

Parbhoo and ors. Vs. Emperor

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Court : Allahabad

Decided On : Sep-16-1941

Reported in : AIR1941All402

Appellant : Parbhoo and ors.

Respondent : Emperor

Judgement :

ORDER

Braund, J.

1. This is a criminal appeal which though not in itself a matter of major importance, raises a question which, to my mind, is of such far-reaching consequence that it appears to me to be my duty to refer it to the Chief Justice with a recommendation that it be put up before a Full Bench of the Court. In order to explain the point which is causing me so much trouble I cannot avoid setting out some of the facts. It appears that, owing to the shifting of the course of a certain river, a piece of land had during the last few years appeared. It is this land which is the subject of the dispute which gave rise to the quarrel, and ultimately ended in the fight, which is the subject-matter of the present charge. In order to put the matter in the smallest possible compass, it is enough to say that there were two rival sets of claimants to the land which had been thus exposed by the changing of the river's course. For the sake of convenience these two rival sets of claimants can be called 'Genda's

party,' on the one hand, and 'Ganeshi's party' on the other hand. The one fact that we know for certain is that, at about 2 P.M., on 26th November 1940, Genda's party and Ganeshi's party met on the land in question and set about each other with lathis with the result that the four appellants at least out of Genda's party were injured, while several casualties occurred among Ganeshi's party, including Ganeshi himself, who ultimately died. Those are the facts we know for certain. As a result of this and of the subsequent cross information reports which were laid at the police station on the same evening, cross cases were brought against some eleven men out of Genda's party, on the one hand and some sixteen men out of Ganeshi's party, on the other hand. Out of Genda's party, the present appellants were convicted and now appeal and out of Ganeshi's followers five men at least were convicted and are the appellants in the cross appeal which will have to be dealt with in a moment.

2. So far as the present appellants are concerned, it must be taken as admitted that they or some one or more, of them actually dealt the blows which resulted in the injuries to Ganeshi's men. There is no doubt about that. No question of identity arises. There may ultimately be some question about 'common intention,' but that is not material at this stage. The real controversy in the case arises out of the appellant's plea of self-defence. The prosecution story was that Ganeshi's party went to the field in question and were wantonly attacked by Genda's party without any provocation being offered to them. If that were true, it would be an end of the matter, and no question of self-defence would arise. The appellant's version, however, was that they had already sown a crop in the land and were deliberately attacked by Ganeshi's men, in consequence of which they had in self-defence to employ their lathis to protect themselves. The controversy of fact, therefore, at the trial can be said to have revolved itself entirely round the question whether it was Genda's men who started it or whether, as the appellants said, it was Ganeshi's party who did the attacking in the first place with the result that the appellant had to defend themselves.

3. At the trial, apart from certain evidence as to whether the appellants had sown a crop in the land or not, a good deal of evidence was adduced for the purpose of trying to show who it was that began the fight. But when carefully examined, it

appears that there were really only two actual eye-witnesses who have been able to say that they were present there and saw the beginning of the fight. They are the prosecution witnesses, Harpal, who is himself accused in the cross case, and Chamela, who also is involved in the other case. If the matter ended there and that were the only evidence before the Court, no doubt the Court would have been obliged to convict. But the appellants then adduced evidence on their own behalf in support of their plea of self-defence. Again, this plea of self-defence involved as its principal point, the question of who it was that started the fight. The defendants therefore, produced two witnesses, Bhagwat and Chhajju, who said that they saw the beginning of the affair and that it was Ganeshi's party who started assaulting Genda's men.

4. At that point therefore the position really was that, apart from certain evidence, as to possession, the importance of which I myself think is apt to be exaggerated, there were in reality two direct witnesses on either side. The learned Judge however at the trial came to a conclusion of fact lying half way between both stories. He relied on the evidence of Yakub Ali, Amin Singh and Balwant, the prosecution witnesses 7, 5 and 4. What he had found had probably happened was that both parties had set out to enforce their rights over the field in question; and in short, that both were equally to blame. Now, in my opinion, the manner in which cases of self-defence and, indeed, all cases in which one of the exceptions in the Penal Code is pleaded-have to be approached is this. It is necessary for the prosecution first to establish a prima facie case that, apart from any question of an exception, the offence charged has been committed. In this case, I think that at the close of the prosecution case they had succeeded in doing this and, if the matter had stopped there, it would have been necessary to convict. The next stage is that the defence relies upon an exception-in this case the exception of self-defence. Section 96, Penal Code, says that : 'Nothing is an offence which is done in the exercise of the right of private defence.' The defence therefore pleaded was that what was done was not an offence because it was done in the exercise of the right of private defence. By Section 105, Evidence Act, it is provided : 'When a person is accused of any offence, the bur. den of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code' - the right of self-defence is one of the general exceptions - 'or within any special

exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances.'

