

PETITIONER:
STATE OF U.P.

Vs.

RESPONDENT:
NIYAMAT & ORS.

DATE OF JUDGMENT 14/04/1987

BENCH:
OZA, G.L. (J)
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OZA, G.L. (J)
KHALID, V. (J)

CITATION:
1987 AIR 1652 1987 SCR (2) 953
1987 SCC (3) 434 JT 1987 (3) 1
1987 SCALE (1) 844

ACT:

Criminal Procedure Code, 1973: s. 41--Arrest without warrant--When unlawful.

Indian Penal Code, 1860: ss. 97 & 99--Reasonable apprehension of death or grievous hurt--Right of private defence--Whether available--Rescue of persons unlawfully arrested--Use of force----Whether permissible.

HEADNOTE:

The respondents, said to be armed with spears pharsas and lathis, were alleged to have assaulted the police party returning after apprehending a suspect villager, resulting in the death of the informer and grievous injuries to the constables, and to have secured the release of the suspect. They were also alleged to have snatched the private gun and belt of cartridges from the constable. The incident took place at night. They were convicted by the trial court under s. 302 read with s. 149, and ss. 395 and 147 I.P.C.

The High Court on appraising the evidence and the FIR came to the conclusion; (i) that the sole object of the respondents in going to the place of occurrence was only to rescue the suspect and not to assault or murder anyone; (ii) that the arrest of the suspect by the police was absolutely unjustified and not legal since no material had been produced either to indicate his involvement in a cognizable offence or for causing reasonable suspicion, therefore, the respondents had a right to get the suspect rescued from custody; (iii) that the respondents did not use force till one of the constables tried three shots, one after another, which was sufficient to cause a reasonable apprehension of either death or grievous hurt in the minds of the respondents, therefore they were acting in the right of private defence; (iv) that none of the respondents made any attempt on the life of the informer till he himself intervened to help the constable, and held that as such it could not be said that they were members of an unlawful assembly or were committing rioting when they used force. In the premises, the Court recorded acquittal of the respondents.

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In the appeal to this Court it was contended for the State: (1) that even if the arrest of the suspect was not

legal, in view of s. 99 I.P.C. right of private defence was not available to the respondents under s. 97 I.P.C. and they could have taken recourse to use lawful methods for rescuing the suspect rather than resorting to violence; and (2) that there was no cause for reasonable apprehension of serious injuries to the respondents, for the constable had fired shots in the air just to frighten the respondents and since it was moonlit night the respondents could have seen the direction in which shots were fired.

Dismissing the appeal, the Court,

HELD: Section 99 of the Indian Penal Code is only attracted where there is no reasonable apprehension of death or grievous hurt. In the instant case. the respondents did not use force unless and until one of the constables actually fired shots. Even if it is accepted that it was a moonlit night, it could safely be inferred that the light may not be sufficient enough so that from a distance the respondents could notice the direction of the barrel of the gun when shots were fired. In such a situation, the conclusion reached by the High Court that it was sufficient to cause reasonable apprehension in the minds of the respondents of death or grievous injury, and, therefore, they were entitled to right of private defence. was justified. [959H; 960E-G]

If the respondents could not be held to be members of an unlawful assembly as their object at best could only be to rescue the suspect from unlawful custody, then even if the right of private defence is not accepted, it is not possible on the basis of the prosecution evidence to find out what respondent caused what injury and it will not be possible to find them guilty for their individual acts. The same will be the situation even if it is held that they exceeded the right of private defence. [960G-H; 961A]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 335 of 1978.

From the judgment and Order dated 13.4.1977 of the Allahabad High Court in Criminal Appeal No. 1855 of 1975.

Dalveer Bhandari, C.P. Mittal and Pramod Swarup, for the Appellant/Petitioner.

R.K. Garg, S.C. Birla, Mukesh K. Giri, S.C. Patel, Syed Ali 955

Ahmad, Syed Tanweer Ahmad, Shaukat Hussain and Ms. Jayshree Ahmad for the Respondents.

