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Court : Allahabad

Decided On : Jul-08-1964

Reported in : AIR1965All417; 1965CriLJ331

Judge : M.H. Beg, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 304

Appeal No. : Criminal Appeal No. 622 of 1963

Appellant : Bharosa and ors.

Respondent : State

Advocate for Def. : K.N. Srivastava, Adv.

Advocate for Pet/Ap. : C.S. Saran, Adv.

Disposition : Appeals dismissed

Judgement :

Beg, J.

1. The appellants Bharosa, Charittar and Shital were charged with offences under Sections 148, 302/ 149, 328/149 and 323/149, Penal Code and the learned Judge who tried them together with the acquitted accused persons, Dwarika and Deoraj, took the precaution, very properly, of charging them in the alternative with offences

under Sections 302, 326 and 323, Penal Code with the aid of Section 34, Penal Code. Charittar appellant was also charged separately under Section 302, Penal Code. The appellants were convicted under Section 304, Part I, Penal Code and Sections 326 and 323, Penal Code read with Section 34, Penal Code, in each case, and were sentenced to seven years, four years, and six months' R. I. respectively.

2. According to the prosecution case, Shiv Dayal deceased Girdhari and Bijai, who were alleged to be in possession of plot No. 131 of village Usari Khurd, in the district of Azamgarh had obtained a decree on 18-7-1962 from the Court of a Munsif restraining Sobaran and others from interfering with what was held to be the decree-holder's possession over plot No. 131. It is also the prosecution case that 9 days after this decree, on 27-7-1982, Shiv Dayal, Girdhari, Hira, (P.W. 6) and Bijai (P.W. 1) were ploughing plot No. 131 as well as the adjoining plots Nos. 130 and 132 when Sobaran (also deceased) and the accused person came armed with lathis and spears and asked Shiv Dayal not to plough there as an appeal was going to be filed against the decree. The defence also admits that Shiv Dayal had obtained a permanent injunction, but it is alleged by it that Sobaran was actually in possession in spite of the decree obtained on incorrect allegations. The defence case also is that Sobaran did not come in the company of other accused persons but came alone to request Shiv Dayal and others not to plough the field as he was in possession. It is also alleged here by the defence that there were mends between plots Nos. 130 and 131 and 132 which were being ploughed up by Shiv Dayal and others so that Sobaran had to come and protest.

3. It is after the arrival of Sobaran and the altercation that is said to have taken place between Sobaran and his party and Shiv Dayal and others that a marpit between the two sides is said to have taken place. Shiv Dayal died as a result of the injuries inflicted upon his person in the course of the marpit, and Sobaran died on the side of the accused persons. The injuries on the body of Sobaran were 15 altogether which included six contused wounds on the head, two punctured wounds on the chest, one each side, and one punctured wound on the right arm, two on the right thigh and one on the right leg. A glance at these injuries shows clearly that whoever attacked Sobaran did not intend to leave him alive and that

the object of the attack was not merely to kill Sobaran but also to do it in a vindictive fashion. In other words, these injuries were apparently the result of some frenzy generated by a powerful feeling such as the death of a person on the side of those who inflicted the injuries on the body of Sobaran. The injuries on the body of Shiv Dayal deceased were only four out of which three were contused wounds on the head and one was a punctured wound in the chest. These injuries could certainly result from a sudden onslaught by several individuals armed with lathis and ballams. In addition, Bijai (P.W. 1) received an incised wound and two penetrating wounds and Hira (P.W. 6) had four injuries. On the side of the accused, Shital had four injuries and Bharosa had eight. Out of these, there was one injury with a sharp edged weapon on Shital and one injury with a sharp edged weapon on Bharosa. If we do not take into account the injuries of the two women, Smt Samarthia, widow of Sobaran, and Smt Jhunia, her relation who had only a contusion on her right thumb, the male persons on the side of the complainant sustained only 11 injuries whereas there were 27 injuries on the side of the accused out of which 15 were sustained by Sobaran only.

4. The principal point which has to be determined in this case, where each side alleges that the other was the aggressor and that the injuries caused by it were during the course of the exercise of a right of private defence, is : How did the occurrence start or who was the aggressor ?

