

Shafiulla Khan Vs. State of Karnataka

Shafiulla Khan Vs. State of Karnataka

SooperKanoon Citation : sooperkanoon.com/379824

Court : Karnataka

Decided On : Jul-24-1987

Reported in : ILR1987KAR2903; 1987(3)KarLJ470

Judge : Patil and ;Vithal Rao, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Crl. Appeal No. 408 of 1985

Appellant : Shafiulla Khan

Respondent : State of Karnataka

Advocate for Def. : B.R. Nanjundaiah, Addl. SPP

Advocate for Pet/Ap. : Shivaraj Patil and C.H. Hanumantharaya, Adv.

Disposition : Appeal allowed

Judgement :

Patil, J.

1. In this appeal, the accused-appellants have sought to challenge the legality and correctness of the conviction passed on them.

2. Accused-appellants Shafiulla Khan @ Jungal Shafi (A-1) and Saleem Afsar (A-2) were tried together by the IV Additional Sessions Judge, Bangalore City, in S.C. No. 75 of 1984. While A-1 was charged with the commission of the offence of murder and simple hurt punishable under Sections 302 and 324 I.P.C. A-2 was charged with the commission of abetment of murder punishable under Sections 302 R/W 109 IPC. A-1 is found guilty of the offence under Sections 302 and 324 IPC and sentenced to suffer imprisonment for life and R.I. for 2 years with a fine of Rs. 2,000/-, and in default of payment of fine to undergo R.I. for 6 months, with a direction further that the substantive sentences shall run concurrently. A-2 is found guilty of the offence under Sections 302 R/W 109 IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs. 10,000/-, and in default of payment of fine to undergo R.I. for 3 years ; out of the amount collected 1/3rd being payable to PW-1, 1/3rd to the parents of the deceased Imtiaz and the remaining 1/3rd of the amount going to the State.

2. The facts of the case are few and simple. A-2 Saleem Afsar being a resident of Mavalli locality in Bangalore was running a Chit Fund named and styled as Seema Chit Fund and was due to pay 14 to 15 lakhs of rupees to 38 members of the Chit Fund including Rs. 8000 00 to his next door-neighbor PW-1 Nawabjan. On account of the pressing demands made by the members of the Chit Fund, there was a Panchayat for settlement of the dues. It was decided that he should pay at the rate of 70 Ps. in a rupee to all the members and he agreed to pay. But, however, he went on postponing the making payment of the moneys due to the members on one pretext or the other. PW-1 was ill and was in bad need of money. So he went on pressing him to pay the money. On one occasion he assured to pay him on 1st of June, 1984, but failed to do so. Although PW-1 requested him to pay atleast Rs. 2000/- and the remaining amount later on, he did not oblige him. PW-1 therefore got upset and he approached deceased Imtiaz, who, accompanied by his cousin PW-3 Moheed Rehman, went to the house Of A-2 and requested him to pay some money atleast. A-2 promised to pay Rs. 2000/- by June 15, 1984, and Rs. 6000/- after 15-20 days later, but without intention to fulfil the said promise. On 2nd June, 1984, at about 9 or 10 PM, he instigated A-1 Shafiulla Khan to throw stones at the house of PW-1, who accordingly threw a big stone towards the window of the house of PW-1 and challenged him and his wife to come out of the

