

P L D 1983 Peshwar 81

Before Abdul Khaliq Khan, J

MIRDAD AND ANOTHER---Petitioners

versus

THE STATE---Respondent

Criminal Revision No. 4 of a 1982. decided on 22nd November, 1982.

(a) Penal Code (XLV of 1860)---

---- Ss. 96 & 97-Private defence, right of-To be considered by Court on material before it even though not specifically pleaded-Evidence failing to satisfy Court affirmatively of existence of circumstances establishing right--Held, accused, nevertheless, entitled to acquittal if, upon consideration of evidence as a whole, reasonable doubt is created in mind of Court.-[Private defence, right of].

Noor Muhammad and another v. The State 1979 P Cr. L J 505 ref.

(b) Penal Code (XLV of 1860)---

--- S. 325/34 read with Ss. 96 & 97-Grievous hurt-Private defence, right of---Injuries on person of complainant more serious than those on person of accused but nothing on record to show as to who commenced aggression---Benefit of doubt regarding their presence at time of occurrence extended to two of accused on same evidence-Held, remaining accused also entitled to acquittal on benefit of doubt.

Ali Muhammad v. State-1968 P Cr. L J 602 and Waryam etc. v. The Sate 1974 P Cr. L J Note 157 at p. 97 ref.

Khalid Rehman Qureshl for Petitioners.

Abdul Khaliq Khan for the State.

Date of hearing : 21st November, 1982.

JUDGMENT

Mir Dad, his two sons namely, Asif and Riyasat and wife Mst. Zaraat Jan were tried in the Court of Illaqa Magistrate, Haripur, under sections 325/34, P. P. C. for having belaboured and inflicted injuries on the person of his brother Gulab, in the precincts of village Phirhari, at a distance of

13/14 miles from Police Station, Haripur. By his order dated 31-12-1979 Mr. Ghulam Muhammad Khan, the learned trial Magistrate found Mir Dad and one of his sons namely, Asif guilty of the offence under section 325/34, P. P. C. and sentenced each one of them to one year's R. I. and fine of Rs. 400 each or in default to suffer 3 months' R. I. each. Out of the fine on recovery, an amount of Rs. 500 was to be paid as compensation to the complainant. Riyasat, and Mst. Zaraat Jan, the two other accused, to whom secondary role had been attributed, were acquitted under section 245, Cr. P. C.

2. The convicts went in appeal to the Court of Session, Abbottabad Camp Haripur, who however, dismissed the appeal vide his judgment dated 26-1-1982. The convicts have, therefore, deemed it necessary to assail the orders of the two Courts below on the ground that not only the prosecution evidence was false, interested, discrepant and unreliable but. that the said Courts have acted against the fact that Mir Dad had acted in self-defence, as he was belaboured by the complainant and his associates.

3. The occurrence took place on 20th of August, 1978, at 10/11 a. m. in the precincts of village Phirhari. Gulab, the complainant got recorded his report on the same day at 3-15 p. m. At first his report was recorded in daily diary but after some of the injuries were declared grievous, a case under section 325/34, P. P. C. was registered against the mentioned accused. It was stated that while proceeding to Dacca Rakh at 10/ 11 a.m., when he reached the place known as Mula Lora', he found his brother demolishing the joint 'Bana'. He was accompanied by his wife, and sons named Asif and Riyasat. When he tried to persuade them from damaging the 'Bana', he armed with a spade rushed towards him. Asif armed with an axe came towards him and gave him a blow with the back of axe. He received the injury on the arm. Mir Dad gave beating on his back with the spade while Riyasat and Zaraat Jan took bold of him. Asif gave him a blow near his left ear. He gave him the third axe blow on left side. He raised an alarm which attracted his wife Ma. Farooq Jan, daughter Mst. Razia Khatoon and son Khawaja Muhammad to the scene of occurrence and relieved him.

4. Muhammad Ilyas Khan A. S. I. Police Station Haripur on receipt of the F. I. R. Exh. P. A. commenced the investigation. He inspected the spot and prepared the site plan Exh. P. B. at the instance of the prosecution witnesses. He made the house search of the house of Mir Dad accused and took into possession an axe Exh. P. 1 vide recovery memo. Exh. P. C. He recorded the statements of the P. Ws. and arrested the accused. After completion of the investigation he submitted the charge-sheet in the Court of Illaqa Magistrate.

5. It may be necessary to mention that on the day of occurrence at 4-30 p. m. Dr. Taj Muhammad, Medical Officer, Civil Hospital, Haripur examined Gulab Khan, the complainant found the following injuries on his person :-

(1) Lacerated wound 1½" x ½" on left side of skull 1- above the left ea;

(2) Bruise 4" x ¼" oblique indirection at upper third of left arm.

(3) Bruise 3" x ¼" at left arm upper end oblique in direction:

- (4) Bruise 4" x 1/4" at the back end upper end of left shoulder.
- (5) Bruise 2 3/4" x 3/4" just below the lower angle of left shoulder blade.
- (6) A bruise 2" x 3/4" x 1 1/4" below injury No. 5.
- (7) Contused wound 3/4" x 1/4" on the left side upper lip, having laceration inside with injured gum, teeth, first premolar shaky.
- (8) Contused wound 3/4" x 1/4" on the lateral side of left forearm with the mark of swelling.

