Khetri Bewa Vs. State

Khetri Bewa Vs. State

SooperKanoon Citation : sooperkanoon.com/524430

Court : Orissa

Decided On : Mar-08-1951

Reported in : AIR1952Ori37; 17(1951)CLT220

Judge : Ray, C.J., ;Das and ;Panigrahi, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 172 and 429; Indian Penal Code (IPC), 1860 - Sections 97, 99, 100, 101 and 304

Appeal No. : Criminal Appeal No. 39 of 1950

Appellant : Khetri Bewa

Respondent : State

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : L.K. Dasgupta, Adv.

Judgement :

1. This appeal was heard by my learned brothers Das & Panigrahi JJ. They differed in their opinions. Hence it was placed before me for placing it before a third Judge under the provisions of Section 429, Cr. P. C. This case has been proceeding since August, 1949 & all the while the accused has been in prison as she was charged under Section 302 & certain other sections of the Penal Code & convicted under Section 304, I. P. C. & sentenced to 4 years R. I. by Mr. D.N. Das,

Ses J., Mayurbhanj Balasore & has never before been enlarged on bail. Notwithstanding that one of the learned Judges of this Court in a well reasoned judgment has adjudged her innocent of the offence, she has not yet been taken out on bail, probably there being none to look after her in this world. Under the circumstances, I felt the necessity of taking up the case, the only other Judge available & the third Judge being absent from the station on duty. Besides, I consider it fair to the learned Judges who heard this case that this third Judge should be one senior to any one of them. The diversity of opinion of the two Judges of the Court is strange. They have seen the things as at poles as under. Hence I have taken great care to scrutiniae things before accepting or rejecting any one of the two opinions.

2. I had first of all to ascertain what was the scope of this reference. According to Section 429 I have to give my opinion about the guilt of the accused& the judgment or order should follow such opinion. The section reads:

'When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, & such Judge after such hearing (if any) as he thinks fit, shall driver his opinion & the judgment or order shall follow such opinion,'

There is a great significance in the words "if any' occurring after 'such hearing.' The question whether the hearing should only consist of judging the respective merits of the two conflicting opinions of the two learned Judges of this Court for the purpose of deciding whether to agree or disagree with any one of them arose (or consideration. After perusing the conflicting opinions placed before me it struck me, if, considering that sharp differences as to the truth of the prosecution version of the occurrence in material particular between the two Judges of this Court, the accused would not be forthwith entitled to benefit of reasonable doubt I could give preference to the opinion in favour of acquittal & pronounce judgment accordingly.

3. The learned Govt. Advocate however, submitted that I was to form an independent opinion after a hearing, though not without taking into due consideration the two diverse opinions pronounced by the other Judges & to deliver the same on which to pass the judgment or order, as the case may be. In

support of this contention, he cited an authority of a decision of the Calcutta High Court in the case of Md. Illias Mistri v. The King, I. L R. (1949) 1 Cat. 43. I have, both in latter & spirit, followed this decision but I record my doubts as to the correctness of the dictum. In my opinion what struck me at the beginning waa correct, namely, that I could, unless on scrutinising the materials on record the judgment of the Judge pronouncing in favour of innocence of the accused was considered far from fairly reasonable, or, to be more accurate, not (sic) perverse, give the benefit of reasonable doubt to the accused & acquit her. If the third Judge is bound to have a full hearing & then to arrive at an independent opinion, the Legislature should not have made it a matter of discretion by inserting the words 'if any' after the words 'such hearing'. But however, after having a full hearing of the case & listening to the arguments advanced by the learned counsel of both parties at length, per-uaing the entire body of evidence oral, documentary & circumstantial & on considering them in their differently permiaaible perspectives in the light of the rival opinions of the two learned Judges of this Court with due & regardful consideration for their views, I have arrived at the conclusion that in my opinion the accused is completely protected within her right of private defence of person in inflicting the injuries that caused the death of the deceased Gedi Giri. In view of the long pendency of this oase, I do not propose to defer delivery of my opinion & passing of the order of acquittal toany other day. In view of the abundant materials on record which must be dealt with & exposed inorder to demonstrate besides how the prosecution has been guilty of suppression of materials & concoction of evidence & why I did not approve of the opinion of one of the Judges of this Court, I would postpone giving the reasons to future date, but would pronounce that I agree with the opinion & the reasonings of Das J. & hold that the prosecution has failed to bring the charge home to the accused. I, therefore, direct that the accused is acquitted & should be released from the jail custody forthwith & that the order of conviction & sentence is quashed.