house to face the assault and at the same time questioning him as to why he had brought people of Kumbarpet to take money and warned of the dire consequences if he again came with those people. PW-1 could not dare come out. The next day morning, i.e. on 3rd June, 1984, when PW-1 came out of his house with a view to go to market, A-2 was standing outside his house. When PW-1 questioned him of the behaviour of A-1 on the previous night, A-2 told him that he would see how he (PW-1) would take money due to him. PW-1 therefore instead of going to market went straightaway to the house of deceased Imtiaz at Kumbarpet and narrated before him all that had happened on the previous night and how A-2 had also showed his mind not to pay the money. Deceased Imtiaz and PW-3 asked him not to lose courage and assured him that they would again tell A-2 to pay the money due to him and accordingly went with PW-1 towards the house of A-2 at Mavalli. After reaching Mavalli, while deceased Imtiaz and PW-3 stood on the footpath near the Mosque, PW-1 went to the house of A-2 to call him. When A-2 came out of the house and went up to the place where deceased Imtiaz and PW-3 were standing on the footpath, the deceased questioned him as to why having promised to pay the money he had instigated A-1 to create galata on the previous night. A-2, without replying him, called A-1 who was coming there on the road and told him that PW-1 had come with rowdies of Kumbarpet and asked him to take care of them and went to his house. Thereafter, when deceased Imtiaz and PW-3 tried to advise A-1, started abusing them and when the deceased questioned him as to why he was so abusing, A-1, it is the prosecution case, took out a knife and stabbed on his left side face, forehead, left-side chest and body. When PW-3 intervened and tried to snatch the knife, A-1 stabbed him also on the left-side neck. In the meanwhile, when Traffic Police Sub-Inspector P W-18 K. Rajagopal and P. C., PW-17 Puttaswamy came there, A-1 went away running with the knife in his hand. Finding that the deceased had sustained serious injuries, PW-18 secured an auto-rickshaw driven by PW-13 Venkatesh and sent the deceased and PW-3 in the autorickshaw with PW-17 to the Victoria Hospital. It was about 7.45 pm when they reached the hospital.

3. PW-14 Dr. K.L. Narayanamurthy examined the deceased. The deceased was directed to take into emergency casualty operation theatre. All efforts made to stop the bleeding from the injuries were futile and the deceased died at about 7.45 pm.

Accordingly, he sent intimation to the Police Station, Kalasipalyam. Even before it reached the Police Station, PW-3 appeared in the Police Station at about 8 pm and orally complained about the incident before the P.S.I. PW-19, Gangadhara, the PSI, was in-charge of the Police Station. He recorded his complaint as per Ex. P-3 and on the basis of the same registered a case in Cr. No. 404/84 for the offences punishable under Sections 302 and 325 IPC and issued F.I.R. to the Court as per Ex. P-29. He also sent express reports to his superiors. He drew up panchanama as per Ex. P-10 in the presence of panchas including PW-10 Chandapasha and seized the bloodstained clothes MOs. 2 to 4 worn by PW-3. PW-20 Kallannanavar, the C.P.(sic)., got information from the control room regarding the incident taking place at the Mosque. He went to the place and on coming to know that the accused had stabbed deceased Imtiaz and PW-3 and they had been shifted to Victoria Hospital, he went to the hospital and learnt that the deceased Imtiaz had died. He also received intimation regarding his death as per Ex. P-13. When he also learnt that after treatment PW-3 had gone to the Police Station, he went there and took up investigation. Thereafter, he went to the scene of offence, collected panchas, examined the place of incident and its surroundings and drew up panchanama as per Ex. P-14 and seized thereunder bloodstained earth and unstained earth MOs. 11 & 12. He sent the police constable PW-16 Dwarakanath to the hospital to keep watch over the dead body of the deceased. On 4-6-1984, he went to the hospital, collected panchas including PW-9 Abdul Kayam and held inquest over the dead body of the deceased as per Ex. P-9 and made over the dead body to the Medical Officer for postmortem examination.

4. PW-6 Dr. S.B. Patil conducted the postmortem examination over the dead body of the deceased and found that the deceased had sustained as many as 14 injuries, of which injury Nos. 10 and 11, which themselves were fatal and sufficient to cause the death in the ordinary course, have been described by him as follows :

(10) A stab injury over right side front of chest at its middle, oblique in direction, 6 cms. to the right of midline, 8 cms. below right nipple measuring 2.5 cms. x 1 cm., outer is sharp and inner end is blunt, edge is clean cut.

(11) A stab wound over right side of chest, 12 cms. below axilla, oblique in direction measuring 3 cms x 1 cm., outer end is sharp, inner is round, edge is clean cut.

