

**ishwar Behra Vs. the State**

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**SooperKanoon Citation :** [sooperkanoon.com/531245](http://sooperkanoon.com/531245)

**Court :** Orissa

**Decided On :** Jun-30-1975

**Reported in :** 1976CriLJ611

**Judge :** S.K. Ray and; N.K. Das, JJ.

**Appellant :** ishwar Behra

**Respondent :** The State

**Judgement :**

**N.K. Das, J.**

1. This appeal is directed against conviction of appellant under Section 302 Indian Penal Code and sentence to undergo rigorous imprisonment for life. He was also charged under S. 307, I. P.C. for attempting to cause death of P.W. 4 and P.W. 6, but he has been acquitted of the said charge on benefit of doubt.

2. The prosecution case, as found from the facts, is as follows. The appellant and the deceased belong to village Kothabhuin in Purunakota Police Station District Dhenkanal. Plot No. 908 measuring about 3 decimals belongs to the appellant. The villagers of Kothabhuin were recorded as Sikimi tenants in respect of A0.01 decimal out of the aforesaid A0.03 decimals. The paddy Gola of the villagers was on the aforesaid A001 decimal of land which had collapsed 5 to 6 years back. The house and the Bari of the appellant are adjacent to the land. Appellant had

included that area into his Bari by putting fence and had also constructed his cowshed on the same and had planted trees. The villagers wanted to construct a Kothaghar on the aforesaid A0 01 decimal of land. Accordingly they got the land measured by the Revenue Inspector of Tainshi on Friday 11-2-1972. After measurement appellant voluntarily removed the fence, put another fence on his own land and cut down the fruit bearing trees in order to enable the villagers to construct the Kothaghar. On Saturday the -12th February, 1972, lay-out for the construction of the Kothaghar was given and construction started. On Sunday, 13th February, morning the deceased and P.Ws. 6, 9 and 10 were engaged in construction of the Kothaghar. P.Ws. 9 and 10 were standing on the beam of the structure while P.W. 6 and the deceased were assisting them in construction standing on the ground. All on a sudden the appellant came out of his house with a Tangia (M. O. I) and dealt a blow on the neck of the deceased with the sharp side of the Tangia and as a result of the same the deceased fell down on the ground with face downwards. Appellant immediately thereafter dealt a blow on P.W. 6 and started running. He then raised the axe to assault P.W. 9 but on imploration he desisted from assaulting P.W. 9. Thereafter the appellant dealt a second blow on the neck of the deceased and proceeded towards the village. On the way he also dealt another blow on P.W. 4 and was proceeding towards Angul Police Station while he met the Grama-rakhi (P.W. 3) and being persuaded by the Gramarakhi he accompanied P.W. 3 to Purunakota Police Station. The Gramarakhi P.W. 3 got the report written out by the Sarpanch (P.W. 1) and proceeded to Purunakota Police Station along with the appellant. The Officer-in-charge was absent. So the Constable (P.W. 2) who was in charge of the Police Station recorded the station diary entry (Ext. 4) copying out the contents of the written report (Ext. 1) produced by P.W. 3. The Officer-in-charge (P.W. 18) returned to the Police Station in the afternoon on the same day and treated Ext. 1 as F. I. R. and took up investigation. The Police Station is situated at a distance of 12 miles from the spot. The Investigating Officer reached the spot on 14-2-1972 at about 7-30 a. m. After completing the investigation he submitted charge-sheet under Section 302 and 324, Indian Penal Code, but appellant was charged under Sections 302 and 307, Indian Penal Code.

3. The defence plea is that on 11-2-1972 the President of the village (P.W. 16) asked the villagers to collect poles et cetera and on 12-2-1972 all those materials were arranged and stacked at the spot. It was decided to start construction on Sunday the 13th of February, 1972. On Sunday morning appellant's son informed him that the villagers had cut down his fence as well as tree and have demolished the house. On hearing this, appellant came to the spot. By that time the villagers had already posted poles and had fixed the beams. The appellant asked them as to why they cut down his fence and trees and demolished the cowshed. At this the villagers present there rebuked him in filthy language and wanted to assault him. The deceased rushed towards appellant by raising a Tangia. Thereupon appellant in self-defence picked up a Tangia lying there and whirled it which struck against the neck of the deceased. Thereafter the villagers rushed at the appellant and appellant left the Tangi at the spot and ran away for fear of his life towards the police station.

