

Jagdish Chandra Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Feb-19-1986

Reported in : 1986(1)WLN431

Judge : Shyam Sunder Byas and; Jas Raj Chopra, JJ.

Appeal No. : D.B. Criminal Appeal No. 711 of 1980

Appellant : Jagdish Chandra

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Shyam Sunder Byas, J.

1. By his judgment dated September 16, 1980 the learned Sessions Judge, Pratapgarh convicted the accused Jagdish Chandra Under Sections 302, IPC and 27 of the Arms Act and sentenced him to imprisonment for life with a fine of Rs. 500/-, in default of the payment of fine to further undergo three months' rigorous imprisonment of the first count and three years' rigorous imprisonment on the second count. Sentences were directed to run concurrently. The accused has come-up in appeal to challenge his conviction.

2. Abdul Rahim the deceased victim in the case - was a resident of Bassi P.S. Vijaypur district Chittorgarh. The accused is, also a resident of the same town. He had, however, migrated to Chittorgarh, but at times used to come to Bassi. When the accused was at Bassi, he used to live in a shop shown by digit '8' in site plan Ex. P 3. At about 8.30 a.m on May 12, 1979, PW 2 Rajmal Teli was taking his bullock-cart loaded with grass-bundles to his house. The cart was moving from North to South. Abdul Rahim came from behind the cart and proceeded further keeping himself on the left-side of the cart. It is alleged that at that very time the accused came out from his shop with a gun in his hand, took position in between the bullock's feet and the wheel of the cart and fired a shot at Abdul Rahim. Abdul Rahim fell down. Rajmal (PW 2) raised cries. The accused went back in his shop and again came out with a gun. He then went towards Abdul Rahim and fired another shot with his gun. The accused returned to his shop, placed his gun there and came out. He then disappeared. Abdul Rahim passed away instantaneously on the spot. Hearing the gun shots, PW 1 Noor Mohammed- Head Constable, Police Out Post, who was on the general round with one Police Constable Pushkar Lal - came running to the spot. Rajmal (PW 2) told them that Abdul Rahim was shot dead by the accused Jagdish Chandra. Noor Mohammed posted Pushkar Lal to keep a watch on the victim's dead body. He drew up report Ex. P 1 and sent it to the Police Station, Vijaypur, with one Roop Lal Kalal. Report Ex. P 1 was received at the Police Station at about 9.30 a.m. A case under Section 302, IPC was registered. The Station House Officer Nana Lal (PW 8) arrived on the spot at about 10.30 a.m. and prepared the inquest report of the victim's dead body. Since the accused was living at Chittorgarh, the message to arrest him was flashed. The Deputy Superintendent of Police Mr. Liyakat Ali(PW18) also arrived on the spot. The site was inspected and blood-stained soil from there was seized and sealed. The postmortem examination of the victim's dead body was conducted at about 4.00 p.m. by PW 9 Dr. Mansukh Lal the then Medical Officer In-charge, Government Dispensary, Bassi. The doctor noticed the following ante-mortem injuries on the victim's dead body;

(1) Lacerated wound on the left-temporal region, margins of wound were irregular torn inverted; underlying bone fractured and brain tissue torn;

(2) Lacerated wound on the right parietal region 2-1/3' above the right ear; margins of wound were irregular, torn and everted; underlying Bone fractured and brain tissues torn as the direction of wound;

(3) Lacerated wound on the head at left mastoid region 1/2' below the left ear; margins of wound were irregular and torn and inverted; underlying bone and brain tissue torn; during examination of brain tissue, five pieces of bullet found in the brain tissue.