4. I now proceed to give my reasons for the opinion that I have already on the question if the accused was entitled to right of private defence of person extending to voluntarily causing death of the deceased. I would, therefore, say a few words as to the law on the subject The sections of the Penal Code relevant for our consideration are Sections 97, 99, 100 & 101. According to Section 97 every

person has a right to defend his own body against any offence affeoting the human body. Such a right within the restrictions prescribed in other sections already referrel to cannot be denied to Khetri Bewa, the accused. Section 99 lays down certain cases of exceptions from the exercise of the right. None of the exceptions, however, have their application, in the facts of the present case, except the one, namely, that the right of private defence, in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose ofdefence. I shall presently notice its relevance at its proper place. Sections 100 & 101 respectively define the extent of the right of the private defence of the body. Keeping ourselves within the limits of our requirements, Section 100 prescribes the extent of this right to the voluntary causing of death or any other harm to the assailant, if the offencewhich occasions the exercise of the right be of any of the descriptions therein enumerated. We have in the present case to ascertain which of the offences enumerated therein should be considered. The first one is: 'such an assault as may reasonably cause the apprehension that death wilt otherwise be the consequence'. This contingency can safely be ruled out in the context of the facts of the present case. This is because the surrounding circumstances do not warrant an apprehension ofan assault of that dimension on the accused. The 'secondly' item is the only one that seems to be relevant, I shall give my reasons for it presently. It is such an assault as may reasonably cause the apprehension that the grievous hurt will otherwise be the consequence. It has further to be borne in mind that the assault referred to does not mean the assault, if any, already committed, but it is the assault of which an apprehension can reasonably be caused & that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be ex-ercised for the purpose of preventing an offence affeoting his body being committed. It is not, as it is sometimes misconceived, a right of retaliation against the completed offence (of assault). I have to rule out the doubt that the confusion of the kind might have led to the opinion that the accused in the present case had no right of private defence of body extending to the voluntary causing of death. Section 101, too, in the cantext of the present occurrence is equally important & of relevance. This section provides that if the offence be not of any of the descriptions enumerated in the last preceding section the right of private defence of the body does not extend to

voluntary causing of the death to assailant. It extends under the restrictions mentioned in Section 99, to the voluntary causing to the assailant, of any harm other than death. This leads me to observe that under Section 101, a person is entitled to exercise his right of private defence of the body, as against any assault other than the first, & secondly of Section 100, to the extent of causing grievous hurt. It will have to be borne in mind, that if, after commission of an assault of a simple or grievous nature, there is, in any case, no further apprehension of assault, oacasion for exercise of the right of private defence of the body should not arige. At the same time, the possibility of infliction of further assault likely to cause grievous bodily injury cannot as a rule be ruled out on the mere ground that the injury or the injuries already inflicted are simple. The law, in this as pect, honours the human instinct of self-preservation. It is a matter for serious consideration of a Judge, that the immunity from punishment for inflicting more grievous injuries in order that he may defend his body against infliction of simpler ones, however slight, is guaranteed by the law of private defence of person, which is codified in the few sections of the Penal Code already referred to. It would amount to erring to hold, irrespective of any consideration of the surrounding circumstances amongst which must be included the etate of feelings between the assaulted & the assailant, that apprehension of an injury of a graver kind by the injured is unfounded as the assaults that p receded produced very simple injuries. In considering whether one is entitled to exercise rigbt of private defence of his body one has to place himself in the position of the accused in the midst of the circumstances in which she stood & to form his opinion whether, for him or her in those circumstances, it was not fairly wise to apprehend such an injury to the body as would entitle him or her to exercise the right that he or she claims to have done. Where, a defendant charged with murder asserts that he killed in self-defence, his state of mind at the time of the killing becomes material, & an important element in determining his justification for his belief in an impending attack by the deceased.

