

Taj Mohammad and ors. Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Aug-03-2009

Reported in : 2010(1)MPHT184

Judge : R.C. Mishra, J.

Appellant : Taj Mohammad and ors.

Respondent : State of M.P.

Disposition : Appeal allowed

Judgement :

R.C. Mishra, J.

1. This appeal has been preferred against the judgment dated 30-9-1994 passed by Ninth Additional Sessions Judge, Bhopal in S.T. No. 299/1992 whereby each one of the appellants has been convicted under Sections 304 Part 1/304 Part II read with Section 34 of the IPC and sentenced to undergo RI for 3 years and to pay fine of Rs. 2000/- and in default, to suffer RI for six months.

2. For the sake of convenience, appellant Nos. 1, 2 and 3 namely Taj Mohammad, Lal Mohammad and Sharafat Khan shall hereinafter be referred to as 'AY', 'A2' and 'A3' respectively.

3. The prosecution case, as disclosed in the FIR (Exh. P-1), may be slated thus:

(i) On 10-5-1992 at 5 p.m., a goat belonging to Nawab Khan (since deceased) entered into the vegetable field of A2 located in Village Malkhedi. As A2 was driving the goat out of the field, Nawab Khan came there along with his brother Ismail Khan (P.W. 3) and nephew Iliyas Khan (P.W. 1) and tried to persuade him and his brothers, the other appellants here, not to goad the cattle. This led to a quarrel. In the course of which, all the three appellants assaulted Nawab, Iliyas and Ismail with lathis/dandas. All the three injured were taken to P.S. Ralibadh where a case under Sections 294, 506 and 325 read with Section 34 of the IPC as Crime No. 38/1992 was registered by scribing the FIR (Exh. P-1). They were sent to Katju Hospital, Bhopal for medical examination.

(ii) After a preliminary examination, Dr. Rajesh Kathal (P.W. 15) referred Nawab, Iliyas and Ismail to Hamidia Hospital for further examination and treatment. Dr. Mahesh Yadav (P.W. 5), the RSO, noticed fracture in the left humerus bone of Ismail. On the following day only, Nawab breathed his last in the hospital. Accordingly, the case was converted into one of murder.

(iii) After inquest proceedings, dead body of Nawab was sent for post-mortem. Autopsy Surgeon Dr. C.S. Jain (P.W. 16) opined that cause of Nawab's death was cranio-cerebral injury and shock arising therefrom.

4. On being charged with the offences punishable under Sections 323, 325 and 302 read with Section 34 of the IPC, the appellants abjured the guilt. A1 raised the plea of alibi by asserting that he had gone to Village Mungalia Chhap to recover money advanced to Tej Singh (D.W. 1) whereas the other appellants pleaded that injuries to the members of the prosecution party were caused by them, in exercise of right of private defence. In the examination, under Section 313 of the Code of Criminal Procedure (for brevity 'the Code'), both of them further pleaded that they were first assaulted by Nawab and his companions at the time when they were taking the goat, that had caused damage to vegetables grown in their field, to the cattle pond. To substantiate the plea of self-defence, the report (Exh. D-5) lodged by A2 leading to registration of counter case under Sections 294, 341, 324 and 506 of the IPC as Crime No. 37/1992 at the Police Station was tendered in evidence.

5. Upon a critical analysis of the entire evidence on record, learned Trial Judge, for the reasons recorded in the impugned judgment, came to the following conclusions:

(i) the plea of alibi set up by A1 was not established.

(ii) the appellants had no right of private defence either of person or of property.

(iii) The appellants were involved in a joint assault leading to death of Nawab but none of them had any intention to cause injuries sufficient in the ordinary course of nature to cause death.

(iv) It was not possible to hold that the appellants had caused injuries to Ilyas and Ismail voluntarily as presence of injuries on the bodies of A2 and A3 was also established.

Accordingly, she proceeded to convict the appellants for the offence of culpable homicide not amounting to murder and sentenced them as indicated hereinabove.

6. Legality and propriety of the impugned conviction have been challenged primarily on the ground of what is termed as mis-appreciation of the evidence relating to defence. Learned Senior Counsel, while placing reliance on the decision of the Apex Court in *Ramraian v. State of Bihar* : AIR 1965 SC 926, has contended that even if the negative finding regarding right of private defence is affirmed, no offence would be made out in view of the provisions of Sections 10 and 20 of the Cattle Trespass Act, 1871. In response, learned Panel Lawyer has submitted that the conviction in question is well founded on merits.

7. In order to appreciate the merits of the rival contentions in a proper perspective, it would be necessary to first advert to the medical evidence on record.

8. Dr. Rajesh Kathal (P.W. 15) proved existence and nature of the following injuries as well as nature of the weapon used:

On the person of Nawab [as described in report (Exh. P-12)]:

(i) Haematoma on left side of head, tenderness present, size 6 x 4 caused by blunt and hard object and simple in nature.

(ii) Lacerated wound on right elbow of size 2 cm x 2 cm x 2 cm. Profuse bleeding present.

On the person of Ismail [as described in report (Exh. P-13)]:

(i) Lacerated wound on left arm size 2 cm x 2 cm x 4 cm. Profuse bleeding present. Haematoma present. Caused by blunt object.

(ii) Swelling and tenderness on left leg caused by blunt and hard object.

(iii) Lacerated wound over left side of head, back side of size 6 x 4 x scalp deep, caused by hard and blunt object and simple in nature.

On the person of Iliyas [as described in report (Exh. P-14)]:

(i) Contusion over hypothenar eminence of the left hand size 2 cm x 2 cm caused by blunt and hard object, simple in nature.

