

Jabbar Dar Vs. State

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Court : Jammu and Kashmir

Decided On : Apr-11-1955

Reported in : 1955CriLJ1179

Judge : Wazir, C.J. and; Kilam, J.

Appellant : Jabbar Dar

Respondent : State

Judgement :

Kilam, J.

1. Sixteen accused persons, including the present appellant, Jabar Dar, were committed to Sessions to stand their trial under various sections of the Penal Code. Out of these 16 accused persons, 15 have been acquitted by the learned Sessions Judge, Srinagar, on the ground that the injuries inflicted by them upon the members of the complainant's party were in exercise of their right of private defence. Jabar Dar, the learned Sessions Judge has held, is not entitled to the benefit of the plea of self-defence. He has convicted him under Sections 304/326/324, R. P. C. and sentenced him to undergo rigorous imprisonment for five years, two years and one year respectively, the sentences to run concurrently.

2. The allegation of the prosecution is that a plot of land belonging to one of the accused persons, Sultan Lone, was mortgaged with one Aziz Wagey. On an

application under the Restitution of Mortgaged Properties Act, the mortgagor accused secured an order for the restitution of the mortgaged land in pursuance of which it is admitted that possession of the said plot was given to him by the Patwari. The story proceeds that the fruit of the tree:: standing on this plot of land was sold by the mortgagor to Jabar Dar accused. On 24th Har 2011, Jabar Dar and others accused persons, the prosecution adds, having armed themselves with some lethal weapons like hatchets, Dandas and Lathis. Jabar Dar himself being armed with a gun proceeded towards the disputed plot of land for the purpose of fencing it when they were stopped by the party of the complainant Aziz Wagey, who had assembled in a shop situate on the road which led to the disputed plot of land. We have it in the prosecution evidence that the tempers of the parties had run very high and their passions had reached white heat.

The complainant's party had also, as it would just appear, made it a point of honour to stop by any means and methods the accused's party from giving effect to their purpose. The allegation proceeds that when the accused's party reached near the shop, the complainant's party came down and stood in the way of their proceedings to the plot in question. It is said that the complainant's party entreated the accused persons to go back and not proceed further or else bloodshed would be the result. This entreaty or warning on behalf of the complainant's party, it is alleged, went empty, with the result that a tree fight ensued between the parties. The prosecution case is positive on the fact that the complainant's party was unarmed and the only weapon which they used was the weapon of entreaties and supplications in a mood of humility. But as against this, it is alleged that the accused persons were aggressive with highly inflamed tempers. The prosecution story after having undergone some gradual changes which will be discussed at its proper place, finally evolved itself into that the complainant's party having done all that was legitimately expected of them to do to stem the tide of aggression by the accused persons, were be laboured with lathis and hatchets and it was at the intercession of one Lassi Lone that the parties were separated from each other.

Then it is alleged that Samad Lone, one of the focused persons, who was standing there instigated the present appellant Jabar Dar that he should use his gun or else it was useless for him to have carried it. The prosecution wants us to believe that

this exhortation by Samad Lone, as it were, galvanized Jabar Dar into action with the result that he started shooting. The first shot is said to have been aimed at Lassi Lone who having been injured fell down. Then another person belonging to the complainant's party by name, Qadir Wagey, is said to have been aimed at and hit by the accused, Qadir Wagey died as a result of gun shot wound. Then the accused is said to have fired a third time which injured a number of persons. It may be Mated here that Jabar Dar's gun was a single barrelled gun in which Chara (grape shot) is used.