3. The injuries were caused by the bullets of a gun. Wounds No. 1 and 3 were entry wounds of the bullets while wound No. 2 was the exit wound. The doctor was of the opinion that the cause of the victim's death was haemorrhage and shock due to injury to vital brain centres by the gunshot wounds. The post-mortem report prepared by him is Ex. P. 8. The doctor seized and sealed the five irregular shaped lead pellets which were found embodied in the brain tissues of the deceased-victim. The accused was arrested on the same day at Chittorgarh. In consequence of the disclosure statement made by the accused after his arrest on May 12, 1979, two S.B.M.L guns (articles 2 and 3) along with gun-powder and other explosive were recovered from his shop. The guns and the lead pellets were sent for examination to the State Forensic Science Laboratory, Jaipur. The guns were found serviceable. It was also found that the guns were fired and the pellets could have been fired from the guns. On the completion of investigation, the police submitted a challan against the accused in the Court of Judicial Magistrate, Chittorgarh, who, in his turn, committed the case for trial to the Court of Sessions. The learned Sessions Judge framed charges under Sections 302, IPC and 27 of the Arms Act against the accused, to which he pleaded not guilty and faced the trial. Denouncing the whole prosecution story as a false and fabricated piece of concoction, the accused claimed absolute innocence. It was alleged by him that only a truncated and lope-sided version of the incident had been placed by the prosecution and the real facts were suppressed and concealed. In his statement under Section 313, Cr.PC, it was stated by him that on the death of his father, the relations between him and his brother Bhanwar Lal sunk low and had totally broken. The deceased Abdul Rahim was a notorious person of the locality. His services were hired by his brother Bhanwar Lal (accused). On July 7, 1978, the

deceased Abdul Rahim along with two sons of Bhanwar Lal made an assault on him (accused) and caused severe and grievous injuries to him. On his report, the police had filed a charge-sheet against the deceased and the sons of Bhanwar Lal for an offence under Section 325, IPC. It Was further stated by him that he was not keeping good health and a day before, i.e. in the evening of May 11, 1979 he was given the medical treatment by Dr. Mansukh Lal (PW 9). Abdul Rahim was after his life. Seeing danger to his life, he migrated to Chittorgarh. At times, he used to come to Bassi. Due to his illness, when he has about to leave for the hospital on the day of the incident, he noticed the deceased Abdul Rahim advancing towards him by taking positions behind a bullock-cart. The deceased had a pistol with him. He became apprehensive of his life and took-up a gun to threaten Abdul Rahim. Abdul Rahim, taking petition behind the bullock-cart, fired a shot at him (accused) from his pistol. He (accused) also, therefore, fired a shot from his gun. The shot fired by Abdul Rahim missed the mark and did not hit him (accused). However, his (accused) shot hit the deceased. It was further alleged by him that dropping the gun there he left the place and reached Chittorgarh, where he was arrested by the police. The accused, thus, pleaded a right of private defence. In support of its case the prosecution examined twelve witnesses and filed some documents. Mr. P.S. Manccha the Fire-Arms Expert of the Forensic Science Laboratory Jaipur was examined as a Court witness. In defence, the accused also filed some documents and examined ten witnesses. On the conclusion of the trial, the learned Sessions Judge found no merit in the accused's plea of right of private defence. He held that Abdul Rahim was shot dead by the accused. The defence plea was dismissed and the charges were held duly proved against the accused. The accused was consequently convicted and sentenced as mentioned at the very out-set. Aggrieved against his conviction, the accused has taken this appeal.

4. We have heard Mr. M.C. Bhandari, the learned counsel for the appellant and Mr. L.S. Udawat the learned Public Prosecutor. We have also gone through the case file carefully.

5. Before dealing with the contentions of the appellant, it would be proper to briefly notice the conclusions of the learned Sessions Judge. The prosecution examined three eye witnesses viz., PW 2 Rajmal, PW 3 Sirajuddin and PW 4 Ali

Mohammed. They all stated that two shots were fired and both hit the deceased-victim Abdul Rahim. The learned Sessions Judge held that PW 3 Sirajuddin and PW 4 Ali Mohammed had not seen the incident and were Falsely introduced as ocular witnesses of the incident by the prosecution. He dismissed their evidence. PW 2 Rajmal however, was found to have seen the incident. But he was also partly believed. The learned Sessions Judge held that the deceased had received only one gun-shot. The two entry wounds found on his head were the results of a single shot. He further held that in the whole incident, one shot was fired and that too was by the accused. He dismissed the plea of right of private defence on the ground that the deceased Abdul Rahim fell down on the spot and passed away instantaneously. The police arrived there within a few minutes. No pistol was found with the deceased or near-about his dead body,