On dissection, he also noticed that under injury No. (10) the weapon had entered into the chest cavity cutting through muscles of the chest at 8th intra-coastal space, diaphragm and front surface of right lobe of liver were incised. The total depth of the injury was 14 cms. and it was directed downwards. Under injury No. (11), the weapon had entered into the chest cavity at the 6th intra-coastal space on the right-side cutting through the muscles of the chest making a nick in the outer surface of lower lobe of right lung. The total depth of the wound was 7 cms. and the wound was directed inwards and downwards. Liver and spleen had become pale. Abdomen contained 800 mls. of blood. The injuries were ante-mortem and caused by a pointed single edged sharp cutting weapon ; and the cause of death, in his opinion, was due to shock and haemorrhage as a result of multiple injuries. He later on issued postmortem report as per Ex. P-6.

5. The accused were found absconding. On 5-6-84, PW-20 the CPI got information that they will be available near the Mosque in Mavalli,. He, therefore, went there and found A-1 was present there behind the Mosque. He took him into his custody and recorded his statement as per Ex.P-22. On the same day, in the afternoon, he arrested A-2 from his house, produced before the Court and took police custody remand. On 6-6-1984, at the instance of A-1, he also recovered knife MO-1 kept concealed in a pipe lying on the left side of his house and seized it under panchanama Ex.P-11. The next day, he sent the accused to the Court and obtained judicial custody remand. On 14-6-84, he sent the bloodstained articles to the C.E. and on receipt of the articles from the C.E., he showed the knife MO-1 to Dr. Patil and obtained his opinion, later on, on receipt of the injury certificate Ex.P-25 in respect of PW-3 and the reports from, the C.E. & Serologist and after completion of the investigation, he placed the charge sheet against the accused.

6. The accused who pleaded not guilty in their statements recorded under Section 313 Cr.P.C., not only denied the correctness of the evidence adduced on behalf of the prosecution regarding the happening, but A-1 also denied of he having

volunteered any information leading to discovery and he producing knife MO-1 from his house. He also filed a detailed written statement raising the plea of right of private defence of person contending, inter alia, that being a servant in the Mosque at Mavally, on 3-6-1984, at about 6 PM. when he was distributing money received from others among the poor people, PW-1 standing at the main door of the Mosque showed him to two strangers ; of them, one was PW-3 and the other was a tall hefty and looking like a wrestler (meaning thereby the deceased) and the latter signalled him to come out. Accordingly when he went out of the main door and was standing near the place where people used to leave their footwears, the tall and hefty person (the deceased) held him by collar of his shirt and took him so holding on to the footpath and started kicking him all over his body and after giving a fist blow on his face told that he would finish him in front of the house of PW-1 and so saying he took him towards east and when he was in front of a store, the hefty man (the deceased) took out a knife from the pocket of his pant and tried to stab him on his chest and abdomen and when he tried to ward off the blow, he sustained injury on his hand and at that moment, apprehending danger to his life, in order to save his life he snatched the knife and then assaulted him (the deceased) as also PW-3 and he did not know where and on what part of the body the blows landed. He also examined five witnesses in defence including two doctors-DW:4 Dr.A.Ghouse Khan, a Private Medical Practitioner, who examined him (A-1) on the evening on the date of the incident and found that he had sustained two incised injuries, one on the left palm measuring 8'x 1/2' 'x1' and, another on the left shoulder. DW-1 Dr. B.N. Venkatesh, Medical Officer in Victoria Hospital, who examined him on 6-6-1984 found that he had sustained the following injuries :

- (1) A sutured infected wound of 4 1/2' in length situated at the disk at the end of the left palm.
- (2) Infected lacerated wound 1/2' x 1/2' x 1/8' situated at the left side of forehead.
- (3) Abrasion of 1 1/2' 1/6" situated at the mandible side of right shoulder joint.
- (4) A laceration of 3/4' x 1/4' over left knee joint

(5) Abrasion of 1/4' x 1/6' over the upper anterior aspect of left fore-arm reddish in colour.

