

Hamji Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-29-1990

Reported in : 1990WLN(UC)440

Judge : A.K. Mathur and; B.R. Arora, JJ.

Appeal No. : D.B. Cr. Appeal No. 485 of 1977

Appellant : Hamji

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Shri. Doongarsingh

Judgement :

A.K. Mathur, J.

1. This appeal is directed against the judgment dated 20th of October, 1977, passed by Additional Sessions Judge, Banswara, convicting the appellant Under Section 302 IPC and awarding a sentence of life imprisonment and a fine of Rs. 200/-.

2. The incident which led to the prosecution of the present appellant took place in the field on 21st. June, 1977 when Kamji deceased was ploughing the land. At that time Hamji came there and asked Kamji not plough the land and inflicted injury with 'Kash'. At that time, Hamji was accompanied by Bhuria and Kalia. The report

of this incident was lodged at Police Station, Sallepat, District Banswara on 21st June, 1977 at 11.30 A.M. by Bhoorji son of Kamji. The prosecution in support of its case examined 16 witnesses PW 1 Bhoorji, PW 2 Jokhi and PW 15 Kanti are the eyewitnesses to the occurrence who has supported the prosecution case during the trial PW 9 Soma and PW 1 Punja, who were cultivating their fields came at the scene of the occurrence when PW 1. Bhoorji raised an alarm and has witnessed the occurrence, but they have not supported the prosecution case during trial and have been declared hostile. PW 7 Magji was the witness relating to the extra judicial confession, but he has also not supported the prosecution case and has been declared hostile. PW 3 Deva, PW 4 Punja, PW 5 Maga and PW 14 Kalia are the witnesses to whom PW 2 Jokhi narrated the whole story after the incident. PW 14 Kalia, there after went with PW 1 Bhoorji at the Police Station, Sallepat, where the FIR was lodged. PW 8 Laxman, PW 11 Raisingh PW 12 Bhagu, PW 13 Dinesh Chandra and PW 16 Chunilal are the police witnesses. PW 8 Laxmansingh registered the FIR which was lodged by PW 1 Bhoorji. PW 11 Lalsingh recorded the statement of 2-3 witnesses and collected the revenue record. PW 12 Bhagu Constable took the sealed packet and deposited them in the crime branch. PW 13 Dinesh Chandra Constable was posted in S.P. Office Banswara to whom sealed packets were handed over by Shri Bhagu and which was kept in his custody in sealed condition and were sent for chemical examination through Jaswant Singh. PW 16 Chunilal is the Investigating Officer, who conducted the Investigation and after Investigation presented the challan. This is the all evidence produced by the prosecution during the trial.

3. We have heard the arguments advanced by Shri Doongarsingh, counsel for the appellant, as well as the learned Public Prosecutor.

4. The main contention of the learned Counsel for the appellant is that the eye witnesses are not reliable witnesses and appellant has been falsely implicated in the case. The next contention of the appellant is that even if the evidence of the prosecution witnesses is take to be true, even then as the appellant was in possession of the land in question and the deceased was trespasser over the land and, therefore, he has not committed any offence as he has a right of private defence of property and his case is squarely covered by sections 104 and 105 IPC

Learned Public Prosecutor on the other hand supported the judgment of the learned Sessions Judge.

5. We will first consider evidence of the eyewitnesses. PW 1 Bhoorji is the son of the deceased who was with his father at the time of the incident. He has stated that in the morning his father Kamji called him to the field. At that time Kamji was cultivating the field. He took the tobacco and sat on the hillock and started grazing the cattle. At that time Hamji came there with Kosh and inflicted injury on the head of Kamji with Kosh Hamji was accompanied by Kalia and Bhuria who asked Hamji to kill Kamji. On receiving injury on the head Kamji fell down. Hamji continued giving beating. He raised an alarm upon which his mother and brother came there. His aunt (Bhuva) also came there. Hamji then threw stone towards his mother. At that time Poonja and Soma were cultivating their field. He thereafter went to the Police Station along with Kalia and lodged the report. PW 2 Jokhi has stated that after hearing the cries, of his son, he went to the scene of the occurrence. At that time Phula, Kalia and Hema were present there and Hema was inflicting injury to her husband. Hema threw stones over her. PW 16 Kanli has stated that she was grazing her cattle and her father was cultivating his field and his brother also was there. Hamji came in the field accompanied by Kalia and Phula and inflicted injury to his father by Kosh. On receiving the injury her father Kamji fell down. Thereafter Kalia and Phulia also inflicted injury to Kamji.

6. We have gone through the statements of these eye-witnesses and the other relevant record of the case and though a thorough cross-examination has been conducted on these eyewitnesses, but nothing could come out from the cross-examination which discredited the testimony of these witnesses. Their testimony has not been shaken in any way. According to us the witnesses are stating what they had actually seen. Their presence at the scene of the occurrence was also natural. The learned Sessions Judge. In our view, has not committed any illegality in relying upon the testimony of these witnesses.