5. The prosecution case was that Sobaran came down with the other accused persons and started attacking Shiv Dayal Hira and Bijai at a time when Hira, Bijai, and Girdhari were ploughing with three pairs of bullocks. Apparently, according to the prosecution case, Shiv Dayal was not ploughing or standing on guard but watching the process of ploughing, and, after the verbal altercation, the attack was begun on Shiv Dayal who fell in the field No. 130 on the eastern side of the marks of ploughing found by the investigating officer. Sobaran, on the other hand, fell in the field of Kishore (P.W. 2) a short distance removed to the southwest of the place which was being ploughed. To the northeast of the place where Shiv Dayal fell are the houses of the two parties from where other persons are said to have come.

6. According to the defence version, sought to be proved by producing Sahdeo D. W. 1, Sobaran came alone without any weapon to the place of occurrence and asked Shiv Dayal not to plough his field, but Shiv Dayal refused to do so. According to the defence version, Shiv Dayal, after this refusal, called his relations from the abadi, and thereupon, Shivraj, Hira, Bira Kunwar and Dukhanti came to the scene of occurrence with spears and Bijaj, Shiv Dayal, and Kunwar came with lathis. After these persons had collected, they are alleged by the defence to have attacked Sobaran who fell in the field of Kishore. Then Smt. Samarthia the wife of Sobaran and Smt. Jhunia are alleged to have come to the scene of occurrence in order to save Sobaran but were also assaulted. At this stage, the accused Bharosa armed with a lathi and the accused Shital armed with a spear are alleged to have arrived at the scene of occurrence and the eight assailants including Shiv Dayal are alleged to have attacked these two also. Bharosa and Shital are alleged to have struck in self defence so that Shiv Dayal fell down and others were injured. In other words, the defence version is that upon the harmless and innocent expostulations of Sobaran, he was beaten up after assembling of eight persons some of whom were called from the village. All this time, Sobaran is supposed to have remained a spectator who did not run away although he had ample opportunity. Then, the beating takes place, according to the statement of Sahdeo (D. W. 1), in three instalments. The two women are alleged to have been beaten in the second instalment. The assault upon them is not mentioned in the F. I. R. lodged by Bharosa appellant at 11.30 on the same day through a chowkidar, whereas the F. I. R. of Bijai, P.W. 1 had been lodged at 10.30 a.m. at Police station Dohrighat.

7. The learned Sessions Judge who had the additional advantage of seeing the witnesses depose in the witness box accepted the prosecution version which is supported by the testimony of the two injured persons, Bijai P.W. 1 and Hira P.W. 6, and corroborated by Kishore P.W. 2 and Ramraj P.W. 4 and also by the post mortem and injury reports. He also pointed out that, on a consideration of broad probabilities, the prosecution case was far more likely than the defence version which did not appeal to reason. The reasons given by the learned Sessions Judge for this conclusion appear to be sound. They are, firstly, that Sobaran could not have gone alone and weaponless to the spot but he must have-gone there in the

company of the appellants who were armed so as to regain lost possession; secondly, the learned Sessions Judge found the calling out of the relations by Shiv Dayal upon a heated altercation to be unnecessary when Sobaran was alone, thirdly, the learned Sessions Judge thought that Sobaran was also likely to have called his own relations if Shiv Dayal could call his relations, fourthly, Sobaran was likely to run away upon seeing the relations of Shiv Dayal coming and not to stay in order to be beaten up; and fifthly, the statement of the Investigating Officer, G. G. Khan, P.W. 8 indicated in the opinion of the learned Judge, that Sobaran, near whose body a bloodstained lathi was found, was not empty handed but armed.