5. The reputation of the deceased for a violent, dangerous, or turbulent disposition is thus a circumstance which would cause such a belief; Lumpkin J. in Monroe v. State, 5 Ga. 137:

"Reasonable fear, under our code repels the conclusion of malice; & has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted." Does it make no difference whether my adversary be a reckless & overbearing bully, having a ear lost to all social ties and order and fatally bent on mischief, or is a man of Quaker-like mien & deportment, one who never strikes except in self-defence & then evincing tbe utmost reluctance to shed blood? Who, knowing the character of Xyd the pirate, or of the infamous John A. Murret, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery or murder or both were contemplated? We apprehend that the imminence of the danger, aa well as the chances of escape, will depend greatly upon the temper & disposition of our foe.'

The previous relationship between the deceased & the accused & the deceased's aggressive temperament & disposition shown in his conduct of trespassing into the accused's house in order to assault her while she was retracing her steps must go a great way to cause belief in the accused in an impending danger to life accompanied with little chance of escape.

6. Mere expression of opinion that the accused has exceeded the right of private defence of body without coming to the definite conclusion as to what extent she had the right, is rather risky. The learned Ses. J. as well as Panigrahi J. both said that the accused in the present case exceeded the right of private defence. This, pre-supposes that occasion for exercise of right of private defence of body had arisen. In that contest, its extent should have been fairly determined before it could be said that it has been exceeded. In this connection, I would invite attention to Section 101 which authorises immunity for grievous hurts with a sharp-edged weapon such as an axe. The section provides for inflicting any harm other than death. In this context it was necessary to come to the conclusion whether if the accused was entitled to cause grievous hurt to the deceased with a sharp edged weapon could be said to have exceeded the same on the ground that death has been the result. I shall now proceed to find out what was the offence against which the present accused had the right of private defence of tbe body. Das J. had, in my opinion, very rightly summarised the position in the following passage:

'..... & in the view that I have taken, the assault has taken place by the deceased having trespassed into the (sic)nced compound. The accused is a widow 30 years in age, having no other adult male member in the family, but with only two sons aged 5 & 7 & a daughter aged about 12. The deceased is a middle aged male of 45 years of normal body & average build. In these circumstances, & having regard to the previous recent tension between the parties & the aggressive trespass of the deceased inside the compound of the accused & his actual assault on the deseased with a substantial bamboo stick, which as stated by the Ses. J. who saw it is 3 cubits in length & two to three inches in girth. I consider it quite reasonable that the accused was likely to have entertained the apprehension that she would be assaulted by the deceased so as to result in grievous hurt to her, if she did not prevent afarther assault by him, though, as a fact, the actual assault by the deceased on the accused produced only some abrasions & contusions. As has been repeatedly pointed out, in judging of the apprehension of the access in circumstances of that kind, the situation cannot be weighed in very nice scales & the accused cannot be expected to act with calmness & deliberation.'

I would entirely agree with what has been observed above.

[His Lordship then discussed evidence and observed:]

7. It follows inevitably from what I have said that the deceased pursued the accused up to the door of her house in order to commit assault on her. It has to be determined whether he thereby committed an offence. Answer to this question would depend upon, whether the accused had done anything, by way not only of provocation, but also of giving rise to an occasion for exercising right of defence of body on the part of the deceased by an assault on her. Tbe learned Ses J. as also brother Das, have agreed in finding that the deceased was the aggressor. This view has been dissented from by Panigrahi, J. He observes that the deceased's movement to point 'L' within the accused's compound from the village foot-path, with an intention to assault, would not constitute criminal or aggressive trespass, occasioning exercise of right of private defence of the body of the accused. While assuming that the assault took place at or about the point 'L', he would still rely on the evidence, and find that the accused rushed out of her compound with the axe

at the deceased while he was still ab point V. This finding, considered along with the assumption that the assault took place at point 'L', would be tantamount to say that as the accused threatened to assault the deceased with the axe wish which she rushed at him while at point 'C' & immediately retraced her steps without inflicting any injury, the deceased was a still entitled to pursue her up to the point 'L' & commit an assault on her with immunity, it being admitted on all hands that the deceased was first an assailant before he was assaulted. I cannot accede to the correctness of this reasoning. Such a course was no longer necessary for his defence (Section 99, I. P. C.). Mere threat, not carried out, & later completely abandoned followed by retracing of steps by the threatener would not justify any assault from the person threatened, as he must have been convinced that the person threatening did not mean to carry out the empty threat. (His Lordship then discussed further evidence and concluded.)

