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Court : Kolkata

Decided On : Mar-22-1968

Reported in : AIR1969Cal28,1969CriLJ160

Judge : A.K. Das and ;S.K. Chakravarti, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 97, 99, 100, 107, 147, 149, 302 and 304; ;Code of Criminal Procedure (CrPC) , 1898 - Sections 403 and 423

Appeal No. : Criminal Appeal No. 764 of 1965

Appellant : Sivapada Senapati and ors.

Respondent : The State

Advocate for Def. : Amiyalal Chatterjee (Sr.), Adv.

Advocate for Pet/Ap. : S.S. Mukherjee and ;S. Roy Chowdhury, Advs.

Disposition : Appeal partly allowed

Judgement :

Das, J.

1. This is an appeal against conviction under Section 302/149 I. P. C. The appellants were sentenced to imprisonment for life. The appellants Shivapada Senapati and Motilal Loher were also convicted under Section 148 I. P. C. and the

rest of the appellants under Section 147 I. P. C., but no separate sentence was inflicted.

2. The prosecution case is as follows;

The deceased Monsaram Mahato and his sons, deceased Abhoy, Debu alias Debendra and Jagat and Parikshit were in possession of a paddy field known as Barakhet and the adjoining khets within Burir-bandh-namo khet. This appertained to a Jama of 11-30 acres in Plot No. 1460 of Manpur Mouza. Monsaram took settlement of the land from Panchakote Raj Estate at a rental of Rs. 35 and he got an Amalnama dated Ppus 17, 1345 B.S. They were in possession of the land for cultivation. On 27th Sraban, 1371 B. S. in the morning, corresponding to August 12, 1964 Mansaram with his sons Abhoy, Debu and Jagat and his brother Paresh went to the field for scraping the ail. While they were so engaged in scraping the western ail of the Burir-bandh-namo khet, the appellants and others -- about forty in number--arrived at the spot armed with various weapons including tangis, spears, axes and lathis.

They had six ploughs with them and they started cultivating the land. Mansaram and his sons protested and asked them not to plough their land and also asserted that they would not allow them to plough the land. This annoyed the appellants and others and Sadananda who has since been acquitted, gave an order for assaulting Mansaram and his sons. Abhoy, Mansaram and Jagat were assaulted by some of the accused persons with tangis, spears, axes and lathis and they fell down on the khet with bleeding injuries on their persons. Paresh and Debu also came up and opposed the assailants. They too were assaulted by them with the weapons as a result of which they also fell down there with bleeding injuries.

After this the appellants and others fled away. Abhoy, Mansaram and Jagat died soon after on the land. Rani Maha-tani, the daughter of Abhoy saw the occurrence from the other ail and she immediately reported the incident to Dibakar, her father's cousin at his house. She then came back to the spot and gradually other persons of the family also came. Paresh was unable to speak but Debu told him of the assault on him and others by naming the assailants. Dibakar went to Hura police station and lodged a F. I. R. before an A. S. I. of Police. This Police Officer

came to the spot and made arrangement for removing the dead bodies to the Purulia Morgue for post-mortem examination.

Investigation was started and some seizures were made. Witnesses were examined and some arrests were made that very night. Gradually the police arrested the other persons on the basis of first information report and after completion of investigation submitted chargesheet against 39 persons for various charges for murder and also for rioting armed with deadly weapons. The learned Judge framed a fresh charge under Section 302/149 I. P. C. and also under Section 304/149 I. P. C. Nine persons who were appellants, were convicted while the remaining 30 were acquitted by the learned Sessions Judge.

3. The defence is a plea of innocence. They pleaded that Shivapada Senapati and his brothers were in possession of the lands within Burirbandhnamo Khet and had already ploughed the lands and rendered them fit for transplantation of paddy seedlings prior to the date of occurrence and on the date of occurrence they went to the land with 8 ploughs and several kamins for the purpose of transplantation. While they were getting the lands ploughed, Mansaram along with his sons and brothers and others, 15/16 in number, came to the land and attacked the ploughmen and others. Shivapada opposed them and he was assaulted by Mansaram with lathi on his head. Kangal and Basudeb also sustained injuries. But they were ultimately implicated in the case over earlier grudge and litigation and over obstruction in their attempt to take forcible possession of the land.

