right of private defence.

24. If follows, the accused have not exercised their right of private defence. Resultantly we allow their Appeal No. 1221/80. Their convictions and

sentences are set aside. They stand acquitted of all charges. Their bail bonds are cancelled. Amounts of fine, if any paid, shall be refunded to them.

State Appeal No. 161/81 and revision No. 136/81 are dismissed. Notice of enhancement of sentence issued by the Court suo moto is discharged.