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Court : Guwahati

Decided On : Aug-13-1982

Judge : K. Lahiri and B.L. Hansaria, JJ.

Appellant : Ayaj Ali

Respondent : State of Assam

Judgement :

K. Lahiri, J.

1. The appellant being indigent this Court appointed State defence for him. He has been convicted under Section 302, I.P.C. and sentenced to imprisonment for life by the learned Sessions Judge, Cachar at Silchar.

2. In a nutshell the prosecution case is that at all relevant times the appellant was a domestic servant of Dholamani Singh. It is alleged by the prosecution that on 9-7-1978 Dholamani Singh and his servant, the present appellant, were grazing buffaloes inside the compound of the deceased wherefor the wife of the deceased protested at the action of the appellant and his master in allowing the buffaloes to graze. In spite of the protest the appellant and his master continued to do so and claimed that they would continue to do so. At this her husband Ganga alias Rosman Ali came out and told them that even after grazing inside their compound they were abusing his wife. This led to altercations and exchange of hot words and the present appellant dealt a dao blow to Ganga, which fell on the left side of his

chest who sustained one injury but succumbed to it. It is alleged, after Ganga breathed his last, his wife mustered courage, took out a lathi and hit Ayaz Ali, the appellant, who was standing and watching the entire drama, P. W. 2 Safina Bibi cried out which attracted attention of others but in the meantime Dholamani Singh as well as the appellant left the place with their buffaloes.

3. To bear up the prosecution case as many as 7 witnesses were examined of which P. W. 2 Safina was the eye-witness and P. Ws. 5 and 6 were the witnesses who came immediately after the incident. 'Right of private defence of persons' was the plea taken by the accused appellant during the trial, we hasten to correct it by stating that this was the plea taken by the accused appellant immediately after the incident and it was taken when the mind of the appellant was not diluted by any other aid; assistance or manufacturing agency, including 'legal aid.' Therefore it was a pure undiluted defence. The appellant claimed before P. Ws. 5 and 6 that it was Ganga who had dealt lathi blow on his head and in order to save his life he brandished his dao and caused only one injury and no more. There is no disputation from any quarter that there was an altercation, exchange of hot words and abuses between the deceased and his wife on one side and the appellant and Dholamani Singh on the other. Now, what was the weapon like with which Ganga dealt the blow? The prosecution failed to seize and produce the lathi in question. When the plea of right of private defence of person is taken and it is alleged that right was resorted to in order to save the life of the accused, it is imperative for the prosecution to produce the weapon with which he had been assaulted, if available, to establish that it was but an innocuous stick or a simple in offensive weapon and thereby establish that the plea of self-defence of life or limb was apocrypha.

4. It is a trite saying that the right of private defence of person is recognised in all free, civilized and democratic country. However, that right is restricted or constricted within certain limits. The constrictions are dictated by two considerations : (1) that the right is available to all the members of the society, and (2) that it is the State which generally undertakes the responsibility of maintenance of law and order. The rule of law never commends the citizens, as a general rule to run away for safety when faced with a grave and imminent danger to their person as a result of aggressions. The rule keeps the society together. The right of

private defence serves a social purpose and it has been recognised as a right, not a privilege or a licence : ' the right' should not be narrowly construed. However, the right is basically preventive and not punitive or retributive. The onus of proof is on the accused but the defence can be established by preponderance of probabilities, it is not required to be proved beyond reasonable doubt. Indeed, it is difficult to assess 'the actions' or 'functions' of the accused - physical and mental - at the time of the incident. These are, more or less, judged by guesswork depending on the facts and the attending circumstances.

5. If we turn over the evidence of the witnesses we notice that P. W. 5 Rais Ali had turned up at the place of occurrence a few moments after the occurrence, went straight to the house of Ayaj Ali. which was right beside the house of the deceased. The appellant, when asked to state the incident promptly reported that Ganga had assaulted him with lathi, he sustained injury on his head and at that moment he brandished his dao and injured Ganga who succumbed to the injury. PW6 Aifasur Ali corroborated the said story in toto. Admittedly, the witnesses are disinterested and had no reason whatsoever to show any favour towards the accused. The statement of the accused was made immediately after the incident and there was no possibility of tutoring or prompting from any quarter, The version is the prosecution story itself which was the plea taken up by the accused during the trial. Therefore, the plea of the accused is supposed by the testimony of two prosecution witnesses.

6. However, the learned Sessions Judge negated the plea of the accused without scrutinizing the impact of the testimony of PWs 5 and 6. The learned Judge was oblivious to the fact that the defence plea could be established on the preponderance of probabilities. Overlooking the evidence of PWs. 5 and 6, Rais Ali and Masur Ali respectively, the learned Judge preferred to accept the version of P. W. 2 Safina who claimed that the lathi blow had been inflicted by her and not by her husband. She said that after receiving the injury inflicted by the accused when her husband succumbed she took out a lathi and dealt a lathi blow on the accused. Thus, she claims that the accused had no reasons to inflict the blow in defence of his person as her husband never dealt any blow on the accused. The learned Judge believed her version and rejected the plea of the accused.