8. On considering the judgments of the two learned Judges of this Court with due regard to their experience & the weight that their opinions deserve, on hearing the learned counsel on both sides, on perusing the records & on considering the materials with due care & attention & on particularly examining the specific points of difference as between the two learned Judges, I have come to the finding which may be summarised inthe following manner, making all allowance for all assumptions in favour of the prosecution--That the deceased's son eased in front of the accused's house in broad day light at midday on 17-8-49. Judging the way in which the village people expose their body lor the purpose of easing, it presented too shockingly an obscene sight to accused Khetri Bewa a young woman of 30 I cannot pass it over so slightly as brother Panigrahi, though (sic)oor the village women have their sense of decorum & it is expected of an adult young man of the village to observe all courtesy & decency to a female. Its non-observance indicates defiance to all sense of civility probably in this case as in all other out of malice if not from ignorance. It provoked righteous indignation in her (a provocation which cannot be explained away by saying that easing by villagers in front of her house in the padia in question was an every day affair & she began filthily abusing the deceased's son. I would assume that her abuses assumed an undue proportion on account of the fact that she had grievance against the deceased and his co-villagers with reference to a fact that led to a case under

Section 354, Penal Code. With the tension of feeling caused by the aforefaid case, deceased took serious exception to the abuses. They both entered into altercations of abusing each other. The deceased threatened to assault the accused, who thereupon took up an axe & threatened to kill him. I would in this connection, even assume that she had rushed at the deceased with the axe but later retraced her steps & went back to her house. The deceased infuriated as he then must have chased nor & came up to her house for the purpose of belabouring her, when he overcame her he assaulted her with a big stick, pressed her against rough ground & probably was still in the act of further assaulting her which she prevented by inflicting fatal injury on the head. In these premises, the question arises what was the offence that she was apprehending at the moment & what was the extent of her right of private defence of person.

9. It is said that as the injuries inflicted on her were very simple she could not reasonably apprehend that the offence about to be committed against her body was such as would result in the consequence of grievous hurt. Aa the law, stands, the nature of apprehension must not only depend upon the injuries already inflicted but the injury likely to be inflicted which is to be judged from all the surrounding circumstances, the existence of tension of feeling & the mutual malice not being excluded. The circumstances have been fully set out in the judgment of my brother Das; & I do not wish to reiterate the same. Placed in those circumstance , considering the tenacity with which the deceased was pursuing her to the extent of entering into her house for the purpose of assaulting with stout lathi that he had in his hand & that he was using,--which used as a weaponof offence can easily cause grievous hurt--(even if I exclude for the time being the cruel manner in, which she muat have been thrown down & pressed with her neck against a surface having broken pieces of earthen pots);--associated with the circumstance that certain other people also had been there who belonged to the deceased's party & who were in all probability, attempting to prevent her from shutting herself up inside the room by anticipating her & coming into the room in advance (here I am thinking of the muddy footprints of the several people inside her house), she could very legitimately anticipate & apprehend that further assaults would cause grievous hurt, (it would not be out of place to suggest here that she might as well suspect that something in the nature of outraging of

modesty as an act of retaliation, might, the deceased being one of the ring, leaders who had lately been prosecuted for having committed an offence under Section 354, Penal Code, against her, otherwise have been committed on her). At that moment she must be thinking of her helpless condition, must also be left in a predicament so that it was nob open to her to pick up any other weapon of a less dangerous character than that of an axe which she had already picked up & had been continuing to hold. iN view of the antecedent tension between the parties, she could not possibly bring up to her mind that the deceased would be so considerate as to limit his outrageous conduct to such harm as was necessary to retaliate a few abusive words, that she had hurled at him & at his son. In fact, when the accused was retracing her steps, the deceased had no business to enter the compound or within the house in order to assault the woman. The matter of hurling of abuses by a woman at her enemy on an exciting occasion as that of an adult sitting naked in front of her for the purpose of easing is not serious enough to justify a reason able man of the deceased's position to proceed to commit criminal trepass with the object of assaulting a young widow after breaking into her house. If the accused's judgment is to be weighed in the scales afforded by these circumstances, it will nob be wrong to say that she could apprehend that unless averted by whatsoever resources available to her, the offence apprehended might result in causing a grievous hurt to her. In the circumstances, she must be held to have rightly exercised the right of private defence of her body by voluntarily causing death to the deceased.