The Judgment of the Court was delivered by

OZA, J. This appeal has been preferred by the State after obtaining leave from this Court against the acquittal of the respondents recorded by the High Court of Allahabad by its judgment dated 13th April 1977 hearing an appeal against the conviction of the respondents recorded by First Additional Sessions Judge, Etah convicting all the respondents under Sec. 302 read with 149, Sec. 395 and 147 and sentenced to life, 10 years and 2 years rigorous imprisonment respectively to each one of the respondents.

The prosecution case at the trial was that on 27.10.1974 A.S.I. Om Prakash Sharma accompanied by two constables Gauri Shanker, P.W. 2 and Kanauji Lal, P.W. 4 went to village Nidhauri Khurd, which was at a distance of three-miles from Kotwali Etah, and arrested one Laturi there at about 1 or 1.30 P.M. Virendra Nath, deceased, had helped them in arresting the said Laturi. The A.S.I. and the two constables returned to the Police Station Kotwali Etah with Laturi in custody at 6.50 P.M. A few minutes later these constables,

Gauri Shanker and Kanauji Lal, were given summons for service on one Girish of Village Nidhauri Khurd. So constables Gauri Shanker and Kanauji Lal returned to the Village Nidhauri Khurd the same evening at about 7.30 P.M. to serve the summons. It is alleged that at that time the two constables were wearing police uniforms and Gauri Shanker was carrying his personal DBBL gun and a belt of cartridges.

While they were in the village, Virendra Nath, deceased, informed them that a bad character named Dharampuri was staying at the house of Bahori Gir, and it is alleged that the Station Officer Kotwali Etah had earlier told these constables that Dharampuri was a bad character (badmash) belonging to Agra District and that he had to be arrested. When Virendra Nath informed these constables that 'Dharampuri was at the house of Bahori Gir, they went to the house of Bahori Gir and arrested Dharampuri at about 8.30 P.M. and after arresting him the two constables started for Etah with Dharampuri in custody and Virendra Nath, deceased, also accompanied them.

At about 9 P.M. when the constables accompanied by Virendra Nath, deceased and Dharampuri in custody reached near the field of one Matadin adjoining Etah-Shikohabad road, the respondents armed
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with spears, pharsas and lathis reached there with intention to rescue Dharampuri from the custody of the constables. Seeing this constable Gauri Shanker fired a shot in the air with his private gun in order to scare away the respondents. When this shot was fired the respondents stopped and the constables proceeded further. It is alleged that thereafter the respondents also advanced and then 'Gauri Shanker fired a second shot, again the respondents stopped for a while and the constables proceeded ahead. And after a short time the respondents again advanced towards the police party and asked them to release Dharampuri. It is alleged that at that time they threatened the constables and the constables refused to release Dharampuri and Gauri Shanker fired the third shot in order to deter the respondents. Hearing the noise, the witnesses and some other persons reached the place, some of whom were carrying torches and flashing them. It is alleged that it was also a moonlit night. On this, according to the prosecution, the respondents assaulted the constables causing injuries to them and they rescued Dharampuri from the custody of the constables. They attempted to snatch the gun of the constable Gauri Shanker and it is then Virendra Nath intervened. He also told them not to snatch the gun and also physically intervened to prevent them from snatching the gun and the belt of cartridges from the constable. In this he fell down and the respondents succeeded in snatching the gun and the belt of cartridges and in this scuffle Virendra Nath was assaulted and he received large number of injuries as a result of which he died on the spot. The respondents, it is alleged, thereafter made good their escape and they also took away Dharampuri, the gun of constable Gauri Shanker and the cartridges.

After the respondents went away, the brother of Virendra Nath who had also arrived on the scene got a report written out by his younger brother Satish Chandra and lodged the report at the Police Station Kotwali Etah which was at a distance of about 3 miles at 10.15 P.M. the same night. Constable Gauri Shanker was medically examined by Dr. R.R. Sharma at the district Hospital, Etah on the same night i.e. 27.10.1974 at 11 P.M. the doctor found 12 injuries on his person consisting of 5 lacerated wounds on the head, 5 contusions and two abrasions on different parts of his body.

