

Mathew Alias Mathai Vs. State of Kerala

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Court : Kerala

Decided On : Aug-05-1992

Reported in : 1993CriLJ213

Judge : K.T. Thomas and; P.A. Mohammed, JJ.

Acts : Indian Penal Code (IPC) - Sections 100, 102, 302 and 351

Appeal No. : Crl. A. No. 50 of 1988

Appellant : Mathew Alias Mathai

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor and; K. Ravikumar, Adv.

Advocate for Pet/Ap. : N.V. Mathew and; V.A. Mathai, Adv.

Disposition : Appeal dismissed

Judgement :

K.T. Thomas, J.

1. In spite of the fact that it was the deceased who struck the first blow, the question - who was the aggressor, deceased or the appellant - remains decisive in this appeal. If the deceased was the aggressor, then appellant had the right of private defence which could be extended even up to causing of deceased's death

on the facts of this case and hence there is no question of exceeding that right. Thus the crucial question is whether appellant had right of private defence at all.

2. The incident happened around 2.30 p.m. on 6-3-1987. Appellant, armed with a chopper went up to the road margin near deceased's shop and rumbled out: 'I won't return without killing you', and hurled a challenge to the deceased to come out. Deceased came out of the shop with a stick and beat the appellant on the head. It was then that appellant inflicted the fatal cuts on the deceased's head with the chopper. This, in substance, is the prosecution case which found acceptance with the Sessions Judge. He, therefore, convicted the appellant under Section 302 of the I.P.C. and sentenced him to imprisonment for life.

3. Appellant, a bachelor, is the cousin of the deceased. According to the prosecution case, deceased's wife Omana had complained to her husband that appellant was making libidinous overtures to her. Deceased administered a warning to the appellant and later when appellant persisted in erotic pranks deceased filed a petition before the police. Appellant and deceased became enemies and on the morning of this crucial day deceased gave a couple of thrashes on appellant's back. With two contusions he got admitted in Vythiri Hospital, but skulked from there by noon. He went home and took a chopper and walked up to deceased's bunk. What happened thereafter has been narrated earlier.

4. Appellant had a lacerated wound 6 cm long on the top of his head which he sustained when deceased whacked him with the stick. Deceased had five serious injuries on the head which cut his scalp, skull and brain, besides a skin deep incised injury on the left palm. According to the appellant, while he was walking along the main road, deceased confronted him with a chopper and beat him with its handle; when he wrested the chopper, the deceased brought a stick to attack him and it was then that appellant used the chopper.

5. Ext. P. 10, Certificate of Forensic Science Laboratory shows that deceased's blood as well as hair had stuck on M.O. 2 stick. On the strength of it, learned counsel contended that prosecution story is only to be thrown overboard since, according to that version, the stick was used to beat the appellant. We are not

impressed by this contention since it is nobody's case, not even that of the appellant, that any stick was used against the deceased. Hence, probably the stick when dropped down would have come into contact with the chipped off hairs of the deceased as well as his blood which must have flowed to the ground.

6. Among the three witnesses who spoke to the occurrence, P. W. 1 is member of a hill-tribe. He was then engaged in the road repair work near the scene. Hence he could see the incident. In fact, the First Information Statement was recorded by the police from this witness. P.W. 2 was employed by the contractor who undertook the road work as his supervisor. P.W. 3 is the driver of the lorry which was parked on the roadside for changing the tyre. P.Ws. 2 and 3 were in conversation with each other when the incident happened. These three witnesses said, in one accord, about the sequences of the occurrence which are consistent with the prosecution version. We are not inclined to disbelieve their version merely because some minor discrepancies have been elicited in cross-examination.

7. Deceased's wife Omana (P.W. 4) said that she saw the appellant proceeding with the chopper and after sometime returning with the weapon. The time and place of occurrence in this case would fit in with her testimony. She also spoke about the earlier amorous overtures made by the appellant towards her. Ext. P4 is the petition filed by the deceased with the police on 8-11-1985 levelling such allegations against the appellant.

8. Dr. Vinod Govind (P.W. 10) Assistant Surgeon of Government Hospital, Vythiri said that he happened to examine the appellant at 9-30 a.m. on the date of occurrence and noted two contusions on his back. Ext. P 12 is the wound certificate issued by the doctor. He also said that appellant skulked from the hospital around 11 a.m. The above items of evidence do not suffer from any serious flaw and we are inclined to act on them.