4. The doctor, P.W. 7 held postmortem examination on 15-2-1972 at 11.00 a.m. Ext. 5 is the post-mortem report. He found the following injuries on the dead body.

(1) One spindle shape gapping incised wound 3' X 1' X 2' on the nape of the neck running transversely, high up placed close to the base of the skull with infiltration of fluid and clotted blood into the surrounding muscles.

(2) One spindle shape gapping incised wound 3' X 1' X 2 1/2' on the right side of the neck close to the root of the neck running obliquely forward and downward from the anterior border of the trapezius with infiltration of fluid and clotted blood into the surrounding muscles.

(3) One abrasion 2' X 2' over the back of the right elbow with blood-clot sticking.

(4) One abrasion 2' 1' surrounded by an area of ecchymosed inches diameter on the right molar region.

(5) One abrasion 1' X 1' on the posterior aspect of the left deltoid region.

On dissection he found that the common carotid artery and the accompanying veins and nerves severed. There was comminuted fracture of the 5th cervical

vertebra with severance of spinal cord at that level, oesophagus and trachea remaining in tact.

According to the doctor injuries Nos. 1 and 2 might have been caused by heavy cutting weapons with sharp edge and injuries 3 to 5 by hard and blunt substance. He is of opinion that the Tangia, M. O. I could cause injuries 1 and 2 and all the injuries were ante-mortem in nature and injury No. 2 is sufficient in the ordinary course of nature to cause death. The appellant has also admitted in his confession that death was caused by the injuries on the neck by means of M. O. I. Therefore, there cannot be any doubt that death of Balaram took place due to the Tangia blow given by the appellant on his neck. The evidence of eyewitnesses also shows that appellant gave the first stroke on the right side of the neck which corresponds to injury No. 2 as found by the doctor and the doctor is of opinion that this injury is sufficient in the ordinary course of nature to cause death.

5. Prosecution relies on the evidence of eye-witnesses, namely; P. Ws, 5, 6, 9, 10 and 15 and judicial confession, Ext. 11, recorded by the Magistrate (P.W. 8) as well as on the fact that the Tangia (M. O. I) was stained with blood.

To appreciate the prosecution case, the story as given by the prosecution, covers three phases from Friday the 11th February, 1972 to Sunday the 13th February, 1972. To be more precise.

(a) On Friday the 11th of February the villagers requested the Revenue Inspector of Tainshi to measure the land. After measurement he found that appellant had encroached on A0.01 decimal of land. There was a writing that the appellant surrendered the said A0.01 decimal of land to the villagers,

(b) On Saturday the 12th of February, 1972, appellant removed his fence from that A0.01 decimal and put another fence on his own land and also cut down the trees standing on that land. Lay-out was also given, construction work started, poles were posted and beams were placed over the poles; and

(c) On Sunday the 13th morning while preparations were being made to put the thatch on the poles, the occurrence took place.

According to appellant there was no measurement and no construction work was started on Saturday but, only on Sunday morning the villagers forcibly cut his fence and trees standing on his land and fixed poles on that land and went on constructing the Kothaghar. He protested against this high-handed action of the villagers and the villagers threatened him. When he was charged by the deceased, he whirled the axe which struck against the neck of the deceased.

6. There is no dispute that appellant is owner of Plot No. 908. It is admitted that the entire land was within one fence and was in possession of appellant. The cowshed of appellant was also on this land and he had planted trees on it. Though prosecution case is that the villagers were recorded as Sikimi tenants under the appellant in respect of AG.01 decimal of land out of aforesaid A6.O3 dwitmafi, yet prosecution has not been able to establish in respect of which ASJ. of district of land the villagers were so recorded. Therefore, prosecution has tried to establish that Iffier was measurement on Friday, and on Saturday appellate, gave up A0.01 decimal of land close to the village road in favour of villagers. We will presently hold that prosecution has failed to establish the incidents said to have taken place on Friday and Saturday.

