

Nityananda Pasayat Vs. the State

Nityananda Pasayat Vs. the State

SooperKanoon Citation : sooperkanoon.com/530430

Court : Orissa

Decided On : Sep-03-1988

Reported in : 1989CriLJ1547

Judge : G.B. Patnaik and ;A.K. Padhi, JJ.

Appellant : Nityananda Pasayat

Respondent : The State

Advocate for Pet/Ap. : Mr. Panda

Judgement :

G.B. Patnaik, J.

1. Appellant Nityananda Pasayat alias Beda has been convicted under Section 302, Indian Penal Code, and has been sentenced to undergo rigorous imprisonment for life for having intentionally caused the death of deceased Banabasa Bank by the learned Additional Sessions Judge, Sambalpur. Along with him four other accused persons stood charged under Sections 148, 149, 323, 324 and 302, Indian Penal Code. Accused Kulamani alias Kuladhar, Krushna, Debarchan and Satyananda were separately charged under Section 323, Indian Penal Code. The learned Trial Judge convicted the accused-appellant only under Section 302, Indian Penal Code, and so far as the other accused persons are concerned, they were convicted under Section 323, Indian Penal Code, and were

sentenced to pay a fine of Rs. 150/- each, in default to undergo rigorous imprisonment for fifteen days each. All other charges against the other accused persons as well as the appellant were held not to have been established. The other accused persons have not preferred any appeal against their conviction under Section 323, Indian Penal Code, and hence in this appeal, we are concerned with the conviction of the appellant under Section 302, Indian Penal Code.

2. Prosecution case, briefly stated, is that accused Nityananda alias Beda and deceased Banabasa were adjacent neighbours. On 23-12-1982, which was a Thursday, a portion of the roof of the house of Beda which had projected towards the courtyard of deceased Banabasa had fallen down on the courtyard of Banabasa. Deceased Banabasa accordingly informed the said fact to accused Beda. Accused Beda, however, alleged that it was Banabasa who had broken the projected portion of the roof and a quarrel ensued between them. Three days thereafter, on one Sunday, accused Beda and Kuladhar repaired the broken roof. On Monday morning at 6.30 a.m. deceased Banabasa went to the place of occurrence and told Kuladhar as to why he had projected the roof of the house towards his courtyard and on that account a quarrel ensued. In course of the said quarrel, accused Krushna arrived there and both Krushna and Kuladhar caught hold of both the hands of deceased Banabasa. Accused Satyananda and one Daktar came armed with sticks and began assaulting the deceased. At that point of time, accused Beda, the appellant in this appeal, came from his house with an axe in his hand and dealt one blow on the head of the deceased from his back with the sharp side of the weapon. Receiving the said axe blow, the deceased fell down with profuse bleeding. Seeing such bleeding, Upendra, the son of the deceased (PW 10), came running. He was also assaulted by accused Satyananda and Daktar as well as by accused Beda. He also fell down on the ground. Thereafter Gainu (PW 11) and Sankar (PW 5), the brother and the son of the deceased Banabasa respectively, came and carried the deceased to his house and from there to the police station. PW 10 also came to the police station in injured condition and gave a report which was treated as F.I.R. The deceased was seriously injured at that point of time and was sent to the hospital for treatment and while under treatment he expired in the hospital.

Pursuant to the F.I.R. (Ext. 12) given by PW 10 the Officer-in-charge had registered a P.S. Case under different sections and directed PW 12 to take up investigation. PW 12 was the A.S.I. of Police attached to Bargarh P.S. and had taken up the investigation, made some seizure and had also examined some witnesses. He received information from the Sub-Divisional Medical Officer of Bargarh that injured Banabasa died in the hospital. He then went to the hospital, held inquest over the dead body and sent the dead body for post-mortem examination. At Bargarh he had also seized the bed-head ticket (Ext. 16). He had also made a query from the Sub-Divisional Medical Officer, Bargarh, as to whether the injuries received could be caused by the axe which had been seized. The seized materials were also sent to the Forensic Laboratory for chemical examination and serological tests. On completion of investigation, he submitted the charge-sheet.