5. The appellants therefore having raised an exception in the form of the plea of self-defence, found themselves faced with the 'burden of proof' (whatever that may mean) and they found themselves, moreover, faced with the concluding words of Section 105, Evidence Act, that 'the Court shall presume the absence of such circumstances.' In this case they have adduced evidence, and I may say at once that that evidence is not conclusive to my mind as substantive proof beyond reasonable doubt of such circumstances as amount to a case of self-defence. I am unable to go so far as to accept the evidence of the appellants as discharging the burden of proof which lay upon them, if the words 'burden of proof' are to be read as meaning the duty of satisfying the Court affirmatively that such circumstances did actually exist as could maintain a plea of self-defence. The position therefore at that point was that the prosecution had to my mind *prima facie* proved a case of the inflicting of voluntary hurt by the appellants which, had no evidence been offered by the defence at all, would have been sufficient to sustain a conviction. The appellants, on the other hand, had offered evidence, in support of their plea of self-defence which leaves me with a doubt as to whether what they say is true or not. Now it is at that point that the difficulty begins.

6. There appear to me to be two ways of looking at the matter. The first is that, when once the accused have offered evidence in support of an exception, which evidence fails affirmatively to establish that exception, then the Court is thrown back simply upon the question whether the offence has been committed, without regard to any question of the exception at all. In other words, the only issue remaining in the case is whether the original offence-that is the offence of inflicting voluntary hurt-was, as a matter of fact, committed by the appellants and in considering that all question of self-defence is precluded by virtue of the initial failure of the accused affirmatively to establish that plea and by virtue of the concluding words of Section 105, Evidence Act. If that is the right way of looking at it, the Court would have to reason that, the plea of self-defence having failed in the sense that it had not been established beyond a reasonable doubt, therefore the

only remaining question was whether, in fact, the appellants or any of them did hit the members of Ganeshi's party. The only issue that remains is the bare issue of inflicting voluntary hurt. That is one way of looking at it, and if that is the right view, then it would appear to me that in this case it may possibly (though I am not now deciding it) be necessary to come to the conclusion that the prosecution has established by its evidence that the appellants did inflict voluntary hurt.

7. There is, however, another point of view which has been brought into recent prominence as a result of the English case in the House of Lords in *Woolmington v. Director of Public Prosecutions* *Emperor v. U Damapala* ('37) 24 A.I.R. 1937 Rang. 83 and a decision of a Full Bench of the Rangoon High Court in *Emperor v. U Damapala* ('37) 24 A.I.R. 1937 Rang. 83. The latter case was one in which, in its earlier stages, I was myself involved and I am not free from some slight embarrassment in throwing open to debate a decision of the Rangoon Full Bench which, in the first place, supported a decision of my own. That case also contained a question of self-defence and what I understand the learned Chief Justice and two other Judges of the Rangoon High Court to have decided is that, in a case in which a plea of self-defence has been taken and has failed to satisfy the Court beyond a reasonable doubt, it still remains open to the accused person to use that evidence as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists, not merely of whether the accused committed the offence itself, but even of whether, in committing the offence, he may not have been acting in self-defence. In other words, it seems to me to give to the accused person the right of saying that he had produced evidence of circumstances tending to show the exercise of a right of self-defence and that, notwithstanding that that evidence was not conclusive beyond a reasonable doubt, he is still entitled to the benefit of his plea of self-defence if the Court is left in doubt whether, after all, it might not possibly have been a case of self-defence. The point, as I understand it, is put by Dunkley J. at p. 682 in the passage in which he says:

The conclusion therefore is that if the Court either is satisfied from the examination of the accused and the evidence adduced by him, or from circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded has been proved, or

upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not, the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of special exception, can be convicted only of the minor offence....