8. The reasons given by the learned Sessions Judge for accepting the prosecution version and rejecting the defence version could be added to. Shiv Dayal, it is evident from the site plan, was killed on the eastern side of plot No. 130 which is nearest to the abadi. This shows that he must have been attacked by a group of persons who came from the abadi. Apparently, after the attack upon Shiv Dayal, others came from the abadi to help him and push back the party of Sobaran into the field of Kishore P.W. 2. Hence, this difference between the two places at which the two, men, Shiv Dayal and Sobaran, fell. Again, the statement of Sahdeo D. W. 1 suggests that the fight took place in instalments. This may explain why the two women got the beating and are not mentioned in the F. I. R. of Bharosa. They must have come after the fight had begun and Sobaran had been beaten. In other words, the failure to mention these women who sustained injuries, in the F. I. R. of Bharosa, was perhaps due to the fear that the truth may leak out that, if these two women were injured at the same time as Bharosa and Shital, the beating of Shital and Bharosa probably took place after the attack on Shiv Dayal and then on Sobaran. After the trillings and the imaginative pieces are eliminated both from the version given by the prosecution witnesses and D. W. 1 Sahdeo, there remains a residue of undeniable facts and circumstances which point unmistakably towards the accused as the initial aggressors in company with Sobaran. It is unnatural to expect those persons who have obtained a permanent injunction to start the aggression. The motive to attack on the part of those who are prevented from disturbing the possession, which is the prosecution case, and even more so if, as a result of the permanent injunction they have been in reality ousted from possession, which is the defence version, is really much stronger than the motive

of those who have succeeded in litigation and are actually ploughing; the land. Those who plough, in these circumstances, do not begin the attack.

9. Mr. C. Section Saran has laid considerable emphasis on the larger number of injuries on the body of Sobaran and the accused, and he adds up the injuries of the two women also among the injuries supposed to have been sustained by the side of the accused in one and the same transaction. I do not think that the prosecution version of the particular separate transaction in which the two women are said to have sustained injuries can be said to be satisfactorily established, but it does appear that the significance of the injuries upon the women is that they appeared at a later stage after they had learnt of the attack upon Sobaran in the course of or just after the first incident which is satisfactorily proved by the prosecution witnesses. It was in the course of this first incident that Shiv Dayal was injured. It is possible that the women may have arrived at the tail end of the whole occurrence which, even if viewed as a single transaction, beginning with the sudden attack on Shiv Dayal's party, followed by the rush of persons to help Shiv Dayal and his associates and ending with the counter attack upon Sobaran and the accused persons, would explain the two deaths of Shiv Dayal and Sobaran as having taken place as a result of the fight begun by Sobaran and the appellants over the possession of land. The learned counsel for the appellants has laid considerable emphasis on the nature of injuries on Sobaran. I think this was due to the fact that the counter attack was vindictive and vehement. I find it extremely unnatural to think of such a vehement initial attack on a mere protest by an unoffending and unarmed Sobaran. The injuries on the body of Sobaran are clearly directed towards bringing about his death. The fact that the accused persons sustained larger number of injuries or that the complainant's party may have exceeded their right of private defence cannot wipe out the criminal liability of the accused persons for the initial attack.

10. It has also been argued that the injuries on Hira (P.W. 6) have not been mentioned in the F I P of the occurrence. It appears that the prosecution witnesses have tried to minimise their Own parts and have perhaps exaggerated facts relating to the weapons wielded by the accused persons. But, after going through the whole evidence in the case which reveals the circumstances mentioned above,

I am of the opinion that the learned Sessions judge arrived at the correct conclusion that the accused persons started the fight which resulted in the death of two persons, and that he was right in rejecting the defence version as totally incorrect. The minor contradictions in the statements of the witnesses cannot destroy the essential facts duly proved from the testimony of the prosecution witnesses. I may quote with advantage the following passage from Norton on 'Evidence' :--

'Discrepancies, often trifling in themselves, when compared with the great mass of evidence in the case, are only too frequently made In Indian courts the ground for acquittal or disbelief. It may of course happen that discrepancies occur in such material portions of the evidence that are so glaring and so utterly irreconcilable with the truth of the rest of the case or of the story of the particular witness, as to afford just grounds for an unfavourable verdict, or for rejection of the whole of a particular witness's evidence. But this is comparatively seldom the case; and the acute and the practised judge will generally be able to sift the wheat from the chaff, to separate the truth from the false; and if after this has been done, there remains a residuum of credible testimony, he should thereon found his judgment--not reject the whole evidence on account of its being more or less tainted with incredibility.'

11. Mr. C. S. Saran appearing for the appellants in the course of his able arguments relied on *Shubrati v. State*, 1959 All L J 423 where it was held :--

'It is well settled principle of criminal law that an accused can be convicted only when, on the evidence produced, the court is in a position to come to a definite conclusion beyond the possibility of reasonable doubt that the accused committed the offence with which he stood charged. No conviction can be based on mere possibilities. Nor is it permissible for the court to speculate as to what had really happened. If both the parties come to court with untrue facts and conceal the real truth they have themselves to blame and they cannot expect the Court to arrive at any definite conclusion on the unreliable evidence produced either for or against either of the parties. In such a case the Court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances it

may be found to be an impossible task.'