P.Ws. 15 and 17 have stated that one Amin was requisitioned for measurement and he found that appellant had encroached on A0.01 decimal of land. It is stated that measurement was done by a bamboo stick, it is not known what was the method of measurement and how this encroachment was discovered. No field book has been produced. The Amin was present in Court to depose, but surprisingly enough he has been kept out of the dock. It also appears from the evidence of the aforesaid two witnesses that in presence of the Amin some writing was done in which appellant also signed. The said writing has not been exhibited. Therefore, the best evidence available to the [prosecution has been withheld. Adverse [inference can be drawn under Section 114 of the Evidence Act against the prosecution for non-production of the document and non-examination of the Amin inasmuch as the Amin would have been the best person to speak about this fact. It is also surprising that the villagers examined in this case have stated that they have no idea if any measurement was done and if after such measurement any encroachment was found out. Thus the prosecution has failed to establish the

story of measurement on Friday.

It is alleged that on Saturday appellant removed his fence from the (encroached portion and put the new fence on his own land relinquishing one decimal in favour of the villagers. The Investigating Officer did not find any new fence, rather he found that a portion of the existing fence was damaged. P.W. 15 is the witness to speak about such removal of the fence, P.W. 5 says that he did not mark as to whether the trees planted by appellant were there or not when he went to the spot P.W. 17 states that a decision was taken by the villagers to that the fence on Friday was not cut or not. From the evidence of P.W. 9 it appears that P.Ws. 4, 5 and 6 were present when appellant cut down the fence. But none of these witnesses supports such contention of P.W. 9. P.W. 4 states that P.W. 16, the President of the village and P.W. 17, the Panchayat member directed the villagers to work for construction of the Kothaghar. But these witnesses were silent about this fact. They do not speak anything about such removal of the fence or cutting of the fruit bearing trees by appellant on Saturday. Therefore, there is no satisfactory evidence from the side of the prosecution that appellant had removed the fence and cut down the trees voluntarily on Saturday and had himself demolished a portion of his cowshed and that lay-out of the Kothaghar had been made on Saturday. The Investigating Officer found that a portion of the cowshed of appellant had been damaged, a portion of the fence had been cut and the materials had been put on the land of appellant.

From the aforesaid facts and circumstances it is clear that only on Sunday morning, at the instance of P.Ws. 16 and 17 some villagers forcibly cut a portion of the fence of appellant and cut down the trees standing on the land and tried to construct a house on appellant's land. This fact is in consonance with the statements of appellant that no measurement was done on Friday and he had not voluntarily cut any fence or the trees or demolished his cowshed on Saturday nor any construction work started on Saturday. From the evidence of the Investigating Officer it appears that P.W. 9 also said that though the villagers asked the appellant to remove his fence, he was not willing. Thus it is clear that the villagers forcibly came on the land of appellant and cut his fence and trees, demolished his

cowshed and started construction of the Kothaghar.

7. When the villagers had trespassed into appellant's land, appellant had an immediate right to resist as there had been actual danger to the property by the time he came to know about it. In the circumstances there was no duty cast on the appellant to retire and to seek protection of the public authorities. When he came to know that the villagers trespassed into his land and tried to construct a house, he was entitled to come to the spot with necessary force to repel the entry and turn away the aggressors. He was entitled to raise his own arm in defence and retaliate to keep away the attack without applying for State aid (see *State of Orissa v. Ratendranath. Dalai*, ILR 1973 Cut 393 :1973 Cri LJ 1686) (FB). Thus appellant had every right to resist the aggressive action of the prosecution party and he had the right to exercise his right of private defence of property.