4. The learned Judge found that the prosecution failed to prove that the disputed land was settled to Mansaram and his sons in tenancy right or that he was in actual possession of the land. Regarding title the learned Judge held as follows: --

'In view of all these circumstances and the absence of any cogent, oral and documentary evidence of the landlords' sherista I find that the story of creation or existence of a tenancy comprising the Barakhet and other adjoining khets out of the Burir-bandh-namo khet in the names of the sons and a son's wife of Mansaram Mahato has not been proved.' Regarding possession the learned Judge found: 'I find that the disputed land comprising the Barakhet and the khets adjacent thereto were in possession of accused Shibapada Senapati, accused Saktipada Senapati

and Khendulal Senapati as appertaining to the Jama held by them under the Panchakote Raj Estate at the time of the occurrence, and not by Mansaram Mahato and his sons as alleged by the prosecution.'

5. The learned Judge however found on the evidence on record and on the circumstances that the appellants had no right of private defence as there was no reasonable apprehension or danger to the body of any member of the party of accused Shibapada or to the disputed property.

6. So far as the first two findings regarding title and possession of the land are concerned, the learned Judge has dealt with the evidence both oral and documentary and his conclusion seems to be reasonable and we find no reason to differ from that view. (The learned Judge after discussing the evidence proceeded.)

7. The evidence therefore is in favour of the learned Judge's finding that not only the Senapatis had title to the land butthey were also in possession of the land on the relevant date and that they actually came on the land with six ploughs for cultivating it.

8. Having made this finding regarding title and possession the learned Judge has held that they had no right of private defence as there was no reasonable apprehension ot danger to the body of any member of the party or the accused Shibapada or to the disputed property. That is the land of the Barokhet which was being ploughed that morning Mr. S. S. Mukherjee, learned Advocate for the appellants has submitted that this view of the learned Judge is not correct and that it is in conflict with the earlier finding of title and possession in favour of the appellants. Mr. Mukherjee has argued that if the appellants had title and were in possession and were ploughing the land with six ploughs in the morning of the date of incident and if Mansaram and his sons and other relations came on the land and put obstructions to their ploughing, they had the right to throw them out and any force used in such circumstances would be in exercise of the right of private defence. There is some force in the contention raised by Mr. Mukherjee. On the finding of both title and possession in favour of the appellants and also of the admitted prosecution case that Mansaram and his men were challenging their

right to plough and putting obstruction to their ploughing, there is no gainsaying the fact that the owner in possession of the land has a right to remove the obstruction by force from the land. They had undoubtedly a right of private defence of property to throw them out. They had besides the right of private defence of the person as well if in course of throwing them out they had any reasonable apprehension of bodily injury. The question that arises here is, in our view whether the right of private defence which the appellants had, was to the extent of inflicting such injury as they have done in the present case leading to death of a number of persons.

9. The prosecution case is that the appellants with others came upon the land with six ploughs and started ploughing. Mansaram and his sons and others protested and attempted to obstruct and thereupon the appellants and their men who were armed with tangis, spears, lathis and other deadly weapons assaulted them resulting in the death of three men on the spot--and this (one?) the same night and grievous hurt to another. Mr, Mukherjee learned Advocate for the appellants submitted that the appellants were in possession of the land from before. They had cultivated the land and on that date they came for final ploughing before actual sowing. They had a right to the property and were in possession of the same. There was besides attack from the side of Mansaram resulting in injury to Sadananda and two others and therefore the appellants who had the right of private defence were in apprehension of not only being thrown out of possession but of being themselves injured at their hands.