12. I have carefully considered the applicability of this ruling to the present case but I find that the circumstances stated above enable me to sift the evidence in such a way as to determine satisfactorily that the version set up by the prosecution is quite true so far as the question of aggression is concerned and that the case set up by the defence could not be true. Even the fact that Kishore P.W. 2 has given put a somewhat stilted version, which has resulted in the acquittal of two accused person, is explicable on the assumption that he may have been persuaded to favour two accused persons which is not an uncommon occurrence in this country,

13. The appellants' counsel also relied on Abdul Razzaq y. State : AIR1960 All567 . This was a case where it was held that there was a sudden fight between two parties leading to death and the prosecution had not led any reliable evidence to determine which party was the aggressor. It was held:

'The court has still to decide who started the fight and who was the aggressor. It cannot follow the path of least resistance and convict both parties by holding that the fight was a free one. If the prosecution evidence is unworthy of credence, the onus still lies on the court to arrive at a finding on the basis of probabilities.'

14. With great respect, I follow that decision and hold that on the probabilities of this case it can be determined quite satisfactorily that the prosecution version about the manner in which the fight started is true and the defence version cannot be true.

15. The next case relied upon by the appellants' counsel is Bala Prasad v. State of Madhya Pradesh : AIR 1961 MP241 where a passage from a decision of Dixon C. J., in Queen v. Howe 32 A LJ R 212 at p. 214, was quoted and the appellants counsel placed great reliance on this passage. I may quote a part of it On which particular emphasis is laid by C. S. Saran:--

'The state of law appears to be that once a ground is disclosed by the evidence upon which a plea of self-defence arises, it is essential to a conviction of some that

the jury shall be satisfied beyond reasonable doubt that one or other or all of the ultimate facts which establish that plea were not present. That appears to be the effect of the modern law. (See *Chan Kan v. The Queen*, 1955 A C 206 at p. 211).'

16. With very great respect, I may observe that I am not aware of any departure made by modern law or a new development which has taken place in our criminal jurisprudence so far as the presumption of the innocence of the accused is concerned in every criminal case including a case in which a plea of self-defence is taken by the accused.

17. What is called the rule laid down by Sir Michael Foster was thus described in *Woolmington v. D. P. P.*, 1935 A C 462 by Viscount Sankey L. C. at p. 481:--

'Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt.....If at the end and on the whole of the case there is a reasonable doubt created by the evidence given by the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case and the prisoner is entitled to an acquittal.'

18. This principle was discussed in its relation to a case in which a plea of private defence, which is covered by Section 105 of the Indian Evidence Act, fully in *Parbhoo v. Emperor* : AIR1941 All402 . Even if the plea is not accepted, the evidence given to substantiate the plea may be sufficient to leave the court in a state of reasonable doubt. But, this principle does not compel a court to give the benefit of doubt to an accused person even if, after considering the totality of evidence, the court is convinced beyond all reasonable doubt that the prosecution case is acceptable and the defence version must be completely discarded. I have not found any new development of the law since then. I am satisfied after going through the whole evidence in the case, that the prosecution version as to how the fight started between the two sides is correct beyond reasonable doubt, and that the version sought to be proved by the appellants could not possibly be correct. On the view I have taken of the facts of this case, it is not possible to give the benefit of reasonable doubt to the appellants.

19. Coming next to the question of sentence, I find that the appellants have been awarded seven years' R. I. under Section 304 Part I read with Section 34, I. P. C., although the learned Judge has found that the attack was made on a sudden quarrel in the heat of passion. Upon such a finding, viewed together with the probability that the worst offender was Sobaran who was killed, and the appellants must have learnt a lesson by his death--Bharosa appellant is the son of Sobaran--I think that the ends of justice will be met by reducing the sentence of seven years' R. I. to four years' R. I. The other sentences are maintained. In the result, I dismiss this appeal with the above modifications. The appellants are on bail. They will surrender and serve out the remaining periods of their sentences.

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