6. In assailing the conviction, the first ground raised by Mr. Bhandari is that PW 2 Rajmal, who has been partly held reliable by the Court below is not a witness of truth. It was argued that tenor of his testimony reveals that either he had not seen the incident or had deliberately given a distorted and twisted version of the occurrence. It was contended that according to this witness, the accused fired two shots. The first shot was fired by the accused by taking position between the bullock's feet and the wheel of the cart. The accused then instantaneously went to his shop and came back immediately again with a gun in his hand. He went ahead of the cart, moved towards the deceased and fired the second shot. The contention of Mr. Bhandari is that the incident could not have taken place in the manner stated by this witness. As per medical evidence, no blackening, tatooing and scorching were found on the victim's dead body. The testimony of PW 2 Rajmal suggests that the shots were the results of the close-range firing. The fire-arm used was a country-made S.B.B.L. gun. The barrel of the gun must be of some length. When the second shot was fired, the victim was lying on the ground. According to Dr. Mansukh Lal (PW 9), injury No. 3 (i.e. the entry wound caused by the second shot) was hit with the barrel being below the aforesaid injury. When the victim was lying on the ground, the barrel could not be below the surface of his head. The contentions have considerable force.

7. PW 9 Dr. Mansukh Lal deposed that since no blackening tatooing or scorching were found on the victim's dead body around his injuries, the fire was shot from a distance of more than eight feet. According to PW 2 Rajmal, the first shot was fired by the accused by taking position in between the bullock's feet and the wheel of the cart. The victim was on the other side of the cart. In the first instance, when the cart was moving, the accused not have taken the position in between the bullock's feet and the wheel of the cart as suggested and stated by PW2 Rajmal. More over, the distance between the victim and the accused should not be more than the width of the cart which should not be more than four or five feet. The learned Sessions Judge was right that injury No. 1 to the victim was not caused as suggested by this witness (PW 2 Rajmal). We are further of the opinion that the second entry wound was also not caused to the victim in the manner suggested by PW 2 Rajmal. The victim was lying on the ground with his face upwards towards sky. It is alleged by PW 2 Rajmal that the caused went to the victim whose he was lying on the ground and then fired the shot. In that situation, the barrel of the gun must he above the head and not below, as suggested by PW 2 Rajmal. It is interesting to note that the name of Rajmal has not been mentioned in the First Information Report Ex. P 1 lodged by PW 1 Noor Mohammed H.C. though he admitted that before writing Ex. P 1 he had contacted Rajmal who told him that the accused had fired the shots and thereby killed the victim. This omission of the name of Rajmal in the First Information Report Ex.P 1 is of considerable importance. The manner in which he has described the incident suggests that he had not seen the accused firing the shot. Since there were two entry wounds on the head of the victim, the witness was made to state that the accused fired two shots. Rajmal (PW 2) is not a witness of truth. Even if his presence is accepted on the spot, it can be safely said that he has given a distorted and twisted version of the incident and has suppressed the real facts.

8. It was next argued by Mr. Bhandari that many of the eye winesses, whose presence on the spot has been admitted by PW 2 Rajmal, have been with held by the prosecution. PW2 Rajmal, in his cross-examination, admitted that Heeralal Suthar, Mst. Bajra and many persons working in the Bidi Factory situate nearby the place of occurrence, had seen the occurrence. The Investigating Officer Liyakat Ali (PW 12), in his cross-examination, admitted that he had interrogated

these persons during investigation. Likewise, Police Constable Pushkar Lal, who was along with Head Constable Noor Mohammed (PW 1) has not been examined by the prosecution. No reasons were stated by the prosecution for with-holding the aforesaid persons and not producing them in evidence. It is true that the prosecution is not required to examine all the witnesses who have seen the occurrence. The prosecution is required to produce only such witnesses who are required to unfold the occurrence. However, here in the instant case, the position is peculiar. Out of the three witnesses, two viz., PW 3 Sirajuddin and PW 4 Ali Mohammed have been falsely introduced as eye witnesses of the occurrence. The testimony of PW 2 Rajmal is not straight-forward, pure and serene. There are lapses and lapses in his testimony. The occurrence had taken place on a busy public way, on the both sides of which are situate the shops and residential houses. In these circumstances, it was incumbent on the prosecution to have examined atleast Heera Lal Suthar and Mst. Bajra, whose presence on the spot has been admitted by the star witness PW 2 Rajmal.