(6) Abrasion 1/4' x 1/6' over the left great toe.

(7) Abrasion of 1/4'x 1/6' present over left arm.

The injuries were old by 3 days. He also got produced several documents including Ex.D-12 by which A-1 was referred to the Medical Officer for examination; and the entries in the Accident Register E-13 to the effect that he had been assaulted by a gang of people on 3-6-1984 at 6 PM with knife and was treated at Hosur by private doctor.

6. The learned Sessions Judge held that not only the deceased died a homicidal death due to the injuries found to have been sustained by him, but PW-3 had also sustained injury in the course of the same incident. He rejecting the defence version of the case as must be 'improbable and a desperate attempt to avoid the consequences' and relying upon the evidence of the occurrence as given by PWs-1, 3, 4 & 5 and the conduct of the accused making themselves scarce and the recovery of the knife MO-1 from the house of A-1, held that the two accused were guilty of the charge of the offences levelled against them. In that view, he having convicted and sentenced to imprisonment and to pay a fine, as already stated above, the accused have come up with this appeal.

7. The fact that the deceased died a homicidal death and on account of the injuries as found to have been sustained by him, to which a reference has already been made above, has neither at any stage of the, trial before the Court below, been sought to be disputed nor Mr, Shivaraj Patil, Learned Counsel for the accused-appellants, has also now sought to dispute the same. Although the doctor who examined the injuries sustained by PW-3 has not been called and examined as witness in the trial, but. the injury certificate issued by the doctor was produced and marked as Ex. P-25 without objection which showed that PW-3 had sustained the following three simple injuries :-

(1) Incised wound of 6' x 1' skin deep over the left side of the neck.

(2) included wound of 1 3/4' x 1/4' skin deep over left side of forehead.

(3) Incised wound of 1 1/2' x 1/4' x 1/4' skin deep over left 8th intra costal space.

Mr. Shivaraj Patil, Learned Counsel for the accused, also did not seek to dispute that PW-3 also received the injuries during the course of the same incident in which the deceased had sustained the injuries resulting in his death. The fact that A-1 was responsible for inflicting the injuries sustained by the deceased and PW-3 is also no more in dispute. PWs-1, 3, 4 & 5 have no doubt given evidence somewhat consistently with the prosecution version of the story as stated above while narrating the facts of the case. The question however is : whether the incident took place in the manner as alleged by the prosecution and made out at the trial from the mouth of these witnesses, Mr. Shivaraj Patil (sic) taking us through the evidence of the material witnesses submitted that not only the genesis of the incident has been suppressed, but the prosecution has presented one-sided picture, therefore, the Learned Sessions Judge was wholly in error in placing implicit reliance on the evidence of occurrence as given by PWs.1, 3, 4 and 5 and finding the accused guilty, Elaborating his Contention and taking us through the evidence of the witnesses and the documents as placed on record Mr. Patil submitted, when arrested although A-1 complained before the C.P.I. PW-20 of the circumstances under which he sustained the injuries at the hands of the deceased, but the Inspector not only failed to record his complaint, but he failed to collect evidence as to the truth for otherwise of the facts stated to him. Even though he referred A-1 to the Medical Officer in Victoria Hospital for examination of the injuries sustained by him, but suppressing that fact sent up a charge sheet giving one-sided picture of the case. Even at the trial not only PWs.1, 3, 4 & 5, who claim to have been present at the time of the incident, feigned ignorance of A-1 sustaining injuries at the time of incident, but the evidence available was suppressed and one-sided picture was presented to the Court. The Learned Sessions Judge had also not only failed to appreciate the evidence in its proper perspective, but has also misdirected himself in rejecting the defence of right of private defence raised by A-1 and, therefore, the judgment and order of conviction as passed by the Sessions Judge cannot be sustained. Taking overall picture of the case, on the basis of the materials placed on record, A-1 was certainly within his right, in the circumstances

of the case, to assault the deceased in exercise of right of private defence of person to save his life and while assaulting also he had acted well within his right and not exceeded, therefore, he was entitled to be acquitted.