3. This in main is the prosecution case. The accused Jabar Dar has not denied his presence on the place of occurrence nor has he denied that he three times, but he denies that there were two incidents: one ending with the intercession of Lassi Lone and the other starting at the point when Samad Lone instigated Jabar to use his gun. He asserts that there was one single fracas which was the result of a mighty preparation made by the complainant's party to stop the accused persons to go to their plot of land and that having been mercilessly belaboured by the complainant's party and also by the attempts made by Lassi Lone to snatch away the gun from his hand, he was constrained to fire two shots in self-defence and a third shot in the air to scare away the complainant's party. It goes without saying that if a gun has been used y Jabar Dar with fatal effect after the quarrel Lad ceased as a result of good offices of Lassi Lone., no plea of self-defence will be available to him, and that he would be simply guilty of murder Under Section 302, R. P. C. Naturally it is necessary for us lo firstly see as to whether the prosecution story as it has finally evolved, is the correct version of the incident or incidents which have taken place that day.

4. But in this case the prosecution witnesses have made a mess of the whole affair, and it is unfortunate that we cannot get any assistance from their statements. As found by the learned Sessions Judge - and with which we are in full agreement - the prosecution witnesses who are related to one another, have suppressed many facts. They have stated that the complainant's party was unarmed and that they did not use any lathi or Danda, but on the contrary it were they who were the victims of beating and shooting. But somehow or the other some of the prosecution witnesses felt after all constrained to admit that the

complainant's party too was armed with sticks and lathis and had beaten the accused persons. The prosecution witnesses started with the allegation that the complainant's party did not inflict any injury upon the accused persons. But we have it from the medical evidence that the accused persons had multiple injuries on their bodies (in some cases as many as ten) some of which were very serious. Two of the accused persons have received grievous injuries.

The learned Sessions Judge is right in saying that the prosecution evidence, as it is, has to be sifted in a very careful manner before any conclusions can be drawn about the alleged facts in the case. It is quite clear that the prosecution evidence painting a picture of innocence and helplessness so far as the complainant's party is concerned stands contradicted by its own mutually contradictory assertions and also from the multiple injuries that have been found upon the accused persons. In order to arrive at the truth, we shall have necessarily to explore the natural circumstances and documentary evidence led in the case. We shall then start with the F.I.R. (Ex. P. A). This document contradicts the theory of two incidents: one ending with the intercession of Lassi Lone and the other beginning with the harangue of Samad Lone. This document reveals a continuous fight in which a gun was used by Jabar Dar. Later on it seems that the prosecution became anxious to separate the case of Jabar Dar from the rest of the accused persons and that they introduced the fact of the two incidents having taken place. Soon after the lodging of the F. I. R., a statement of Lassi Lone was recorded as a dying declaration. This statement is marked Ex. PP.

In this statement which is a fairly detailed statement we find no mention of two incidents. On the contrary we find Lassi Lone giving a description of the fracas as a continuous fight. In this statement Lassi is ultra-cautious not to attribute any aggressive part to his party. Lassi Lone was confronted with this statement in the sessions Court, but he offered a curious explanation to escape from the conclusions that would otherwise ensue therefrom. He said that having received the gun shot wound in his arm, he became confused and that he does not know what statement he gave at that time. The internal evidence provided by this statement Ex. PP shows that it is not the outcome of a deranged mind, but that the statement is a cautious performance in which facts have been detailed with great

meticulousness. But no mention has been made of the two incidents. Under these circumstances when we bear in mind the colossal suppression of facts made by the prosecution witnesses-which has made the learned Sessions Judge also-to place least reliance on them, it would be very difficult for us to hold that there have taken place two incidents in the manner in which it is suggested by the prosecution witnesses. This finding of ours-receives further support by both the F, I. R. Ex, PA a'd the statement oi Lassi Lone which unequivocally suggests that there has been only one continuous incident.