9. The next contention raised by Mr. Bhandari, which is the main and principal, is that the Court below was not justified in not accepting the plea of the right of private defence specifically raised by the accused in his statement under Section 313, Cr.PC. It was argued that according to the three eye witnesses of the occurrence, viz., PW 2 Rajmal PW 3 Sirajuddin and PW 4 Ali Mohammed, they heard two shots. PW 2 Noor Mohammed, HC. who was only fifty feet away from the place of occurrence also speaks of hearing of the two shots. The author of one shot is admittedly the accused. Since the accused is the author of only one shot, the other shot must naturally be attributed to the deceased. It was argued that though no pistol was found with the deceased, there are strong indications in the prosecution evidence that the accused after dropping his gun in his shop took to heels. None of the witnesses stated that when he left the shop, he had closed it and locked it; The prosecution evidence that after his arrest the accused opened the lock of his shop and got the fire-arms recovered, is wholly untrue. The suggestion that the accused had locked the shop and kept the key in a TAAK of the shop situate in the outer-wall near the door, is highly ridiculous and highly improbable. When the search of the shop was taken, a pistol was found therein. It has not been proved by the prosecution that the pistol belongs to the accused. In

these circumstances, when the shop was open and unlocked, the possibility of planting the pistol therein cannot be ruled out. It was further argued that the accused was an ailing man. He was medically treated by Dr. Manshuk Lal (PW 9) only a day before the incident. The deceased was a quarrelsome man and a DADA of the locality. He had earlier assaulted the accused and caused grievous injuries to him. It was the deceased who had come to pick-up the quarrel with a pistol in his hand. He had fired the pistol at the accused. The accused was, therefore, left with no option but to fire back to save himself. The shot fired by the deceased himself missed the mark. However, the shot fired by the accused hit the deceased. It was argued that in the context of these circumstances when a detached view is taken of the entire situation it cannot be said that the accused had not acted in self defence. Reliance in support of the contention was placed on *Amzad Khan v. State* : 1952 CriLJ648 , *Daya Bhai v. State of Gujarat* : 1964 CriLJ472 and *Yogendra v. State of Gujarat* : 1980 CriLJ459 .

10. In reply, it was contended by the learned Public Prosecutor that the story of two shots in the incident is not correct. It is a case in which only one shot was fired and that too by the accused. It was by sheer mistake that the three eye witnesses and PW 1 Noor Mohammed spoke of the two shots. The learned Sessions Judge has categorically examined the evidence and held that it was a case of only one shot. There is no evidence that the deceased had a pistol. If he had the pistol, it must have been found with him when he fell down. There is nothing on record to suggest that some-body removed the pistol from the deceased and planted it in the accused's shop. The plea of right of private defence was, therefore, rightly dismissed by the trial Court.

11. We have given our anxious consideration to the respective contentions.

12. The pertinent question before us is whether a right of private defence was available to the accused. This right is based on the instinct of self preservation. The instinct of self preservation is indomitable in a human being and this instinct has been recognised as a lawful defence in the laws of all civilized countries. It has been so recognized in Sections 96 to 106 of the Penal Code. If the danger to the body or property is there to a citizen, he need not flee away. He is entitled to

hold his ground and strike back in defence. But he can do so within the limits prescribed by the aforesaid sections of the Penal Code. The gist of these sections, when read together, is that the apprehension of danger to life and property must be read and well founded and the harm inflicted on the assailant should not be more than necessary demanded by a given situation. The apprehension must be imminent. It is the imminence of the danger-the urgency of the situation that is material. Whether the apprehension was real or not, is always a question of fact depending upon the circumstances and the background in which the incident had taken place. In evaluating the circumstances and back ground, one should place himself in the position of the accused and to assess how he would have reacted in the given situation and in face of that particular apprehension of danger. The situation should be viewed with the stand-point of the accused and not with the spectacles of a cool by slander.

13. Here in the instant case, the accused has come up with his specific defence that it was the deceased who had fired the shot first at him. It was only thereafter that he (accused) fired the shot in self-defence. The burden, therefore, lies on him. The material on record speaks much in his favour.

14. PW 2 Rajmal, who is a star-witness of the prosecution speaks about two shots attributing both of them to the accused. We have discussed and held that the accused had fired only one shot at the deceased. The witness is positive about two shots. PW 1 Noor Mohammed, who is Head Constable Police and was posted at Police Out Post, Bassi deposed that when he was nearly fifty paces away from the place of occurrence, he heard a shot. Instantly within few seconds, he heard another shot. To quote him in his own words:

ml le; Is ge ?kVukLFky ds djhc ipkl dne nwj Fks vkSj ,d cUnwd ds Qk;j dh vkokt lquh A ml le; es ?kVukLFky Is pkSdh dh rjQ djhc 50 dne nwj Fks A dqN gh {k.kks es fQj ,d nwljs Qk;j dh vkokt vk;h A

