

Somnath Das Vs. State

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Court : Orissa

Decided On : Oct-25-1968

Reported in : AIR1969Ori138; 1969CriLJ922

Judge : G.K. Misra and ;B.K. Patra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 97, 100, 300 and 304

Appeal No. : Criminal Appeal No. 88 of 1966

Appellant : Somnath Das

Respondent : State

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : R.K. Mohapatra and ;R.C. Misra, Advs.

Disposition : Appeal partly allowed

Judgement :

G.K. Misra, J.

1. The appellant has been convicted under Section 302, I, P. C. and sentenced to imprisonment for life. The prosecution case may be stated in brief. The accused and the deceased were cousins. They lived in adjacent houses, and were not pulling on well. On 9-6-1965 at about 6 P. M. they came in front of their respective

houses in the village Danda and started quarrelling. The accused held a Kati-Katua and the deceased held a stick. The son of the accused had a Kati. In course of the quarrel Narasingha, the son of the accused, threw a Kati towards the deceased. The deceased warded off the Kati with his stick and it fell down near him. While he attempted to pick up the Kati, the accused gave a stroke with his Kati-Katua on the head of the deceased. The deceased received a severe cut injury and fell down senseless. The wife and the son of the accused caught hold of him and dragged him towards their house. The head of the accused struck against the door frame of his house resulting in a bleeding injury on his hand.

P. W. 4 and others removed the deceased to Shergarh Dispensary wherefrom he was taken to Berhampur Government Hospital. He died on 11-6-65 at 2 P. M. In his statement under Section 342, Cr. P. C. the accused took the plea that the deceased assaulted him with a Katua. The wife of the deceased supplied him a Kati. The accused gave a stroke with a lathi on the hand of the deceased. The Katua fell off from his hand and hit the head of the accused who got a bleeding injury, The deceased fell down and the accused does not know as to what happened next as he himself became senseless. During the trial the accused suggested to the eye-witnesses that he had the right of private defence. The learned Sessions Judge on a thorough analysis of the materials on record rejected the plea of the right of private defence and held that the accused caused the death of the deceased.

2. The learned Sessions Judge in paragraph 4 of his judgment concluded that the death of the deceased was homicidal. This finding is not assailed before us. It is not necessary to repeat the discussions made by the learned Judge. For reasons given by him, we are in agreement with him that the death was homicidal. The concession on this point was rightly made.

3. The next question for consideration is whether the accused caused the death of the deceased. P. Ws. 4, 5 and 8 are the eye-witnesses. P. Ws. 4 and 8 are the cousins of both the accused and the deceased. In cross-examination it was suggested to P. W. 4 that the accused filed a criminal case against him on an allegation that he assaulted his mother. P. W. 4 admits that there was such a

criminal case, but denies any suggestion of enmity subsequent thereto. The criminal case was filed 15 to 20 years ago, P. Ws. 4 and 8 are the common relations of the parties. Nothing has been suggested as to why they will falsely implicate the accused. P. W. 5 is a resident of the neighbouring village who admittedly saw the occurrence. Nothing has also been suggested against him.

There is no serious discrepancy in the evidence of these eye-witnesses. All of them state that the accused held a Kati-Katua and the deceased a stick. When a Kati is fixed to the flattened end of Katna, it is called Kati-batua, They narrate how the son of the accused threw a Kati towards the deceased who warded it off with his slick and then attempted to pick it up, and that while he was in the process of picking up the accused gave the fatal blow on his head with his Kati-katua, as a result of which the deceased fell down senseless. Before the learned Sessions Judge it was very strongly urged that the accused had no Katua in his hand. The evidence of the 3 eye-witnesses belies the assertion of the accused. In cross-examination to P. W. 4 the following suggestion was made :--

'It is not a fact that the wife of the deceased threw a Kati near the deceased to help him. It is not a fact that when the deceased picked up the Kati, then the accused gave a blow with the Katna on the head of the accused (deceased?) in his self defence.'

Similar suggestions were made to the other 2 eye-witnesses. It is manifest, from this suggestion that the accused's positive case is that, he gave a stroke on the head of the deceased with a Katua. The subsequent Version in his statement under Section 342, Cr. P. C. that he merely held a stick is belied by the suggestion in cross-examination that he held a Katua and gave a stroke with it on the head of the deceased. Confronted with this position Mr. Mohapatra found it difficult to wring out of the situation. It is unnecessary for us to repeat all the arguments dealt with by the learned Sessions Judge.