5. There is yet another fact which lends support to this finding of ours. It is urged on behalf of the prosecution that the second incident began-with a harangue by Samad Lone. Samad Lone is a teacher in some village school situate at some distance from the place of occurrence. The learned Sessions Judge is very doubtful about his presence-on the spot. For this finding of his he has drawtt support from the fact that Samad Lone was present in school the whole day on the day of the occurrence and,also from the fact that no injury of any kind was found on the person of Samad Lone. From this it would naturally follow that the fact of the second incident having taken place as a result of Samad Lone's instigating Jabbar to use the gun itself becomes very doubtful. The prosecution is-positive that the second incident arose only because of the instigation of Samad Lone which would only mean that but for Samad Lone's instigation, the second incident would perhaps not have taken place. But as Samad Lone's presence on spot is not established beyond doubt, coupled with other facts discussed above, we find that there has been one continuous fight in which along with other weapons., used by the parties, Jabar also used his gun. It has been argued on behalf of Jabar that he used his gun no doubt with fatel effects only in self-defence.

6. Now let us examine the other aspects of the case to see if under the circumstances of the case-a plea of self-defence claimed by the appellant is available to him. It is admitted that the decree-for the restitution of mortgaged property was passed on 1st Maghar 2010 and the possession of the iand was given to Sultan Lone on 4th of Magher. In the meanwhile Aziz Chopan the mortgagee preferred an appeal along with a stay appucation in the District Judge's court against the same order. The order passed on the stay application was that in

case possession of the disputed plot had not been given to Sultan Lone, the proceedings shall be stayed. In view of the fact that possession had already been given to Sultan Lone, this order of the District Judge meant very little to the mortgagee. He seems to have realised this, kept the order with; himself and produced it at a late stage in the Court of the committing Magistrate. The decree for possession having been passed in favour of Sultan Lone and possession having been already given to him, Sultan Lone and his friends including Jabar Dar who is said to have been purchaser of the fruit of the trees standing there, had every right to go to the plot of land and fence it.

When they were proceeding on this lawful purpose of theirs, they were stopped in the way by the complainant's party. Even through the thick veneer of falsehoods with which the prosecution witnesses have Covered their statements, one can easily see that the complainant's party was not at all non-aggressive as they say they were. We have it in the prosecution evidence that the entreaties made by the complainant's party to the accused persons for not proceeding to the disputed plot were accompanied by threats of bloodshed. It is an admitted fact that some of the accused persons were carrying the fencing wires, some others were carrying poles though some of them are credited with lathis and hatchets. Then we find that a fight ensued in which the accused persons also received very serious injuries including grievous ones. It is apparent that the medical examination of some of the accused persons was made by the police simply to establish their presence on spot. It is just possible that many other persons belonging to the accused's party who had received similar injuries may have hidden themselves . to escape prosecution. Anyway, it is fully established that the accused persons were going lawfully for the performance of a lawful object when they were stopped in the way by the complainant's party which resulted in a fight injuring people on both sides.

Under these circumstances we have got to read the mind of the persons engaged in that fight not in the light of a peaceful atmosphere that might prevail after the fight is over, but in the light of the rising passions at the time when the fight is on and tempers are inflamed and a mood of revengefulness has captured the minds of all. At that time it would be indeed very difficult to expect of the participants thereof to judge things coolly and use only that much force as would be necessary

in the circumstances of the case. As has been observed in many judgments, it would not be fair to expect of an accused under such circumstances to weigh in golden scales the amount of force to be used by him.

7. Before discussing further this aspect of the case, we might examine the plea of the accused also. Jabar Dar accused says that before he fired the first shot, Lassi Lone came towards him, caught his gun, and tried to snatch it away. Lassi Lone has denied that he ever tried to snatch away the gun, or was even near the gun. But Ali Wagey in his statement before the police with which he was confronted says that Lassi Lone caught hold of the gun when Jabar Dar began to fire. This witness denies having said so before the police. Even in the committing Magistrate's Court, this witnesses has stated that Lassi Lone went ahead and that he stretched out his hand to catch hold of the gun. Similarly it can be gleaned from the statements of Ahmad Wagey and Mohd. Lone that Lassi Lone did, as a matter of fact, try to catch hold of the gun. It has been argued on behalf of the appellant that Lassi Lone having tried to snatch the gun from the appellant, and thus disarm him in a highly dangerous situation, there was no other alternative for him but to fire at Lassi Lone and thus save himself from the danger. Jabar appellant further says that after Lassi was wounded, Qadir pounced upon him with a hatchet in his hands, and before the blow fell upon him he fired at Qadir who died. This is supported by the defence evidence and also by other circumstances discussed above. Then Jabar says that in order to scare away other people, he fired a third shot in the air. It may be stated here that there are some others who received simple grape shot wounds. This shows that the last shot was not aimed at any particular person but was a random shot. Taking all these circumstances into consideration, we are of the opinion that it has been fully established that Jabar had a right of self-defence and that he has not exceeded this right.