Accused Kulamani had also lodged an F.I.R. which was registered as Bargarh P.S. Case No. 330 of 1982 on the same day at about the same time and the said case was treated as a counter case to the present case and it is admitted that both the cases arose out of the same occurrence at the same place and out of the same dispute.

On being committed, the accused persons stood their trial before the learned Additional Sessions Judge.

3. The defence plea is that the deceased and his brother Gainu with their sons being armed with weapons attacked the accused persons. Sankar, son of the deceased, dealt an axe blow on Kulamani and Satyananda. It is only thereafter accused Beda snatched away the axe from the hand of Sankar and waved it in order to protect them. While waving, the axe hit the deceased and injured him. It was also the further plea of the defence that they were assaulted by Banabasa, Gainu and their sons and even Aparsini, a daughter of Kulamani, was also injured being attacked by the deceased and his party-men.

4. Prosecution has examined as many as 12 witnesses and on behalf of the defence, two witnesses have been examined. Out of the 12 witnesses, PWs 4, 7, 8, 10 and 11 are supposed to be the eye-witnesses to the occurrence; PWs 3 and

5 are the two post-occurrence witnesses; PW 2 is a seizure witness; PW 1 is a constable who had carried the dead body for post-mortem examination ; PW 9 is the doctor who had conducted the post-mortem examination on the dead body of the deceased and had also examined the injured persons; PW 6 is the Revenue Inspector, who on police requisition had prepared the spot-map (Ext. 6); and PW 12 is the Investigating Officer.

5. Relying upon the medical evidence of P.W. 9, the learned Trial Judge has come to the conclusion that the death is homicidal in nature. P.W. 9 has stated in his evidence that he found three external injuries of which one is an incised wound and another is a lacerated wound and the third one is a swelling. On dissection he found the right parietal bone to be fractured into three pieces, the fracture line extending from 1" below the right fronto-parietal Suture 2' from the midline extending backward. He also found the dura mater to be reaptured and the cranial cavity was filled with blood and the brain substance was coming out in the fracture line. He opined that all the injuries were ante mortem in nature and according to him the cause of death was due to intra-cranial haemorrhage and shock as a result of injury No. 1 caused by the sharp-edged hard substance. Ext. 7 is the post-mortem report given by him. He had also disclosed that the injuries found by him were sufficient in ordinary course of nature to cause death and injury No. 1 was possible by the axe produced in Court by its sharp-edge. In view of the aforesaid medical evidence, the conclusion of the learned Trial Judge with regard to the homicidal nature of death of the deceased is unassailable and the learned Counsel for the appellant also does not challenge the same,

6. To bring home the charge against the accused-appellant, the prosecution relied upon the ocular statements of P.Ws. 4, 7, 8, 10 and 11. The learned Sessions Judge after discussing their evidence accepted their evidence in respect of the fact that it was the accused-appellant who assaulted the deceased by means of the axe and also accepted the manner in which he gave the assault and ultimately came to the conclusion that the accused committed the offence under Section 302, Indian Penal Code.

7. Mr. Panda, the learned Counsel for the appellant, raises two contentions in assailing the conclusion of the Trial Judge, namely-

(i) Admittedly, the accused persons having sustained grievous injuries and the prosecution not having offered any explanation as to how those injuries were caused, it must be held that the prosecution has suppressed the genesis and origin of the occurrence and has not presented the true version and the circumstances, it is the defence version which is more probable and, therefore, the prosecution case must be rejected and the accused persons should be entitled to benefit of doubt; and

(ii) On the materials on record, the only conclusion possible is that the accused-appellant, gave the blow in exercise of right of private defence of person and, therefore, he could not be convicted under Section 302, Indian Penal Code.

Both these contentions require careful examination of the evidence on record as well the question of law arising therefrom.