8. The judicial confession (Ext. 11) was recorded by P.W. 8 after observing necessary formalities after giving necessary caution. Appellant also admits this fact before the Sessions Court. He admits that on Sunday morning the villagers forcibly entered into his land and tried to construct the house. This part of the confessional statement is also supported by facts and circumstances as discussed above; He admits in Ms confessional statement that he had a Tangia with him and when the deceased ran towards him he assaulted the deceased with his Tangia on Ms neck. This blow, as appears from the prosecution evidence, was on the right side of the neck. According to the doctor this injury was the fatal injury. It appears from the evidence of witnesses that P.Ws. 5, 6, 9, 10, 11, 12, 13, 14, 15 and 16 were at the spot and they were engaged in the construction of the house. They had instruments with them for cutting bamboos and for preparing beams and rafters. Thus it is clear that they had instruments in their hand. Moreover, as it appears from prosecution case, there were bamboo pieces and pieces of wood on the land which were required for beams and rafters.

The only question for consideration is whether appellant had right to use his Tangia for causing death of Baiarann in self-defence. Appellant's plea is that the villagers threatened him and abused him in filthy language, when Balaram proceeded towards him to assault, he assaulted Balaram with the Tangia at his

neck. This part of the confessional statement of appellant is not acceptable. It is well settled that the whole of the confessional statement is to be brought into evidence, with a view to have before the Court, not only the circumstances appearing in favour of the accused but also circumstances which are gains him. It does not necessarily follow that the Court has to accept the entire statement of the accused. The Court can reject part of the statement which it finds that it is improbable or there are sufficient grounds not to accept the same or the prosecution has contradicted that part of the statement (See Nishikant Jha v. State of Bihar : 1969 CriLJ671 and a decision of this Court. Arjun v. State, in Criminal Appeal No. 71/73 decided on 25-6-1975). There is no material on record in support of the contention of appellant that there was any apprehension of imminent danger to the life of appellant. The right of private defence of a person is available against an offence and, therefore, where an act is done in exercise of the right of private defence such act cannot give rise to any right of private defence in favour of the aggressor in return. This would be so even if the person exercising the right of private defence has the better of his aggressor provided he does not exceed his right, because; the moment he exceeds, he commits an offence. No doubt the appellant was alone at that time, armed with a Tangier and the villagers were bent upon forcibly constructing a house on appellant's land and there had been protest by appellant. There were also some instruments, factious pieces and wooden pieces on the land. In assessing the value to be attached to the evidence of the type with which we are concerned the Courts have to rely more on human probabilities than on the assertions of the witnesses. It is probable that when appellant was threatened by the villagers and they proceeded towards him with a view to retaliate or to drive him out, he in the heat of the moment and fearing, that he might be dealt severely, attacked the person close to him. There was thus no premeditation on the part of the appellant to that effect. Second part of the Section 259, Indian Penal Code speaks of intention to cause such bodily injury as is likely to cause death. This has corresponding provision in Clauses (secondly) and (thirdly) of Section 300, Indian Penal Code, Section 304, Part I, Indian Penal Code covers cases which by reason of the exceptions under Section 300, Indian Penal Code are taken out of the purview of Clauses (1), (2) and (3) of Section 300, Indian Penal Code but otherwise would fall within it and

also cases which fall within the second part of Section 29ft but not within Section 300; Clauses (2) and (3). Clause (2) of Section 301 is attracted when the act is done with: the intention, of causing such bodily hurt as- the offender knows to- he likely to cause, the death of the person, to- whom, the) him is caused; Clause (3). of Section 302; provides that is the act is do with the intention of causing injury to any person and such injury is sufficient in the ordinary course of nature to cause death. Exception (2) to Section 302 is that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law and caused the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. There are no materials on record to show that appellant had any reasonable apprehension of death or grievous hurt on him. Appellant's contention that Balaram proceeded to assault him with Tangia has not been substantiated either by evidence or by circumstances. Therefore, appellant has exceeded his right of private defence and there was no premeditation for causing death of Balaram. In such circumstances he is to be convicted under Section 304, Part I, Indian Penal Code and not under Section 302, Indian Penal Code.

9. As a result, the appeal is partly allowed, the conviction under Section 302, Indian Penal Code is set aside and the appellant is convicted instead under the first part of Section 304, Indian Penal Code. In view of the change in the offence for which appellant is being punished, we set aside the sentence of imprisonment for life and instead award him a sentence of rigorous imprisonment for five years.

**S.K. Ray, J.**

10. I agree.