They had therefore the right to attack Mansaram and his men for saving their lives and property. They had reasonable apprehension of death in view of the fact that Mansaram was accompanied by 10/11 persons and had earlier attacked them. Shibpara was examined at the Sadar hospital Purulia on August 14, 1954. The doctor who examined him found one lacerated injury 1' x 1/2 x scalp deep about 2' of the right side of the head about 2' left of frontal eminence. The injury might be caused by some hard and blunt substance such as lathi. There is no evidence that anybody else from the appellants' side was examined by any doctor and there is no specific evidence about the nature of such injury.

The injury of Shivapada is not therefore of such a nature as might give rise to a reasonable apprehension that the lives of the appellants would be at a stake unless they attacked Mansaram and his party and inflicted such injury resulting in the death of so many persons. Section 100, Indian Penal Code provides the circumstances when the right of private defence of the body extends to the voluntary causing of death. This section provides for a right of private defence to the voluntary causing of death or of any other harm to the assailant, if the offence which oc-casions the exercise of the right is such as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

There is sufficient evidence to show that the appellants' party consisted of more than nine persons. According to the prosecution it was 40 persons and the evidence has shown that though they came with ploughs, they came armed with deadly weapons including tangis, spears, axes, lathis etc. The injury on the head of Shivapada was of a minor nature and on the evidence it is difficult to hold that even if Shivapada was assaulted by Mansaram it was to such an extent as would reasonably cause an apprehension in the minds of the appellants and others that unless they inflict blows they would themselves be killed. The trouble was over possession of land and according to the defence they were in possession of the land. The prosecution has adduced evidence to show that some of them were shouting that the whole family of Mansaram would be finished. As a matter of fact the dead persons include Mansaram, his three sons and his brother. It is true that this right of private defence cannot be weighed in a golden scale in times of excitement but even so, the facts disclose that the situation was not such as would justify making murderous assault on so many persons as a result of which three died on the spot and one died in the hospital same night while fifth had at least grievous hurt. The evidence and circumstances clearly show that the appellants' party wanted to make exhibition of force and P. W. 3 stated in his evidence that one of them was shouting that the whole family of Mansaram would be ex terminated. On the evidence therefore we hold that even though the appellants had the right of private defence, they had exceeded it and there could not have been any reasonable apprehension in their minds that such murderous assault was necessary either to save their property or to save themselves.

10. The appellants have been convicted by the learned Sessions Judge under Section 302 read with Section 149 I. P. C. We have already found that the appellants had title and possession in the property and that they had right of private defence. It is true that they went to the spot armed although ostensibly for ploughing, but even so that assembly of the appellants cannot be said to be an unlawful assembly and therefore the conviction under Section 302 read with Section 149 I. P. C. is bad in law.

11. The learned Judge framed charge both under Section 302/34 and also under Section 304/149 I. P. C. In view of our finding that the appellants had the right of private defence but they exceeded it the offence committed would be one under Section 304 I. P. C. (After discussing the evidence his Lordship proceeded).

The injuries were of very severe nature and the strokes were all on vital parts and according to the doctor, could be caused by sharp-cutting weapons like tangis, spear, axe and also lathi. We have already noticed that though the appellants had the right of private defence they had exceeded it and the injuries inflicted were not only on five persons ultimately resulting in the death of all but also were on the vulnerable regions and applied with great force. It is true that they had right of private defence and their assembly was not unlawful. So that conviction under Section 302/149 I. P. C. is not legal. In view also of the finding that they had right of private defence the offence committed would not be one under Section 302 I. P. C. but would be under Section 304 I. P. C., that is, for culpable homicide not amounting to murder. The charge was under Section 304/149 I. P. C. also, but then there is no bar against conviction under Section 304/34 I. P. C. even though no charge on that section was framed provided there is common intention. Common intention has to be gathered from the facts and circumstances and in the present case it is clear that they came upon the land for ploughing but they came heavily armed and when protest was made from the side of Mansaram, they started assaulting and inflicting grievous injuries on so many persons. All of them were armed with tangis, spears, axes, tabla and lathis and the doctor's evidence discloses that there were such injuries as could be inflicted by these weapons. They came together upon the land, inflicted injuries and while the people were lying in the land they left together. This is the evidence of the prosecution