8. Coming to the first question, on a scrutiny of the prosecution evidence itself, it transpires that on the very same day arising out of the self-same incident, accused Kulamani (since acquitted) and given a report which was treated as F.I.R. and Bargarh P.S. Case No. 330 of 1982 had been registered. This is apparent from the evidence of the Investigating Officer (P.W. 12). P.W. 12 has further disclosed in his evidence that in respect of the F.I.R. lodged by Kulamani, charge-sheet has been filed against Huradhan, Judumani, Bisikesan, Gainu, Surendra, Upendra, Sankar and Premraj of whom Sankar, Upendra and Gainu are P.Ws. 5, 10 and 11 respectively in the present case. The F.I.R. in that case also implicated deceased Banabasa as an accused and charge-sheet in that case had been filed under Sections 147, 148, 325, 323/149, Indian Penal Code. The Investigating Officer (P.W. 12) further states that in both the cases the spot was the same place and the occurrence arose out of the same dispute. P.W. 11 who is the brother of the deceased in his cross-examination has candidly admitted that in respect of the occurrence of the same day, a case is pending against them in the Court of the Sub-Divisional Judicial Magistrate, Bargarh, and they have been released on bail in the said case. D.W. 1 is the doctor attached to the Government Hospital at

Bargarh. He had examined on police requisition accused Kulamani Pasayat and found a lacerated injury on his scalp in fronto-parietal region. Ext.E/1 is his report in respect of the said injury. He had also examined one Aparasini Pasayat, niece of the present appellant Nityananda, and found a haematoma on the right parietal region of 1' diameter which according to him might have been caused by a blunt weapon. Ext.O/1 is his report in respect of the said injury. On examining accused Debarchan, he found three injuries which according to him were possible by a blunt object. He also examined on police requisition accused Satyananda and found a lacerated injury on his scalp 4'x 1/6'x 1/8' extending from the middle of the occipital region upto 4" from the upper part of the ear and a swelling of the right index finger. The evidence of P.W. 12 indicates that Satyananda was admitted into the hospital as an indoor patient in the counter case. In this view of the evidence, we come to hold that four persons including 3 of the accused persons in this case belonging to the party of the appellant were seriously injured in course of the self-same incident on the basis of which the present appellant is facing the charge of murder. In 4 case of murder, the prosecution is obliged to offer some explanation in respect of the injuries found on the accused persons, provided it is established that those injuries have been caused in course of the same incident and further that the injuries are not minor or superficial. The learned Additional Government Advocate placing reliance on the decision of the Supreme Court in the case of State of Gujarat v. Bai Fatima : 1975 CriLJ1079 , contends that the prosecution is not obliged to explain the injuries on the accused in each and every case. We do not agree with the contention of the learned Additional Government Advocate. The aforesaid Supreme Court decision does not lay down the law in that broad proposition. On the other hand, the said decision would apply to a case where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. Fazal Ali, J. explained the decision of the Supreme Court, referred to supra : 1975 CriLJ1079 to the aforesaid effect in the case of Lakshmi Singh v. State of Bihar : 1976 CriLJ1736 . In view of our conclusion that the injuries sustained by accused Kulamani, Satyananda, Debarchan and the niece of the appellant, Aparsini are quite serious in nature and,

at any rate, not so minor and superficial so as to be ignored, and further in view of our conclusion that they sustained the injuries in course of the same incident, which has formed the subject-matter of charge in the present case, non-explanation of the injuries by the prosecution must be held to be fatal. All the eye witnesses, namely P.Ws. 4, 7, 8, 10 and 11 have expressed their ignorance as to how the injuries on the accused persons could be found. The only possible explanation offered by P.W. 10 in his examination-in-chief to the effect that when accused Daktar dealt one lathi blow on him, he avoided skillfully and the lathi blow hit Satyananda on his head, also is of no consequence, since in the cross-examination he admitted that he did not state so in his statement recorded under Section 161 of the Code of Criminal Procedure and further he had also not stated so in the F.I.R. In this view of the matter, we cannot but hold that the prosecution has failed to explain the injuries on the accused persons as well as on Aparsini, the niece of the present appellant. On account of such non-explanation of the injuries on the accused persons by the prosecution, which have been established to have been caused in course of the same occurrence, there has been a manifest defect in the prosecution case and it shows that the origin and the genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. In the aforesaid premises, it is not possible for us to disengage the truth from the falsehood and to sift the grain from the chaff and it is not possible for us to reconstruct a new case for the prosecution. Our aforesaid conclusion is fully supported by the decision of the Supreme Court in the case of Lakshmi Singh : 1976 CriLJ1736 (supra). We would accordingly hold that the prosecution has failed to establish its case beyond reasonable doubt against the appellant and he is entitled to be acquitted of the said charge. The first contention of Mr. Panda, the learned Counsel for the appellant, therefore, must be sustained.