Constable Kanauji Lal was medically examined the next morning i.e. on 28th Oct. 1974 at 10.15 a.m. and he was found to have two bruises and an abrasion.

Dr. R.P. Yadav performed the postmortem examination on the body of Virendra Nath. He found two incised wounds, seven stab wounds, five lacerated wounds and sixteen contusions on various parts

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of his body. All the respondents pleaded not guilty. The prosecution examined 12 witnesses in support of the prosecution case, out of whom the informant Rajendra Nath, P.W. 1, Brahma Singh, P.W. 3 and the two constables Gauri Shanker P.W. 2 and Kanauji Lal, P.W. 4 are the eye witnesses.

The learned Judges of the High Court after considering the evidence of the witnesses especially the eye-witnesses, the First Information Report, came to the conclusion that the respondents had collected and gone to Matadin's field with the sole object to rescue Dharampuri and that they had not gone to that place with the intention of assaulting much less murdering Virendra Nath. It was further found from the recital in the F.I.R. by the High Court that the respondents in the beginning tried simply to rescue Dharampuri from the custody and none of them assaulted either the constables or Virendra Nath and it was only when Constable Gauri Shanker fired 2 or 3 shots with his gun that he was assaulted and his gun and cartridges were snatched. The learned Judges also observed "it is obvious that at that time when it must have been dark (except for the light of torches which were being flashed and which could not have produced any steady light) the appellants (respondents in this Court) could not have seen the direction in which the shots were fired. So they may well have thought that they were being fired at and reasonably apprehended serious injuries to themselves." On reading of the F.I.R. the learned Judges rightly came to the conclusion that the respondents assaulted the constables only when one of the constables actually fired. It was also found that none of the respondents made any attempt on the life of Virendra Nath till he himself intervened to help the constables. In view of these findings reached by the High Court, it was found that the object of the respondents when they came to the field of Matadin was only to rescue Dharampuri and it was not their object to assault or murder anyone. This conclusion was reached by the learned Judges even after considering in detail the evidence of constables Gauri Shanker and Kanauji Lal. Consequently the finding of fact reached by the High Court is that the respondents came to the place of occurrence with the sole object of rescuing Dharampuri from the custody of Constables Gauri Shanker and Kanauji Lal. So far as these facts are concerned they are not much in dispute. The learned counsel appearing for the appellant State contended that even if the arrest of Dharampuri was illegal the respondents had no right of private defence under Sec. 97 to rescue Dharampuri especially in view of Sec. 99 of the Indian Penal Code.

The learned Judges of the High Court also came to the conclusion

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that if arrest of Dharampuri was illegal it could not be said that the respondents when they collected with the object of rescuing him it could be said that they were members of an unlawful assembly or were committing rioting when they used force.

The High Court considered the provisions of Code of Criminal Procedure in respect of arrest to come to a conclusion as to whether it could be said that the arrest was

lawful. For that purpose the relevant provisions which has been considered is Sec. 41 of the Code of Criminal Procedure, 1973. Learned counsel for the appellant contended that the relevant provision is Sec. 41 clause (a). The constables were told by the Police Officer and on that basis it could be suggested that a reasonable suspicion existed that Dharampuri was concerned in some cognizable offence or that a reasonable complaint has been made.

High Court came to the conclusion that the police officer who is said to have told the constables has not been examined. No material has been produced to indicate that there was any complaint of Dharampuri being involved in a cognizable offence nor any other material produced to indicate that there was material for reasonable suspicion. High Court on the basis of the material as it was came to the conclusion that the arrest was absolutely unjustified and not legal and in this view of the matter it was held that the respondents had a right to get Dharampuri rescued from the custody. Learned counsel appearing for the appellant State in view of the material as has appeared in evidence contended that even if it is held that the arrest was not legal he emphasised that in view of Sec. 99 I.P.C. right of private defence was not available to the respondents and it was contended that the judgment of the High Court could not be sustained.