8. The learned Acting Advocate General has laid great stress on the fact that the accused party was heavily armed and in his submission it is proof for the fact that they had aggressive intentions. But the fact of the matter is that it was the complainant's party which had assembled on a shop with the avowed purpose of stopping the accused party from proceeding towards the land, possession whereof was given to them. And though it was denied that the complainant's party had any

weapon with them, it is fully established by evidence that they also were armed with lathis etc., if not with a gun. It is in evidence that the preparations for stopping the accused persons from proceeding to the land in dispute were started by the complainant's party the previous evening. It can by no means be denied that the accused persons had a right to go to the land in dispute. They had every right to use the public way which led to the disputed plot of land and it is also admitted by the prosecution that they were stopped by the complainant's party from proceeding further. And if as a result thereof a free fight ensued and the parties received injuries and one of them died, the fact cannot be denied that the accused persons had a right of self-defence.

9. The learned Acting Advocate General has further argued that the accused persons should have approached the police before taking the law into their own hands. But as has been held in - *Abdul Hagi v. Emperor*' AIR 1934 All 829 (2) (A).

It is not the intention of Sections 97 & 99 to compel a person having the right of private defence of property to acquiesce in criminal trespass and not exercise his right of private defence at all. Therefore such a person need not, instead of protecting his property run to the police and leave the aggressors to do what the law entitled him to protect himself against by exercising his right of private defence.

The learned Acting Advocate General tried to make one more point. He has argued that since a death has taken place in the complainant's party, it might well be held that the accused persons were the aggressors. But as observed in - *'Bhartu v. The State'* : AIR1954 All35 :

Where the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused persons the injuries by themselves do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence....

10. It cannot be denied that the complainant's party had, as a matter of fact, formed themselves into an unlawful assembly with the object of stopping the accused persons from going to their land and fence it, and as such as long as the

accused persons were confronted by such an assembly, they were entitled to deal with that assembly so long as it continued to be dangerous to them. Though the accused inflicted fatal injuries on a member of this assembly, yet under the circumstances of the present case they cannot but be held entitled to take all measures necessary for their own safety, and as laid down in - 'Ram Sagar Gane v. Emperor' AIR 1936 Pat 622 (C) 'they could not be expected to judge too accurately what was the exact amount of force necessary for that purpose.'

11. In - 'Sardara v. The Crown', 38 Punj LR 131 (D) there was a similar dispute as in the present case. Even though one of the complainant's party died as a result of a free fight which had ensued with an attempt by the complainant's party to dislodge the accused persons from their lawful possession, it was held 'that the complainants being the provoking party were in this wrong, and that the accused certainly had a right to turn the complainants out of the land by using necessary force.'

12. In a recent ruling of the Punjab High Court reported as - 'Virsa Singh v. The State' AIR 1955 (NUC) (Punj) 1353 (E) the finding recorded on facts is that the accused were in lawful pursuit of ploughing their own land, the deceased went there and started a fight forcibly whereby preventing the accused from the lawful exercise of his right, and also inflicted certain injuries, It was held on these facts that 'all this gave the accused the right of private defence and in killing the deceased they committed no offence,'

13. For the foregoing reasons, we accept this appeal and set aside the order of the trial Court. The accused is acquitted of all the charges. He need not surrender to his bail bonds.

Wazir, C.J.

14. I agree.