So far as A-2 is concerned, he submitted, the prosecution version of the case that he asked A-1 to take care of the deceased and went away not only seems to be more artificial than real, but he was nowhere present there and he has falsely been implicated and that is quite clear; because the complaint of the incident was allegedly given by no other than PW-3, an eye witness to the incident, and the complaint Ex.P-3 was conspicuously silent about his presence and abetment, therefore, the Sessions Judge was wholly in error in finding A-2 guilty of the offence of abetment punishable under Section 302 R/W Section 109 IPC.

8. Mr. Nanjundaiah, learned Additional State Public Prosecutor appearing for the State, on the other hand, argued supporting the order of conviction and sentences as passed on the accused. He also submitted, all the injuries sustained by A-1 were simple and the injuries sustained by him on the left hand palm could as well be self-inflicted. Therefore the plea of right of private defence raised by him cannot be sustained. Moreover, if, as claimed by him, he had disarmed the deceased, there being no apprehension to his life the right of private defence was no longer available and the learned Sessions Judge was right in rejecting the defence of right of private defence of person raised by him and finding him guilty. Although the complaint is silent about the instigation by A-2, but the evidence given by PWs-1, 3 & 5 showed that he instigated A-1 to take care of the deceased, suggesting thereby to assault him, and left the place, therefore, there are no reasons whatsoever to interfere with the order of conviction and sentence as passed on the accused.

9. Having regard to the background under which the incident is said to have taken place, particularly what happened on the night previous to the incident, it would be improbable to believe that either PW-1 went all the way to Kumbarpet merely to request the deceased to persuade A-2 to give him the chit fund money said to be due to him, or that the deceased went towards Mavalli accompanied by PWs 1- & 3 to gentlemanly persuade him the money due to him; because it does not appear

the deceased had any previous acquaintance with A-2 so as to presume that he would influence and use his good office to persuade A-2 to give the money, who inspite of settlement by elders of Mavalli had not kept up the promise made by him. The background under which the incident took place showed that the deceased went to Mavalli accompanied by PWs-1 & 3 not merely to persuade A-2, but also to question about the stone throwing incident on the previous night; because it would appear it is not the money that mattered more, but the behaviour of A-1 on the previous night and that was the immediate cause and motive for the offence. In other words, the deceased who appears to be more friendly with PW-1 and interested in him, as they had lived as neighbours in Kumbarpet for a long period, wanted to show his might and valour as he was tall hefty and strong man. The prosecution version of the case that they in the first instance approached A-2 and A-2 instigated A-1 to take care of them and went away, as has been tried to be made out, does not, appear to be true. If there was really any truth in that, PW-3 who had complained to the police of the incident shortly after the incident, when his memory was still fresh, would not have failed to mention about it, particularly having referred to the money matter. The tenor of the complaint goes to show that they together went only to question A-1 about his behaviour on the night previous to the incident. We have, therefore, no doubt in our mind, finding the opportunity, the witnesses have thought of involving A-2 also by giving him a role as an abettor.

10. As noticed earlier, A-1 had undoubtedly sustained several injuries. They were also of the same age. A-1 was also treated for those injuries in the evening on the very day of the incident by DW-4. When arrested, A-1 had also complained about the assault on him by the deceased. It does not appear the CPI had either recorded his complaint or collected any evidence to negative the assertions made by him. As rightly argued by Mr. Shivaraj Patil, it would appear, this aspect of the case was suppressed. Even at the Trial it was suppressed. In other words, not only the investigation of the case was unfair, but very astonishingly one sided picture was presented before the Court even during trial.