witnesses, particularly the evidence of P. Ws. 2 to 4 and they are eye witnesses of the occurrence. Common intention, in our view, is apparent from the fact that they came together and they left together and in the meantime inflicted injuries on so many persons with various weapons which they carried. Although there is a difference in common object and common intention they both deal with combination of persons which became punishable as sharera in one offence and the charge under Section 149 I. P. C. is no impediment to a conviction by the application of Section 34, if the evidence discloses the commission of the offence in furtherance of common intention of all. The only question that may be considered in this connection is whether any prejudice is likely to be caused to the appellants for the absence of a charge under Section 304 read with Section 34 I. P. C. There were already charges under Section 302 read with Section 34 I. P. C. against the appellants for murder of the different persons and they were therefore aware of the charge and evidence was adduced and the question of prejudice does not arise in the present case. The appellants had notice that they were being tried as sharers in the offence of murder tinder Section 34 and also that their liability was collective and vicarious and not individual. On the evidence therefore the inference of common intention can be drawn and the appellants are liable to be convicted for the offence of culpable homicide, read with Section 34 I. P. C. We have already held that the appellants have the right of private defence and therefore the appellants must be held guilty under Section 304 Part I read with Section 34 I. P. C. We have already discussed the nature of the injuries and of the shouts to exterminate the whole family and obviously the injuries were inflicted with intention to causing death and death has caused to three on the spot, to one in course of the same night and fifth man had at least grievous hurt.

12. Mr. Mukherjee has urged that the learned Judge framed a charge under Section 302/34 I. P. C. and acquitted the appellants of that charge. There was no appeal against that order of acquittal and as such this Court sitting in appeal should not convict them for murder read with Section 34. There is no doubt that the learned Judge acquitted them of the charge of murder under Section 302/34 I. P. C. and on the principle of autrefois acquit as dealt with in Section 403 of the Cr. P. C. they cannot be convicted under Section 302/34 I. P. C. We have however already found that in view of the fact that they had a light of private defence they

are not found guilty under Section 302 I. P. C. but their conviction under Section 304 I. P. C. read with Section 34 is not hit by earlier acquittal under Section 302/34 I. P. C. and is perfectly legal and proper in this case.

13. Now coming to the evidence we find that the learned Judge dealt with the evidence against each of the appellants in some details. (After discussing evidence the learned Judge proceeded.)

14. In the result therefore we find all the appellants guilty under Section 304 Part I read with Section 34 I. P. C. On the question of sentence these appellants are all agriculturists and they have natural attachment for their land. They had their title and possession in the land and they cams in the height of cultivation season with their ploughs also and there was earlier trouble over their possession. Undoubtedly there was obstruction from the side of Mansaram and his relations and apparently they lost their heads over obstruction to their possession at that time of the year. They are not really criminals by nature but they lost their balance. We are aware of the agriculturist's love for land and we feel that in a case like this they should be leniently dealt with, notwithstanding the fact that several persons lost their lives. We, therefore, sentence each of them to R. I. for 10 years.

15. We have already found that there was no unlawful assembly and therefore the conviction under Sections 147 and 148 I. P. C. cannot stand. Their conviction under Sections 147 and 148 I. P. C. are set aside and they are acquitted of the charge. This appeal therefore succeeds in part. The conviction under Sections 147 and 148 I. P. C. is set aside and they are acquitted of the charge. The conviction of the nine appellants under Section 302/149 I. P. C. is also set aside but they are instead convicted under Section 304, Part I read with Section 34 I. P, C. and they are sentenced to R. I. for 10 years each. The appeal is disposed of accordingly.

S. K. Chakravarti, J.

16. I agree.

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