7. Now coming to the point what offence has been committed by the accused persons. PW 2 Jokhi who is the mother of PW 1 and the wife of the deceased in her cross-examination has admitted that the field in question where the incident

took place, was in possession of Hamji who was cultivating the field and her husband came to that field only on that day and the field of her husband was another. PW 2 Jokhi has also admitted that litigation regarding this very field was going on in the court between her husband and Hamji and the last date in that case was on the previous day of the incident. PW 1 Bhoorji has also admitted in his cross-examination that Hamji used to cultivate this field where the incident took place previously and they were not cultivating this field and regarding this field there was litigation going on. His father was given another field which is situated on the hillock. No question regarding the possession has been asked to PW 15 Kanti. From the evidence produced by the prosecution, it is thus established that the field in question where the incident took place was in possession of the complainant party. In this view of the matter, deceased Kamji was a trespasser over the land in question and appellant has therefore every right to protect his possession. Thus from the evidence on record, the position emerges is that on the day of incident, the land where the incident took place, was in possession of Hamji accused and it is on the days of the incident Kamji for the first time had gone to plough the field and had not sown any crop on this land at any time prior to the date of the incident. The land in question is a culturable land and was in possession of accused Hamji, while Kamji deceased had another land in his possession which was being cultivated by him. This fact had been admitted by PW 1 Bhoorji and PW 2 Jokhi Hamji being the rightful owner and in peaceful possession of the property, in the case of invasion of his right by Kamji was entitled to defend the property by force, as he had seen the actual invasion of his rights and that invasion amounted to an offence under the Indian Penal Code and he had no time to get the help of the Police. It is settled position of law that against the criminal trespass the person in possession of the property has a right of private defence of property so long as the trespass continues and this right extends to causing to the trespasser any harm other than death subject to the restrictions mentioned in Section 99 of the Indian Penal Code. However, the true owner or the person in possession has every right to dispossess or throw out a trespasser in the act or process of trespass and has not accomplished the possession but this right is not available to the true owner if the trespasser had been successful in accomplishing his possession to the knowledge of the true owner. In such

circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law. In the present case Kamji entered over the land in question only on that day and had ploughed a small part of the land and he has not even sown the crop and thus his possession over the land cannot be said to be a settled possession. He was merely a trespasser and the appellant Hamji being in possession of the land had a right of private defence of property against criminal trespass committed by the deceased and so long as such trespasses has not come to an end and the trespassers did not leave the field and continued the criminal threspas, accused in exercise of his right of private defence of property, could voluntarily cause any harm, other than the death of the trespasser. The right of private defence of property had been provided Under Sections 104 and 105 of the Indian Penal Cide. It is a right of protection and not of vengeance or aggression. This right of private defence is subjected to certain limitation and restrictions as provided in Section 99 of the Indian Penal Code. One of the restrictions is that in no case it should extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The Supreme Court in the case of Puran Singh v. State of Punjab : AIR 1975 SC1674 has laid down certain limitation on the exercise of the right of private defence of person and property. It has been observed by the Hon'ble Supreme Court that the right of private defence of person or property is to exercised under the following limitation:

(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 a reasonable apprehension of death or of grievous hurt to person or damage to the property concerned.

8. It is thus not the law which requires that a person whose property has been the subject matter of the trespass or mischief should the aggressor to take possession of the property and he should run to the public authority to seek redress. But when there is an element of invasion or aggression on the property by a person who had no right to possession then there is obviously no room to have recourse to the

public authorities and the accused-appellant has undoubtedly right to resist the aggression and use force if necessary.

9. In the present case, the settled possession over the land in question was that of Hamji accused-appellant and he had got every right to defend his property against the invasion by Kamji. When a trespasser enters upon the land of another, the person whom the right of possession is envisaged, if the man in possession may turn the trespasser out of the land by force while the trespasser is in the process of acquiring the possession and in doing so if he inflicted such injuries on the trespasser as are warranted by the situation he then the person in possession commits no offence and his action would be covered by the principles of self defence as embodied in Section 96 to 105 of the Indian Penal Code. From the discussion made above, it is thus clear that the possession over the land in question was of Hamji accused and prior to the date of occurrence he was cultivating this land while the deceased has another piece of land which he was cultivating. The deceased trespassed over the land of the accused-appellant has every right to defend the possession of the property from Kamji who was trespasser over the land but Under Section 104 of the Indian Penal Code his right was limited to cause any harm other than the death but he inflicted 7 injuries to Kamji and causes death of Kamji and in this way while exercising his right of private defence of property he exceeded this right. The case of the appellant, therefore, falls under exception to Section 300 of the Indian Penal Code and the appellants has thus committed culpable homicides not amounting to murder as it was committed in good faith and in the right of private defence of property but he exceeded the right provided to him by the law and caused the death of Kamji. In this view of the matter, the appeal filed by the appellant is partly allowed, the conviction of the appellant Under Section 302 IPC is set aside and the appellant is convicted Under Section 304 Part II IPC.

10. The incident in the present case took place on 21st of June, 1977 and more than 13 years have elapsed the accused has already undergone 1 year 8 months and 18 days and we do not think it proper to send the accused behind the bars again after a lapse of 13 years. We therefore sentence him to undergo the imprisonment already undergone and impose a fine of Rs. 5000/- and in default of

payment of fine to further undergo 2 years RI. Two months' time is allowed to deposit the amount of fine.

11. The result is that the appeal is allowed in part conviction Under Section 302 IPC is set aside and the accused is convicted, Under Section 304 Part II IPC and is awarded a sentence for imprisonment already undergone and a fine of Rs. 5000/- and in default of payment of fine to further undergo 2 years' R.I The appellant is allowed two months' time to deposit the fine. The amount of fine, if so paid, may be given to the legal representatives of deceased Kamji.

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