The accused having claimed trial, the prosecution got examined in addition to the formal witnesses, Gulab; the complainant and Mst. Farooq Jan, as ocular witnesses. On conclusion of the prosecution evidence, the four accused were examined who pleaded innocence. It may be necessary to state that Mir Dad, who received simple injuries during the occurrence, was not put any question regarding his injuries. Mr. Tadamava Sato of the Telecommunication Research Centre and Dr. Haji Taj Muhammad were examined in defence. Mr. Tadamava SATO deposed to the effect that the acquitted accused namely Riyasat was present in the Factory from 9 a. m. to 2-30 p. m. His evidence in view of the fact that Riyasat has already been acquitted, will require no special mention. Dr. Haji Taj Muhammad Khan, was re-examined as defence witness to prove the certificate Exh. D. W. 1/2 issued to Mir Dad accused. The said Mir Dad had been brought to the hospital by Saifur Rehman F. C. No. 523 on 20-8-1978 and was examined at 5-25 p. m. The following injuries were found on his person.

- (1) A bruise 1 1/4" x 3/4" at Rt. maxillary prominence.
- (2). A bruise 4 3/4" at back of left shoulder.
- (3) A swelling at back and middle of Rt. forearm.
- (4) A bruise in the middle of hip marks swelling at left hip 3/4" x 3". Advised X/ray Rt. forearm and left shoulder.

7. On consideration of the evidence, the learned trial Court, as stated earlier convicted the petitioners under section 325/34, P. P. C. and sentenced as stated above.

8. The learned counsel for the petitioners pot only urged that the evidence produced was unreliable and discrepant but laid stress on the fact that the two Courts below had failed to take into consideration the plea of Mir Dad petitioner that he had acted in self-defence. Mr. Abdul Khaliq Khan, Advocate appearing on behalf of the State not only expressed his satisfaction as far as the prosecution evidence is concerned but asserted that it would be a late stage to consider the plea of self-defence when the said plea was not agitated earlier.

9. I have gone through the evidence recorded in connection with the prosecution case. It is clear that no plea of self-defence has been expressly taken in his statement under section 342, Cr. P. C. His plea is that of false charge because of the dispute over landed property.

10. The first question for determination, therefore, would be if the plea of private defence in fact and circumstances of the case can be agitated. The learned counsel for the petitioners in support of his claim cited *Noor Muhammad and another v. The State* (1979 P Cr. L J 505) where it has been observed that "it is true that the two appellants have not pleaded self-defence. It is, however; well-settled rule that if such plea can be spelt out from the evidence and the circumstances of the case, the accused should not be denied the benefit of the same only because he has not expressly pleaded it. In the instant case one of the co-accused namely Manzoor has claimed right of self-defence. In the circumstances, if I find that the plea set up by Manzoor is reasonably plausible, benefit of the same will be given to the two appellants"

11. It is, thus, clear that the right of private defence of the accused can be considered by the Court on the material before it, even though it was not specifically pleaded and that the accused will be entitled to acquittal even if the evidence fails to satisfy the Court affirmatively of the existence of the, circumstances establishing the right, if upon consideration of the evidence as, a whole, a reasonable doubt is created in the mind of the Court.

12. Reverting to the evidence brought on the tile, reference can be conveniently made to Exh. D. W. 1/2. Though all the injuries found on the person of Mir Dad Khan, the petitioner are simple but it do provide an inkling, how the complainant received the injuries. It would be sufficiently established that there was a brawl between the two brothers, and in result both received injuries. It is, however, not clear from the evidence who commenced the aggression. It has been held in 1968 P Cr. L J 602 at p. 607 that "the right of private defence can be considered even though not' specifically claimed. If the Court is in dour as to whether this right has been exceeded, the benefit is to go to the accused." In the circumstances, though the injuries on the person of the complainant are more serious than that of the accused but in the absence of positive evidence who commenced the aggression, it cannot be held that the accused petitioner had started the aggression and had exceeded the right of self-defence.

13. Moreover, we cannot ignore another aspect of the case. The accused, as the evidence goes, was found in constructing, `Band' to protect his land from wash off. The complainant would, however, not allow him to do so. The accused party in the circumstances had to act in exercise of right of self-defence as well as that of property. It has been held in *Waryam etc. v. The State* (1974 P Cr. L J Note 157 at p. 97) that "where possession is with one party and the title with the other, the person in settled possession has the right to repel aggression".

14. In view of the fact that it is not clear from record who commenced the aggression, that two of the accused have been extended the benefit of doubt regarding their presence at the time of occurrence, on the same evidence. Therefore, the benefit of doubt should have been extended to the petitioners too. Moreso, when the medical evidence show, that all the injuries have been received on the left side of the body (that of victim) would create doubt, that two of the assailants had acted in concert at the same time.

15. In result the petitioners are also to be acquitted. Their bail bonds stand cancelled.

S. Q.

Petition accepted.

