

Krishan Kumar and Others Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jan-11-2000

Reported in : 2001(1)MPHT45

Judge : Mr. D.M. Dharmadhikari and ;Fakhruddin, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 96, 99, 100, 102, 103, 302, 304, 307, 324 and 441; [Evidence Act, 1872](#) - Sections 3 and 156; [Hindu Succession Act, 1956](#) - Sections 14

Appeal No. : Criminal Appeal No. 407/94

Appellant : Krishan Kumar and Others

Respondent : State of M.P.

Advocate for Def. : Shri Ranbir Singh, ;Panel Lawyer

Advocate for Pet/Ap. : Shri Rajendra Singh and ;Shri H.S. Dubey, Advs.

Disposition : Appeal Party allowed

Judgement :

Fakhruddin, J.

1. The appellants have preferred this appeal against their conviction and sentence. Appellants Krishan Kumar and Vinod Kumar have been convicted under Section

302, Indian Penal Code, and sentenced to imprisonment for life and fine of Rs. 2000/- each and default to further undergo six months' rigorous imprisonment. They have been further convicted under Section 307, IPC and sentenced to seven years rigorous imprisonment and a fine of Rs. 1000/- each and in default to further undergo three months rigorous imprisonment. Appellant Basant Kumar has been convicted under Section 302/34, IPC and sentenced to imprisonment for life and a fine of Rs. 2000/- and in default to further undergo rigorous imprisonment for six months. He has also been convicted under Section 307/34, IPC and sentenced to seven years rigorous imprisonment and a fine of Rs. 1000/- and in default to suffer further rigorous imprisonment for three months. Both the sentences of imprisonment were to run concurrently.

2. The prosecution story is that the appellants are sons of Sardar Sab. On 21-4-1986 at about 6.30 a.m. in the morning they caused the death of Awdhesh Kumar and further caused injuries to Pramod Kumar (P.W. 2) and thereby attempted to commit his murder. Apart from the appellants, Vijay, another brother of the appellants, was also prosecuted, but since he died during the pendency of the trial (on 21-12-1993) the proceedings against him had abated. The prosecution story further is that the appellants and deceased Awdhesh Kumar and P.W. 1 Anil Kumar, P.W. 2 Pramod Kumar and P.W. 3 Amod Kumar are cousin brothers. Their grandmother Bhagwati Devi was alive and was living with the accused persons. She had been given 3 acres of land in family partition. It is also in the prosecution case that Bhagwati Devi had given her land to the accused persons for cultivation. It is also the prosecution case that crop was sown by the accused persons and it was ready for reaping. The prosecution alleges that on the fateful day, i.e., 21-4-1986, at about 6.30 in the morning Awdhesh Kumar was standing under a tree near the land of Bhagwati Devi. He saw the accused persons coming duly armed, along with labourers. Awdhesh Kumar objected to the reaping of the crop on the ground that he and his brothers had a share in the crop. On this hot talks started followed by 'marpit'; Awdhesh Kumar called his brothers Pramod Kumar (P.W. 2), Anil Kumar (P.W. 1) and Amod Kumar (P.W. 3). As a result of the 'marpit' Awdhesh Kumar sustained injuries and died. Pramod Kumar (P.W. 2) also sustained injuries. The report (Ex. P-1) was lodged by Anil Kumar (P.W. 1) which was registered at Crime No. 18/86. Accused Basant Kumar also lodged a report

(Ex. D-5) for an offence under Section 324/34, IPC against Pramod Kumar, Anil Kumar and Amod Kumar. On the basis of these two reports lodged by rival parties investigation was conducted and as against the appellants the present 'challan' was filed and against the complainant party a case under Section 324/34, IPC was filed, before the Court of Judicial Magistrate, First Class. Appellant Basant Kumar was got medically examined, his injury report is Ex. D-7.

3. The appellants pleaded not guilty and contended that they have exercised the right of private defence of person and property.