10. As I have already said even if the right available to her was one prescribed in Section 101, Penal Code, she would be justified in using an axe & assaulting the deceased with a view to cause grievous hurt. The mere circumstance that she used a sharp edged weapon as an axe & selected head as the site of injury might not be enough to hold that she exceeded right of private defence. She must exercise the right to avert the peril to her life by completely disabling or disarming theassailant. So long as the assailant's hands with the stout lathi were free to inflict assault on her the apprehension of grievous hurt could not be averted. In all probability the head or upper part of the body were the only portions open to attack which also could be interrupted by the deceased using the lathi in his hand. In unequal fight of the kind the weaker's instinct is to lose no opportunity & to leave

no stone unturned to avert the peril to life. It is always a question of judgment of the man in peril. To such cases the following observations quoted from Ratanlal's Law of Crimes based on various judicial pronouncements that have become classic would aptly apply :

'Where the assault has once assumed a dangerous form,every allowance should be made for one, who, with the instinct of self preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actuallycontinuing danger but whether there was a reasonable apprehension of such danger. He is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over.

..... The law will always make just allowance forthe sentiments of a person placed in a situation of peril who has no time to think. His blood is then hot & his sole object is to strike a decisive blow as to ward off the ranger. In the excitement & confusion of the moment it is not to be expected that an average man would weigh the means that he intends to adopt on the spur of the moment for self-defence in golden scales. . . .

If a person has genuine apprehension that his adversary is going to attack him & reasonably believes that the attack will result in a grievous hurt he can go to the length of causing the latter's death in the exercise of the right of private defence even though the latter has not inflicted any blow on him. A subsequent blow will also be justified on the same ground if there is every probability that the latter, is not altogether disabled, will try to hit the former. But where the subsequent blow is delivered not on account of this fear but because the latter goes on abusing the former, the subsequent blow is not protected by the light of private defence.'

11. I have already discussed the facts of the case in the light of the law as laid down in the aforesaid observations made from time to time by the eminent Judges in applying the law of right of private defence as enacted in the few sections of the Penal Code already referred to. iN this view of the law the second blow given by the accused on the frontal aspect of the left arm at a time when the deceased had been completely disabled may be said to be one not protected by the right of

private defence. This aspect, how ever, would not make her liable to be convicted under Section 304, Penal Code. But, however, the finding arrived at in this respect is quite different from what the prosecution wanted to establish.

12. After delivering my opinion & the judgment in Court, I took an opportunity of reading at home the Case Diary. On reading it, I am now perfectly satisfied that the prosecution has not been fair in placing on record all the materialevidence available. This sort of suppression of truth & introduction of falsehood entitle theaccused to benefit of reasonable doubt as to her guilt, if not anything more.

[His Lordship then referred to the Police Diary.]

13. I would address a word of 'caution' to the learned Ses. J. & say that if he had closely followed the Case Diary he should have appreciated the case of right of private defence of body on the put of the accused, & he should have come to the same opinion as I have arrived. The evidence of P. ws. 11 & 12 was an eye-opener & the curious manner in which a second stick was introduced on the 4th or 5th day of investigation during supervision by the Circle Inspector of Police would have convinced him that the prosecution was tampering with the evidence in order to make out a case against the accused. The Case Diary cannot certainly take the place of evidence. But the evidence recorded can be much better understood in the light of materials available therein.

14. After reading the Diary I am thoroughly well convinced that the view that I have taken of the case on the materials on record produced in Court is the only possible view.

15. I would, therefore record, with respect, my appreciation of Das J.'s careful handling of the case.