11. It is not in every case a duty is cast on the prosecution to explain the injuries found to have been sustained by the accused, but in a case like this where plea of

right of private defence is raised and witnesses after witnesses are cross-examined on that line, denial by the witnesses, or feigning ignorance of the injuries and suppression on the part of the prosecution of the evidence of the injuries sustained by the accused not only give rise to suspicion of the truthfulness of the prosecution version of the case, but the non-explanation of the injuries sustained by the accused in the course of the incident assumes greater importance and open to inference that the accused had inflicted the injuries on the deceased and prosecution witnesses in exercise of right of private defence of person, : 1976 CriLJ1736 . In such a case, the evidence adduced was a whole, whether it comes from the side of the prosecution or from the side of the defence has to be considered and the issue - whether or not the accused inflicted the injuries, for which he is tried, in exercise of right of private defence has to be decided applying the principles of balance of probability. Although the onus lies on the accused to prove the defence of right of private defence, but the onus is not as onerous as it lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond all reasonable doubt, : 1980 CriLJ1010 .

12. the fact that the CPI did not record the complaint of A-1 or collect any evidence to negative the assertions made by him makes us not only to suspect the truthfulness of the prosecution version of the case as put forth, but there appears to be some element of truth in the defence version of the case. The watchman of the Mosque examined as DW-3 has also stated as to the circumstances under which A-1 went out of Mosque as called by two strangers. There are no substantial reasons to disbelieve or discard his evidence.

13. Although number of decisions of the Supreme Court and those of other High Courts and of our own High Court were cited before the learned Sessions Judge dealing on this aspect of the case, he has not only failed to apply the principles laid down in the various decisions, but also by approaching the case from a wrong perspective, on erroneous reasonings and merely copiously quoting the decisions, having lost the core of the point, has reached a wrong conclusion. He appears to have tried to balance the evidence adduced on behalf of the prosecution and the defence without looking into the quality of the evidence and entirely forgetting that the prosecution had from the beginning tried to suppress the injuries sustained by

the accused. It is this wrong approach and appreciation of the evidence made by the Sessions Judge that has, in our opinion, resulted in miscarriage of justice. Considering the evidence as a whole, we have no doubt in our mind, not only a distorted version of the incident is sought to be presented before the Court, but the accused had, in exercise of the right of private defence and in the circumstances stated, in order to save his life and in exercise of right of private defence, inflicted the injuries. It is well settled that in such situation in which the accused is placed and faced with imminent peril to his life or limb by a strong person, it could not be expected to weigh in golden scale the precise force needed to repel the danger. In such a situation the apprehension being real, it is his judgment that matters more than what a calm and unruffled man could imagine. These are well established principles and it is not necessary to refer to various decisions cited on both sides. The right of private defence accrues with the commencement of apprehension of danger to life or limb and lasts as long as the apprehension continues. The danger and nature of the apprehension depends upon not only the weapon used against him, but also on the strength and weakness of his assailant. No one is expected to run away like a coward faced with such apprehension. Merely because the accused, as claimed by him, had snatched the knife from the hands of the deceased, it cannot be said the apprehension in his mind had ceased or the right of private defence had come to an end. There may be situation where in spite of snatching the weapon the apprehension still continues in the mind of the accused either because his assailants are more in number or he is strong enough to overpower him and inflict injuries. The test, in such cases, is not whether there is any actual danger, but whether there is reasonable apprehension ; and the accused, when under such apprehension of death or grievous hurt, cannot be expected to judge too nicely the situation or modulate his defence step by step. Here in the case on hand, not only the deceased himself was much stronger than the accused, but his assailants were three in number. In such a situation, he would be within his right to give decisive blows until disabling his assailants and therefore, as claimed by him, after snatching the knife, if he had wielded it inflicting injuries, it cannot be said that he had exceeded the right of private defence of person available to him; because in spite of injuries, as we have in the evidence, the deceased was still standing and not fallen down so as to hold that he had

exceeded his right of private defence when he inflicted the injuries on the deceased. The Learned Sessions Judge was wholly in error in rejecting the right of private defence and finding the accused guilty.

We, therefore, allow the appeal and set aside the order of conviction and sentence passed on the accused ; hold the accused not guilty and acquit them and direct that they shall be set at liberty forthwith.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com