The matter is clinched by the suggestion of the accused made in cross-examination and more particularly when the accused was defended by a fairly senior advocate Shri K. C. Panigrahi. The suggestion in cross-examination fully supports the story narrated by the eye-witnesses. We accept the prosecution

version as to the manner in which the deceased died. We hold that both the accused and the deceased came out of their houses fully armed and started quarrelling on the Danda. The accused had a Kati-Katua in his hand and his son had a Kati. The deceased had only a stick. The son of the accused at first threw the Kati to hit the deceased. The deceased tried to pick up the Kati. At that particular moment the accused gave a heavy blow on the head of the deceased with the Kati-Katua.

4. The question for consideration is whether on the aforesaid finding the accused has any right of private defence. Section 97, I. P. C. lays down : 'Every person has a right, subject to the restrictions contained in Section 99, to defend--

First-- his own body, and the body of any other person, against any offence affecting the human body;'

Sections 299 to 377, I. P. C. deal with, offences affecting the human body. By the quarrel between the deceased and the accused no offence affecting human body was committed by either of them. They had therefore no right of private defence of the body at that particular stage. There is no question of right of private defence of property and it need not be discussed. Neither the accused nor the deceased had any right of private defence of body in course of the quarrel. Each of them had time to take recourse to the protection of the public authorities. They could not attack each other on account of the quarrel. They indulged in a free fight and in such a case none of them have any right of private defence. The position of law was fully explained in 32 Cut LT 441 = (AIR 1966 Orissa 199), Padia Patra v. State.

In Ahrned Sher v. Emperor, AIR 1931 Lah 513 a lucid exposition of the conception of a 'free fight' was given. Their Lordships observed thus :

'A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. Do such free fights often occur and form the material for riot cases in court? Very, very rarely. When they do, everybody on both sides is equally guilty

of offences committed by any member of either army and the only point to be decided is who were members of the unlawful assemblies, which formed the armies.'

The same principle applies to a free fight between two individuals. The aforesaid position of law was accepted with approval in *Gajananda v. State of Uttar Pradesh*. AIR 1954 SC 695.

On the finding recorded by us the accused and the deceased had a free fight. The accused had therefore no right of private defence.

5. Even assuming that there was no free fight, the facts and circumstances of this case do not justify a conclusion that, the accused had the right of private defence of body which extended to cause death. Under Section 100, I. P. C. the right of private defence of the body extends to the voluntary causing of death if the offence which occasions the exercise of the right, be of any of the descriptions enumerated therein. There are 6 clauses. The first two clauses are only relevant. The first clause is, 'such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault'; and the second clause is, 'such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault'.

On the facts as found by us it is clear that the deceased did nothing to cause a reasonable apprehension in the mind of the accused that he would cause either death or grievous hurt. He merely held a stick and was picking up the Kati aimed at him by the son of the accused. At that stage the accused gave the fatal blow. There was therefore no reasonable apprehension in the mind of the accused that either death or grievous hurt would be caused to him if he did not exercise his right of private defence.

In any view of the matter the plea of right of private defence cannot be sustained.

6. Mr. Mohapatra next contends that in the facts arid circumstances of this case the accused can at best be said to have committed an offence under Section 304 second Part I. P. C. The fourth exception to Section 300, I. P. C. runs thus :

'Oulpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

7. In this case the accused gave the fatal blow without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. There is no evidence that the accused took any undue advantage or acted in a cruel or unusual manner. He merely gave a single stroke on the head of the deceased which ultimately proved fatal. He did not go on assaulting the deceased despite his falling down unconscious on the ground. All the elements of Exception 4 are therefore fulfilled in this case. We are clearly of opinion that the offence committed by the accused will be culpable homicide not amounting to murder and he is punishable under Section 304, I. P. C.

8. The further question is whether first part or second part of Section 304, I. P. C. would apply. First part deals with the first two clauses of Section 299 while second part deals with the third clause. In this case the accused caused the bodily injury on the head of the deceased which resulted in his death. The weapon used was a sharp cutting heavy weapon. Head is a vital part of the body. In the circumstances we are of opinion that the accused caused the death of the deceased with the intention of causing such bodily injury as is likely to cause death. The offence would accordingly come under the first part of Section 304, I. P. C. The accused gave a single blow and did not pursue the assault. In the facts and circumstances of the case we are of opinion that a sentence of R. I. for 7 (seven) years would meet the ends of justice.

9. In the result, the conviction under Section 302, I. P. C. is set aside and the appellant is convicted under Section 304, I. P. C. and sentenced to 7 years' R. I. The appeal is accordingly allowed in part.

Patra, J.

10. I agree.