7. Therefore, two questions crop up, First, whether the story of PW 2 Safina can be relied and on that basis can we negative the plea of the accused that the deceased had assaulted him with the lathi and to ward off the assault he dealt the dao blow. Secondly, whether the story of PW 2 Safina is acceptable in view of the evidence adduced by PWs. 5 and 6 read with the statements of the accused. Safina says that the accused dealt the dao blow and remained standing and when Ganga succumbed to the injuries, she could not resist dealing a blow on the accused, probably as revenge or retribution. The story of the accused remaining at the scene of occurrence for such a long period does not fit in with his conduct of dealing blow. It appears that she tried to take upon herself the responsibilities of her husband, who had dealt the blow on the accused and it will be evident from the evidence of PWs 5 and 6. When these witnesses came to the place of occurrence PW 2 Safina gave in detail statements before them. However, she never told any of these witnesses that he dealt any blow to the accused. Therefore, her story of dealing a blow on the accused was an afterthought, How could she omit the vital part of the story? It is worthwhile to note that the lathi, which was never taken away by the accused, was neither seized nor produced before the court. Naturally a presumption arises that it was not produced as (a) it was too heavy a weapon for P W. 2 Safina to deal a blow, and (b) it was a dangerous and heavy weapon and it was reasonably probable for the accused to apprehend death or grievous hurt when he was attacked with the weapon.

8. Therefore. scanning the entire evidence we find that it is difficult to accept the sole testimony of PW 2 Safina that she dealt a blow on the accused for the reason that there is no corroboration from any quarter about this part of the story emanating from PW 2 Safina. However, when we assess the plea of the accused we find that the accused immediately admitted to PWs 8 and 6 that he dealt the blow, but to ward off the lathi blow of the deceased Rosman Ali @ Ganga. He owned the responsibility of assault on Rosman Ali (deceased), but narrated that he was attacked by Rosman. Thus, the story depicted by the accused and supported by two independent witnesses for the prosecution, namely. PWs 5 and 6 makes the defence plea more probable than that of PW 2 Safina. Further, the lathi, though available, was not produced which goes to show that it was a heavy and dangerous weapon. Therefore, on scanning the evidence, we find that the

accused had set up a clear case of the right of private defence of person even before the commencement of the investigation. His plea is fully corroborated by the evidence of PWs 5 and 6. The plea being taken by the accused before the commencement of the investigation it was the duty of the prosecution to negative the plea. Instead, the prosecution has proved through PWs 5 and 6 that the accused had the right. The prosecution could have established that the accused had no reasonable apprehension of death or grievous hurt by establishing that the weapon was not a dangerous weapon. However, they have failed to do it. For the foregoing reasons we have no manner of doubt that Rosaman Ali @ Ganga was the aggressor, dealt a blow with a dangerous lathi on the head of the accused and apprehending danger to his life and limb, the accused exercised his right of private defence of person. There was no time to take resort to the public authority. Everything happened within a matter of seconds. Accordingly, we hold that the accused is entitled to the benefit of doubt.

9. The appellant is a day labourer and he had no reasonable grouse to kill Ganga except for the altercation that happened when the sun was going down and the day labourer was tired. Apart from this the house of the deceased was on a hill-top covered by thick jungles and vegetation, Ayaz Ali was employed to graze the buffaloes of his master. The compound of the deceased was full of grass, PW 3 has stated that the area was full of jungles. PW 6 has stated that the quarrel arose as the buffaloes were grazing inside the compound of the deceased. Dr. R. K. Talukdar. PW 4. who examined the accused found an injury on the accused caused by a blunt weapon. It was an abrasion 2' x 1/3' x 1/4' in longitudinal direction on the middle of the head. Even a simple injury on the temple can daze a person. When the blow was inflicted on the most vital part of the body.

We cannot say that the appellant had not had the right of private defence of his person. Situated thus, the accused dealt a blow in exercise of his right of private defence of person. But considering the facts and circumstances of the case, we hold that the accused exceeded his right as he used a dao and retaliated and dealt the blow on a very vital part of the body. It is true that he dealt only one blow but there is no justification for a reasonable person like the accused, who used a dao, to cause such an injury on a vital part of the body. The blow inflicted

for the accused was a gapping and penetrating wound and the lung tissue came out. The blow cut the lung as well as heart of the deceased. There were a number of internal injuries. The blow was very severe and heavy. Therefore, under these circumstances, it appears that the appellant exceeded his right of private defence. Therefore, on consideration of the entire evidence, we set aside the conviction of the appellant Under Section 302, I.P.C. and alter it to Section 304, Part II, I.P.C.

10. While considering the question of sentence, we have taken into consideration the age of the accused, his status of a hired labourer, that he is an indigent person, that he did not derive any personal benefit out of the incident and that he took out the buffaloes of his master as ordered by the latter, who had been acquitted on compromise made between PW 2 Safina (the injured) and the accused Dholamoni Singh. We have perused an order passed in Criminal Appeal NO. 14 of 1981, the connected appeal, preferred by Dholamoni Singh, who was convicted Under Section 324 I.P.C. for inflicting injuries on P. W. 2. In the trial, the said Dholamoni Singh was a co-accused. Safina excused her assailant and compounded the case. Therefore, when Safina could pardon the other co-accused Dholamoni who had inflicted injuries on her, we must award the sentence balancing the circumstances. Accordingly, we sentence the accused to suffer R.I. for 3 1/2 years Under Section 304 Part II, I.P.C. we are told at the bar that the accused has already undergone the said period of sentence.

11. In the result, the appeal is partly allowed. The conviction is altered to Section 304 Part II. I.P.C. and the accused is sentenced to 3 1/2 years' R.I., which period the appellant has already undergone. He may be released if he is not wanted in connection with any other case.