4. The prosecution examined Anil Kumar (P.W. 1), Pramod Kumar (P.W. 2) and Amod Kumar (P.W. 3) as main eye-witnesses, apart from other witnesses. Dr. R.K. Upadhyaya, Assistant Surgeon (P.W. 14) performed postmortem on the person of Awdhesh Kumar on 22-4-1986. He found 23 injuries on the body of Awdhesh Kumar. On internal examination it was noted in para 3 of the post-mortem report that the injuries were on the brain and the lungs. Death was due to coma and syncope caused by the multiple injuries on the head. Ex. P-30 is the requisition for the post-mortem but the actual post-mortem report has not been exhibited. The report is in C file of the original record. Ex. P-32 is the injury report of Anil Kumar (P.W. 1) and Ex. P-33-A is that of Pramod Kumar (P.W. 2). The injuries on the person of Pramod Kumar are alleged to have been caused by 'Pharsa' and 'lathi'.

5. As mentioned hereinabove, one of the accused had died during the pendency of the case and proceedings against him had abated.

6. The learned Trial Judge found appellants Krishan Kumar and Vinod Kumar guilty of the offence under Section 302, IPC and appellant Basant Kumar under Section 302 with the aid of Section 34, IPC, Krishan Kumar and Vinod Kumar were also found guilty for attempting to cause the death of Pramod Kumar and convicted them under Section 307, IPC, while Basant Kumar has been convicted under Section 307/34, IPC.

7. Shri Rajendra Singh, learned senior counsel appearing for the appellants submitted that the partition in the family had taken place in 1981 which has even

been admitted by P.W. 1 Anil Kumar in para 7. Three acres of land was admittedly given to the grandmother Bhagwati Devi, which was being sown and reaped by the accused persons. Para 9 of P.W. 1 Anil Kumar was also referred to contend that on the date of the incident wheat crop sown by the appellants was standing on the field. The grandmother Bhagwati Devi was living since 1981 with the appellants. It was contended that in view of this material which has been brought on record by the prosecution itself, the right of private defence of property was available to the appellants not only to protect the possession but also to protect the crop. It was contended that in this case the property belonged to the grandmother and she was the absolute owner thereof under Section 14 of the [Hindu Succession Act, 1956](#).

8. Learned senior counsel for the appellants contended that the right of private defence commences as soon as mischief/annoyance is caused. In this case, the complainant party had absolutely no right or any semblance of right at all to object to the harvesting of the crop. Their objection had no basis either in law or on fact. So far as the law is concerned, it was pointed out that once partition having taken place under the personal law - Hindu Succession Act - Bhagwati Devi who was residing with the appellants was the absolute owner of the property and, as such, the complainant party could not have raised any objection to the reaping of the crop. It was submitted that it was more so when actual possession was with the accused persons who had sown the crop and were to reap the same. Some apprehension of danger to body and property was there and, therefore, the labourers were called from nearby village. It is submitted that Awdhesh Kumar had no right to object and by raising objection he caused annoyance and tried to intercept the appellants from reaping the crop. He called his brothers who came to the spot. The appellants were in clear and effective possession of the property. They had sown the crop. Even a trespasser has the right of private defence of property and person, and the nature of possession required for exercising the right against others including the true owner. In the instant case, it has been brought on record by the prosecution itself that the accused persons were in possession, they were in settled possession. The expression 'settled possession' has been used in AIR 1968 SC 702 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. The right of private defence of person and property is a well recognised valuable right and it is necessary to be preserved for maintenance of the rule of law. Persons have to respect the right of person as well as of property. The right to private defence is available for protection against apprehended unlawful aggression and not for furnishing the aggressor for the offence committed by him. It is a preventive and not a punitive right; It is not the law that a person when called upon to face an assault must run away to the police station and not to 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 away 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 of 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. See *Jai Dev v. The State of Punjab*, AIR 1963 SC 612.

9. In the instant case, as has been pointed out, the complainant party was the aggressor in the sense that it objected to the settled right of the appellants and, more so, to the reaping of the crop. The Police after investigation registered a case at Crime No. 20/86 against. Anil Kumar (P.W. 1), Pramod Kumar (P.W. 2) and Amod Kumar (P.W. 3) for an offence under Section 324/34, IPC on the report of appellant Basant Kumar (Ex. D-5) and his medical report (Ex. D-7).

10. Shri Rajendra Singh, learned senior counsel submitted that the evidence of the prosecution witnesses regarding fire by gun shot and throwing chilli powder in the eyes is not reliable and they have exaggerated their version, It is contended that there are material contradictions and the said allegation does not find place in the first information report (Ex. P-1); such version cannot be relied upon and in support thereof reliance has been placed on a decision of the Supreme Court in *Muluwa v. The State of Madhya Pradesh* (AIR 1976 SC 989) where it has been held :

'It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted.'