9. The second contention of Mr. Panda the learned Counsel for the appellant, is also equally sound. Under Section 96 of the Indian Penal Code, nothing is an offence which is done i : exercise of the right of private defence. A right of self-defence has been granted to a citizen to protect himself by effective self-resistance against unlawful aggressor and no man is expected to fly away when he is being attacked. He can fight back and when he apprehends that death or

grievous hurt would be caused by his adversary, he can retaliate till the adversary is vanquished. But he can exercise such right only if he comes to the conclusion that the danger to his person is real and imminent. If he reaches the conclusion reasonably, then he is entitled to exercise the right so long as the reasonable apprehension has not disappeared. In a given case whether such a right exists or not has to be decided reading the evidence as a whole. The Supreme Court has said in several cases that right of self-defence should not be too narrowly construed and further it is not required to be proved beyond reasonable doubt. An accused need not specifically plead right of private defence and yet, the Court may consider the said plea if it appears on the record. The burden of proof can be discharged by preponderance of probabilities. See. : 1975 CriLJ1079 Mr. Panda, the learned Counsel for the appellant, very much relies upon the decision of the Supreme Court in the case of Deo Narain v. State of U.P. : 1973 CriLJ677 . The Supreme Court in the aforesaid case has held that the right of private defence rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. It has also been stated that to say that a person could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault, is a complete misunderstanding of the law embodied in Section 102 of the Indian Penal Code. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. Keeping in mind the aforesaid principles, when we examine the evidence on record, we find that some of the accused persons did sustain serious injuries in course of the occurrence and prosecution has not offered any explanation for those injuries. P.W. 4 in his evidence has stated that while he was returning from a shop he found the accused persons and deceased Banabasa and his sons Upendra and Sankar were fighting with each other in front of the village temple on the village road and he was not in a position to say as to who assaulted whom in the fight. In the cross-examination, he has categorically stated that accused Beda was waving something holding in his hand and he was waving that object in order to protect Kulamani and Satyananda. P.W. 8 who is also an eye witness to the occurrence states in his evidence that when he came in the morning out of his house he found accused Krushna and Kuladhar quarreling with deceased Banabase and

thereafter accused Daktar and Satyananda came there with lathis. In his cross-examination he also states that the accused persons and the deceased were abusing each other. He has also admitted in his cross-examination that accused Satyananda remained in the hospital for one month after the occurrence due to assault on him. P.W. 10 also states in his evidence that there was not exchange of words between the accused persons and the prosecution witnesses, referred to earlier, is that accused Beda in order to save the other accused persons snatched the axe from the hands of Sankar and waved the same due to which the deceased sustained the injury. The statement of the accused-appellant in his examination under Section 313 of the Code of Cr.P. is also to the same effect, namely, Gainu, Upendra, Jadumani Haradhan, Banabasa, Bisikesan assaulted Kuladhar and Satyananda and Sanker also with an axe assaulted Kuladhar and Satyananda and Beda, the appellant, then snatched the axe from Sankar and waved the same in order to save Kuladhar and Satyananda. This version of the defence as unfolded in the accused's statement is fully supported by the evidence of P.W. 4, as discussed earlier. In this view of the matter, we cannot but hold that the defence plea is not only probable, but has also been established through the prosecution evidence itself and accordingly, the accused-appellant gave that stroke on the deceased in exercise of right of private defence of person of Kuladhar, Satyananda and Aparsini and, therefore, did not commit the offence of murder under Section 302, Indian Penal Code. The second contention of Mr. Panda, the learned Counsel for the appellant, therefore, must also be upheld.

10. In the result, therefore, we hold that the prosecution has failed to establish the charge against the appellant beyond reasonable doubt and accordingly the conviction and sentence passed against the appellant by the learned Additional Sessions Judge are set aside. The appellant is acquitted of the said charge and he is directed to be set at liberty forth with.

11. This Jail Criminal Appeal is accordingly allowed.

A.K. Padhi, J.

12. I agree.