8. The learned Judge by his use of the words 'whether such circumstances do exist or not' makes it clear that the accused is in his opinion entitled to the benefit of the doubt, not only as to whether there was culpable homicide or voluntary hurt as the case may be, but also as to whether that culpable homicide or voluntary hurt was the result of self-defence. In short, upon this view, he is entitled to the benefit of the reasonable doubt both as to the substantive offence and as to the exception. The question is whether that can be reconciled with the concluding words of Section 105, Evidence Act. The learned Chief Justice of the Rangoon High Court put it slightly differently but, with great respect, I think he meant the same thing. He said: Put shortly, the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal.

9. To my mind, the whole question is really involved in what the learned Chief Justice meant by the words 'in the case for the prosecution.' There can be no doubt that the whole of the evidence in the case could be used for the purpose of establishing 'the case for the prosecution,' in the sense of the case which the prosecution originally set out to establish, that is to say culpable homicide or voluntary hurt, as the case may be. The doubt that creeps in is whether the abortive evidence upon the plea of self-defence can be used - so to speak, for a second time - to establish a reasonable doubt as to whether there was self-defence or not. To put it in another way, the question is whether 'the case for the prosecution' is merely whether culpable homicide or voluntary hurt was committed by the accused or whether such culpable homicide or voluntary hurt was committed by the accused in circumstances which did not give rise to a case of self-defence. Was there a burden on the prosecution to establish the negative fact that no case of self-defence arose? The third of the learned Judges implicated in

that decision, who is now the Chief Justice of Madras, contented himself merely with concurring. I think that the full implication of this case is made still more clear by a later criminal appeal in the Rangoon High Court, *Nga Thein v. The King* ('41) 28 A.I.R. 1941 Rang. 175, in which the learned Chief Justice and Dunkley J. interpreted it in the wider sense and allowed the evidence in question to be used to establish a reasonable doubt, not only as to the factum of the offence itself, but also as to whether there was a case of self-defence.

10. As I said at the beginning of this judgment, this is a question which, in my view, is of the greatest importance. It has, as far as I am aware, never been discussed in this High Court. It is a view which, if it be the right one, is relevant in a great number of criminal appeals indeed, in most criminal appeals in which any plea involving an exception is taken. In my brief experience in this Court, I have been under the impression that the accepted view of the law is that the burden lies upon an accused person to prove his exception if he can and, if he fails, then all that the prosecution has to do is to prove the offence without reference to the exception. I may be wrong, but that is my impression of the law as it stands in this High Court. If however the view of the Rangoon Full Bench *Emperor v. U Damapala* ('37) 24 A.I.R. 1937 Rang. 83, based on *Woolmington v. Director of Public Prosecutions* *Emperor v. U Damapala* ('37) 24 A.I.R. 1937 Rang. 83 is right, then it would seem that this statement of the law is now inadequate, because it would still remain for the prosecution to establish, not only that the actual offence was committed, but that it was committed free (so to speak) from any exception. In other words, in any case in which the accused person offers any evidence of self-defence, it throws upon the prosecution the burden of proving, not only the crime, but the absence of the exception as well. It is from that point of view that I regard this case as of such importance as to warrant a reference to a Full Bench. I desire to make it particularly clear that I am venturing myself to express no opinion at all and still less am I venturing to raise any doubt as to the correctness of a decision of a Chief Justice and two former colleagues of my own for whose judgment I have nothing but the greatest respect. But I regard the question of such importance, and as far as I know, it has not yet been before this Court, that I am venturing to ask his Lordship the Chief Justice to constitute a Full Bench to deal with it. In the present case, it will have a considerable influence on the result of this appeal,

because if, conformably with the Rangoon decision, the burden lies upon the Crown to prove, not merely that the appellants inflicted voluntary hurt on Ganeshi's party, but also that they did so in circumstances which beyond a reasonable doubt did not involve self-defence, the result may be quite different from the conclusion which would have to be reached if the law is as I believe it to stand at present in this province.

11. The question therefore I would have referred to the Full Bench is this : 'Whether, having regard to Section 96, Penal Code, and Section 105, Evidence Act, in a case in which any general exception in the Penal Code is pleaded by an accused person and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused person is entitled to be acquitted, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception), a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception?'

12. I understand that the appellants are not on bail. While appreciating that the granting of bail in the middle of the sentence, as a rule, is undesirable, I cannot possibly allow them to remain in jail pending the hearing of this Full Bench reference. I shall, therefore, order that, upon furnishing security to the satisfaction of the District Magistrate of Meerut, the appellants are to be released on bail pending the ultimate disposal of this appeal. In the meanwhile, I shall stand over this appeal until the reference to the Full Bench has been disposed of.

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