The witness, thus, speaks of two shots fired in quick succession within few seconds. The accused, as discussed above, fired only one shot. The statement of the accused, therefore, that other shot was fired from the pistol by the deceased should be accepted. The accused is not required to prove his defence to the hilt. If

he is able to show preponderance of probabilities in his favour, it is sufficient for him to discharge the burden of proof of his defence. After the arrest of the accused, a search of his shop was made by the Investigating Officer Mr. Liyakat Ali the then Deputy Superintendent of Police, Chittorgarh. He deposed that on the search to the accused's shop, one country-made revolver was found. PW 11 Mohammed Ibrahim, who is a witness of search, also admitted this fact that when the search of the accused's shop was made, one country-made revolver was found. This revolver was seized and sealed, but was not produced during trial in this case. A separate case against the accused was registered. Admittedly this country-made revolver (Tamancha or pistol) was not sent for chemical examination to the Ballistic Expert. Had it been sent, it could have been, ascertained whether it was used in firing in this incident or not.

15. The prosecution has strived to establish that since the revolver was found in the shop of the accused it should be taken to be in his possession. We are unable to accept this suggestion on account of some vital reasons. It is alleged that the accused after firing the shot at the deceased went to his shop, dropped his gun there and took to heels. He did it so quickly that PW 1 Noor Mohammed, who was nearly fifty paces away from the place of the incident could not see the accused. PW 2 Rajmal did not state that when the accused left his shop and took to heels he closed the shop and locked it. PW 1 Noor Mohammed also does not state that the accused had closed the shop and locked it before running away from there. The seizure memo of the guns and the search of the accused's shop is Ex. P 10. It has been mentioned therein that the accused opened the lock of his shop with the key he had with him. When the accused was arrested and personal search was taken, no key was, found with him, vide his arrest memo Ex P 9. The prosecution was, therefore, faced with a difficult situation as to how the possession of the key with the accused should be explained because it was not so mentioned in his arrest memo Ex. P 9 and search memo Ex. P 10. A new story was therefore, developed during trial that the accused lifted the key lying in the Taak situate in the outer wall of the shop near the door. PW 11 Mr. Mohammed Ibrahim and the Deputy Superintendent of Police Mr. Liyakat Ali (PW 12) in their statements, developed this new story. We are unable to conceive that the accused, who had locked his shop would keep the key in a Taak outside the shop where anybody

can lay hands on it. The suggestion of these to witnesses that the key was found in the Taak of the outer wall of the shop is highly ridiculous and does not stand to reason. In these circumstances it would be perfectly legitimate to infer that when the accused left the shop, he neither closed it nor locked it. The revolver could thus, be planted there by any body before the arrival of the police.

16. The deceased Abdul Rahim as per the evidence of the defence witnesses was a rowdy and turbulent fellow who was shooting troubles here and there in the town. His relations with the accused had sunk deep low. He was taking sides with the brother of the accused. On July 1, 1978 the deceased along with the sons of the accused's brother made an assault on the accused and caused grievous injuries to him. On the accused's first Information Report Ex. DI, the police submitted a challan Ex. D 3 against the deceased Abdul Rahim and the two sons Radhey Shyam and Gordhan Lal of the accused's brother. The relations between the deceased and the accused had, thus completely broken.

17. Thus the position which emerges out is that the relations between the deceased and the accused had completely broken. The deceased had earlier made an assault on the accused and had caused grievous injuries to him. The deceased was of aggressive temperament and disposition. He came with a pistol in his hand and fired it at the accused. These facts must go to great way to cause belief in the accused's mind that he was faced with imminent peril. If, therefore, he fired the shot at the deceased his firing the shot cannot be held as causing more harm than necessary. When the deceased fired the shot at the accused, the accused was left with no alternative other than to fire the shot back in self defence. The accused has thus, acted in self defence and cannot be held guilty for the offences he was convicted. His firing the shot at the deceased was in self defence and that exonerates him completely from the guilt.

18. For the reasons discussed above, we are unable to maintain the conviction and sentence of the accused. He is entitled to acquittal.

19. In the result, the appeal of accused Jagdish Chandra is allowed. His convictions and sentences under Section 302, IPC and 27 of the Arms Act are set aside and he is acquitted of the said offences. He is in custody and is undergoing

the sentence. He shall be immediately set for that liberty, if not wanted in any other case.

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