9. Learned counsel for the appellant alternatively contended that appellant had not committed assault even if he had uttered the words asking deceased to come out of the shop to be killed, since appellant was standing as far away as seven meters from the shop of the deceased. (The scene mahazar (Ext. P2) shows that the scene of occurrence is 10.63 meters south of deceased's bunk shop). According to

the learned counsel, mere utterance of words would not amount to assault and hence deceased by walking towards the appellant with a stick was not doing a defensive act, but was resorting to aggressive move. By striking the first blow on the appellant deceased was clearly the aggressor, contended learned counsel.

10. If deceased's act was a step in exercise of his right of private defence, then appellant's attack cannot have the protection of law because it is axiomatic that there is no right of private defence against private defence. Right of private defence conferred by law was designated to serve a social purpose. Hence such right deserves to be fostered, of course, within the limits prescribed. Such a right is enshrined in the Penal Code for the purpose of emboldening people to repel unlawful aggressions without succumbing to them and also to encourage citizens to behave with manly spirit when confronted with eminent danger from a truculent adversary. Law does not expect anyone to behave like a coward and genuflect before a belligerent. However, the right of private defence cannot be used as a pretence for justifying an aggression. That is why it is said that an aggressor cannot claim right of private defence. In short, the principle is, there is no right of private defence against private defence.

11. A Division Bench of Punjab High Court has observed in *Kirpal Singh v. State* AIR 1951 Punjab 137: (1951 (52)Cri LJ 1517) that 'it would be strange indeed if a person who provokes an attack, brings on a combat and then slays his assailant, were to take shelter behind the plea of self-defence in justification of the blow which he struck during the encounter'. The bench also observed that it is an accepted proposition of law that a person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and wilfully brought on himself, without legal excuse, the necessity for the killing. Supreme Court has stated in *Munneykhan v. State of M.P.* AIR 1971 SC 1491: (1971 A11LJ 1299) that right of private defence should not be allowed to be pleaded or availed of as a pretext to aggressive purpose. 'Right 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'. A person's right of private defence of body commences as soon as he entertains a reasonable apprehension of danger to his own (or another's) body from an act of

assault or attempt to commit assault. This position emerges from a combined reading of Sections 100 and 102 of the P.C. Of course the extent of the right varies in different situations. Section 351 of the Penal Code defines 'assault' thus:

'Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person is said to commit an assault.'

12. While the Explanation makes it clear that mere utterance of words does not amount to assault, it clarifies that such words when associated with a gesture can turn into an assault. One of the illustrations given to the Section is worth extracting in this context: 'A takes up a stick saying to X 'I will give you a beating'. Here, though the words used by A could in no case amount to an assault and though the mere gesture unaccompanied by any other circumstances might not amount to an assault, the gesture explained by the words may amount to an assault. According to Lord Goddard, pointing a gun at a person is an assault (vide *Kwaku Mensah v. The King*, AIR 1946 PC 20: ((1946) 47 Cri LJ 569). However, showing a knife or chopper by itself may not amount to an assault in all situations. But, if the person who shows the knife or chopper utters words conveying the threat that hurt would be caused with it, such gesture would amount to assault. The distance between the aggressor and the target may have a bearing on the question whether the gesture amounted to assault. No precise yardstick can be provided to fix such distance, since it depends upon the situation, the weapon used, the background and the degree of the thirst to attack etc.

13. Here, when appellant stood near deceased's shop and displayed the chopper saying that he would not leave the place without killing the deceased and hurled the challenge to the deceased to come out, appellant had committed assault as defined in Section 351 of the Penal Code. The distance of 11 metres is not appreciably long to dispel the possibility of instilling the apprehension, when the entire conspectus including the background is viewed. We have no doubt that deceased had the right to repel the assault by resorting to such steps as he considered necessary in the situation.

The conclusion is that appellant was the aggressor and hence deceased was only acting in exercise of his right of private defence when he went out of his shop and dealt a blow on the appellant with a stick, we, therefore, confirm the conviction and sentence and dismiss the appeal.

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