It is also contended that even if it is taken that fire in the air was shot it was with an object to disperse the complainant party and yet they did not disperse and leave the field.

11. In the facts and circumstances, the contention of the learned counsel for the appellants is that the complainant party had absolutely no right to object. The crop was sown several months back. If any action was required to be taken by the complainant party it was open for them to have taken recourse under law, but for taking recourse under the civil law some right had to be shown. In the instant case, the admission made by Anil Kumar (P.W. 1) in paras 7 to 9 and by Nalwa (P.W. 5) goes to show that the complainant party had no civil right to object. If a person had no right and yet objects it creates an apprehension and causes annoyance. The incident admittedly had taken place in the field which was in the possession of the accused persons. The deceased Awdhesh Kumar and his brothers P.W. 1 Anil Kumar, P.W. 2 Pramod Kumar and P.W. 3 Amod Kumar had caused annoyance and committed criminal trespass.

12. Since trespass was committed, Sections 96, 103 and 104 of the Indian Penal Code, are relevant which read :

'96. Nothing is an offence which is done in the exercise of the right of private defence.'

'103. The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the description hereinafter enumerated, namely:--

Firstly. -- Robbery;

Secondly. -- House-breaking by night;

Thirdly. -- Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly. -- Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.'

'104. If the offence, the committing of which or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99 to the voluntary causing to the wrong-doer of any harm other than death.'

Since the incident had taken place in the field possession of which was with the accused persons, the offender/complainant party continued in the commission of criminal trespass. Criminal trespass as defined in Section 441 of the Indian Penal Code reads thus: '441. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there, with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.'

13. It is contended that the prosecution has not led any evidence as to which injury caused the death of Awdhesh Kumar and which injury is attributed to the individual accused. In case of exceeding private defence it is the individual act upon which responsibility is fastened. Reliance has been placed on State of Bihar v. Nathu Pandey (AIR 1970 SC 27) where the Supreme Court has observed in para 7 :

'Some of the respondents were armed with bhalas but it is not possible to say which of them were so armed and which of them inflicted the fatal wounds on Ramdhari and Ramswarup, Accordingly we cannot convict any of the respondents under Section 302.'

It is further contended that where individual act could not be attributed to any particular individual the other persons would not be liable under Section 302 read with Section 34, IPC. Reliance has been placed on *Joginder Ahir and others v. The State of Bihar* (AIR 1971 SC 1834) where the Supreme Court has observed in para 4 :

'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 acts 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.'

14. A person in possession of property has a right to protect the possession as well as the property and where there is actual invasion of his rights and an attempt on his person by others, he can defend himself and his property by force and to collect such numbers and such arms, as contended by *Shri Rajendra Singh*. Reliance has been placed on *Summa Behera and others v. Emperor* (AIR 1945 Patna 283) where it has been held :

'It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence.'

15. In view of the aforesaid discussion, in our opinion, the conviction of appellants Krishan Kumar and Vinod Kumar under Section 302, IPC, is not sustainable. and so also the conviction of appellants Basant Kumar under Section 302 read with Section 34, IPC. Since the criminal trespass was committed by the complainant party the appellants had the right of private defence of person and property, but in doing so they had exceeded the right of private defence by causing the death of Awdhesh Kumar. The conviction and sentence of appellants under Section 302 and Section 302/54, IPC is set aside and instead, they are held guilty of the offence under Section 304 Part I, IPC. It is submitted that the appellants have remained in jail for five years and 10 months. In the facts and circumstances, the appellants are sentenced to the period already undergone by them.

16. So far as the conviction of the appellants under Section 307 and Section 307/34, IPC, is concerned, it is completely covered under Section 104, IPC. Even otherwise, in this case it has been pointed out that the injuries suffered by Pramod Kumar (P.W. 2) do not go beyond Section 324, IPC. In any case, the appellants have remained in jail for a period of five years and 10 months.

17. In the result, the appeal is partly allowed. The conviction of the appellants under Section 302 and Section 302/34, IPC and the sentence passed thereunder is set aside and, instead, they are convicted under Section 304 Part I, IPC and sentenced to the period already undergone by them. The conviction of the appellants under Section 307 and Section 307/34, IPC is set aside and, instead, they are sentenced under Section 324, IPC, and sentenced to the period already undergone by them. The sentence of fine is also set aside.

18. Appeal partly allowed.