(ii) Swelling and tenderness over right ankle joint, movement of joint restricted.

On the person of A2 [as described in report (Exh. P-10)]:

A lacerated wound over the right side of head at the parietal region 6 cm x 4 cm x scalp deep caused by hard and blunt object.

On the person of A3 [as described in report (Exh. P-11)]:

Abrasion over the left side of lumbar region of size 6 cm x 2 cm x 2 cm caused by hard and blunt object.

9. Although, Dr. Mahesh Yadav (P.W. 5), the then RSO in Hamidia Hospital, asserted that he had also noticed a grievous injury in the form of fracture in Ismail's left hand yet, no report as to corresponding radiological examination was brought on record.

10. An unusual aspect of the medical evidence is that Dr. Rajesh Kathal characterized the injury on Nawab's head, that was ultimately proved fatal to him, as simple. Moreover, the medical expert could find only two injuries including the one on head whereas Dr. C.S. Jain (P.W. 16), the autopsy surgeon, clearly testified that he had noticed as many as 7 injuries described as under:

(i) Swelling in occipital region diffused with underneath ecchymosis in area 6x4 cm.

(ii) Swelling in left frontal region in area 6 x 4.5 cms underneath scalp. Ecchymosis. Bone is having depressed fracture in 4 x 3 cm in two pieces.

(iii) Contusion right frontal region in sagittal plane in 7 x 2.5 cm underneath scalp ecchymoscd.

(iv) Abrasion on left side of left eye in 2 x 2 cm area.

(v) Superficial laceration, right side abdomen in 15 x 0.3 cm.

(vi) Two parallel rail pattern contusions on left side of hip transverse purple red in colour size 5.5 x 2.5 cm each.

(vii) Two rail pattern contusions on left popliteal and one on right popliteal, two on right calf region present, size of each 4.5 x 2.5 cm.

According to him, the internal examination of the body further revealed that-

(i) Whole scalp was ecchymosed with coronal suture.

(ii) Fracture on right side in parietal bone from coronal suture and a linear radiating fracture in the parietal bone 3 cm long had also arisen.

(iii) Brain was lacerated and necosis had started extra-dural haemorrhage present in frontal side, right frontal lobe was also having intra-cerebral haemorrhage.

11. In the light of these findings, the opinion that Nawab's death was homicidal in nature was rightly accepted by learned Trial Judge. However, it was also apparent that Dr. Rajesh Kathal had conducted the medical examination of Nawab in a

casual and perfunctory manner and, therefore, the possibility that a proper and skilful treatment of the head injury would have prevented Nawab's death could not be ruled out.

12. Eye-witness account rendered by injured witnesses, viz., Iliyas (P. W. 1) and Ismail (P.W. 2), female members of the family namely Quresha Bi (P.W. 7) and Saeedan Bi (P.W. 8) and Saeed Ahmad (P.W. 9), a crop-sharer drew ample support from a promptly lodged FIR and a consistent medical evidence. Injuries found on the persons of A2 and A3 conclusively prove their participation in the assault resulting in death of Nawab whereas falsity of plea of alibi was an additional link to infer A1's involvement therein. The overwhelming evidence was sufficient to prove complicity of the appellants in causing the Nawab's homicidal death beyond a reasonable doubt.

13. Nevertheless, the FIR (Exh. D-5), that was lodged only 15 minutes prior to the FIR (Exh. P-1) contained a categorical assertion that A2 and A3 were jointly attacked by Nawab, Ismail, Iliyas and Shareef at the time when they were taking the goats to cattle-pound. As indicated already, the medical evidence proved existence of injuries in the form of lacerated wound over the right parietal region of A2 and abrasion on the left lumbar region of A3 that could be caused by hard and blunt object. On being questioned about the plea, as introduced in the FIR and set up in the examination, under Section 313 of the Code, although the related witnesses, viz., Iliyas, Ismail, Quresha Bi and Saeedan Bi came forward with a new statement that Nawab's goat was unnecessarily seized by the appellants and their companions at the time when it was wandering in the field belonging to one Sattar yet, they could not explain the relationship between Sattar and the appellants. Moreover, the prosecution did not prefer to examine Sattar. Further, Saeed Ahmad (P.W. 9), who had taken the field of Nawab on crop-sharing basis, clearly, admitted that the goat was causing damage to vegetables grown in the field wherefrom it was driven out by the appellants. In this way, the appellants were able to prove that Nawab had used force to rescue the goat from being taken to the pound.

14. As explained by the Apex Court in Ramratan's case (supra):

When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he was taking them to the pound, he commits no offence of theft, however, mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Act. He has no right to use force to rescue the cattle so seized..as the accused and their men could have apprehended, in the

circumstances, that owner's party was not peacefully inclined and would use force against them in order to rescue the cattle and that the force likely to be used could cause grievous hurt, the accused committed no offence in causing injuries to persons in the owner's party and in causing the death of a person in that party.

(Emphasis supplied)

15. This ratio squarely covers the case of the appellants who were able to discharge the special burden cast on them to disprove the criminal liability for the homicidal death of Nawab. Accordingly, the plea of defence could not be rejected as an afterthought or a tailor made device. The question as to whether appellants had the right of private defence either of person or of property was not required to be gone into. The appeal, therefore, must succeed on a short yet a very significant point only.

16. In the result, the appeal is allowed. The impugned conviction and the consequent sentences are hereby set aside. Instead, the appellants are acquitted of the offence. Fine amount, if deposited, be refunded. Their bail bonds shall stand discharged.