The learned Judges of the High Court came to the conclusion that as the arrest was not legal it could not be held that the respondents were members of an unlawful assembly when the sole object of theirs was to rescue Dharampuri who was wrongfully arrested by the constables. They also came to the conclusion that the respondents did not use force till Constable Gauri Shankar fired not one but three shots one after another which was sufficient in the light of the circumstances of case for a reasonable apprehension in the minds of the respondents that their lives may be in danger and it is in this view that the High Court came to the conclusion that they were acting in the right of private defence. Sec. 97 I.P.C. reads thus:

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"Every person has a right, subject to the restrictions contained in section 99, to defend--

First--His own body, and the body of any other person, against any offence against the human body.

Secondly--The property whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

The first part deals with the body against any offence affecting the human body either on the person himself or any other person and this will include an unlawful arrest also as an unlawful arrest is a offence against human body.

Sec. 99 on which the emphasis was laid by the learned counsel, reads:

"There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is room to have recourse to the protection of the public authorities.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

In fact the first sentence of this section itself makes it clear that this section is only attracted where there is no reasonable apprehension of

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death or grievous hurt and the emphasis laid by the High Court in its judgment on the fact that the respondents did not use force unless and until the constable shot three rounds which apparently will cause a reasonable apprehension of death or grievous hurt in the minds of the respondents. Once the circumstances justified such a reasonable apprehension the contention of the learned counsel for the appellant (State) that in such a situation even if the arrest was illegal the respondents could have taken recourse to use lawful methods for rescuing Dharampuri rather than resorting to violence. This contention of the learned counsel could have some weight if the incident had not started after the constable fired three rounds from his gun. Realising this difficulty an attempt was made by learned counsel for the appellant State to contend that this constable, as his evidence discloses, fired shots in air just to frighten the respondents and the learned Judges of the High Court came to the conclusion that it was night and though torches were being flashed but there will not be consistent light and when the constable fired not one but three shots one after another the respondents naturally will have a reasonable apprehension of either death or grievous injury. In order to contend that this finding reached by the High Court on facts is not justified, it was contended that it was a moonlit night, there were torches flashed but it is significant to see the circumstances which emerged from the evidence that the constables were moving with Dharampuri in custody and the deceased whereas the respondents were moving at some distance. Even if it is accepted that it was a moonlit night, it could safely be inferred that the light may not be sufficient enough so that from a distance the respondents could notice the direction of the barrel of the gun when constable Gauri Shanker fired the shots.

It also appears from the prosecution evidence that the torches were flashed when there was a melee and other witnesses reached hearing the shots and in such a situation the conclusion reached by the High Court that when this constable fired one after another three shots it was sufficient to cause reasonable apprehension in the minds of the respondents of death or grievous injury and therefore they were entitled to right of private defence is justified.

The learned Judges of the High Court also considered the other aspects of the matter that if the respondents could not be held to be members of an unlawful assembly as their object at best could only be to rescue Dharampuri from

unlawful custody, then even if the right of private defence is not accepted, it is not possible on the basis of the prosecution evidence to find out what respondent caused what injury

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and it will not be possible to find them guilty for their individual acts. The same will be the situation even if it is held that they exceeded the right of private defence.

Learned counsel for the appellant State took us through a discussion of evidence by the Sessions Judge and also by the High Court and also referred to relevant portions of the evidence of the prosecution. Having gone through them, in our opinion, it could not be concluded that the learned Judges of the High Court committed an error in coming to the conclusion that when the respondents used force it was only after 3 shots were fired and therefore they were acting in the right of private defence and in this view of the matter the conclusions reached by the High Court, in our opinion, could not be assailed. We therefore see no reason to entertain this appeal. It is therefore dismissed. The acquittal recorded of all the respondents by the High Court is therefore maintained. SLP (CrI.) No. 362/78 is also dismissed for the reasons state,d above.

P.S.S.
missed.
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Appeal dis-