

**Govind Natha Vs. the State**

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**Court :** Gujarat

**Decided On :** Sep-13-1960

**Reported in :** AIR1961Guj11; 1961CriLJ57; (1961)0GLR168

**Judge :** Miabhoy and; Raju, JJ.

**Acts :** [Evidence Act, 1872](#) - Sections 118; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 286, 367 and 423; Oaths Act, 1873 - Sections 5; [Indian Penal Code \(IPC\), 1860](#) - Sections 96

**Appeal No. :** Criminal Appeal No. 233 of 1960 (Cri. Appeal No. 598 of 1960 of Bombay file)

**Appellant :** Govind Natha

**Respondent :** The State

**Advocate for Def. :** H.K. Thakore, Asst. Govt. Pleader

**Advocate for Pet/Ap. :** S.H. Bhargushastri, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Miabhoy, J.**

1. Appellant Govind Natha has been convicted by the learned Sessions Judge, Kutch at Bhuj, for the offence wider Section 304, Part, I, Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and for the offence under Section 21, Indian Arms Act, and sentenced to suffer rigorous imprisonment for three months. The learned Judge has ordered both the sentences to run concurrently.

2. The first charge against the appellant was that, on or about 3-10-1959 at about 5-00 p. m. he committed the murder of one Aher Suthar Punja Mahisur at his, i.e. appellant's shop in the village Mirzapur, Taluka Bhuj, District Kutch. The second charge against the appellant was that, in contravention of a licence to possess 12 cartridges at a time, the appellant possessed, on the aforesaid date and time, 30 cartridges.

3. A majority of the facts on which the prosecution has relied to establish the two charges against the appellant has been admitted by the appellant and those facts have not been challenged before us by Mr. Bhragushastri, learned Advocate for the appellant. We shall first of all briefly mention those undisputed facts.

4. The appellant conducts a grocery shop in the village Mirzapur. That shop is situated at one of the corners of a place where four roads meet. The shop faces north and measures 12' x 12'. Towards the west of the shop, there was a small , desk which was used by the appellant as a counter and the appellant used to sit on a cushion spread near that counter. On 3-10-1959, deceased Punja had come to the shop of the appellant for purchasing a match-box and 'Didis'. The deceased was a carpenter by profession and belonged to the said village Mirzapur. The appellant gave a match-box and 'Bidis' to Punja and accepted their price. At this time, witnesses Mohanlal and Meghji were present at the shop. Mohanlal had come there for purchasing sugar and Meghji had come at the shop to call Mohanlal back, because one of Mohanlal's relatives was ailing. After the match-box and the 'Bidis' had been sold, the appellant demanded the arrears of his dues from Punja. It appears from the account-book of the. appellant that Punja was indebted to him at the date of the offence to the tune of about Rs. 100/-. This demand of previous dues in the presence of other customers was resented by

Punja and, as soon as the demand was made, Punja picked up a weight which was lying in the shop and threw it against the appellant. Fortunately, appellant quickly stood up and parried the throw and no injury was caused to the appellant. There is the prosecution evidence to show that, after appellant had stood up on the 'Thada' of the shop, Punja caught hold of appellant's testicles, This is deposed to by witnesses Mohanlal and Meghji, examined on behalf of the prosecution. This part of their test-mony has not been accepted by the learned Judge, Then, according to the prosecution, certain acts were committed by the appellant as a result of which Punja died on the spot. This part of the prosecution case is disputed by the appellant and we shall mention that part just in a moment. Then, it is common ground that, after some time, appellant left his shop on a motor-cycle and went to Bhuj in search of witness Vaghji who appears to be a leader of the village. On the way, appellant met his servant Premji and asked him to go to the shop and keep a watch there by sitting outside the shop during his absence. The appellant met with an accident on the way and fell down from his motorcycle and, as a result, his knees were injured. Then the appellant borrowed a bicycle from one Naran Jiva and exchanged that bicycle for another bicycle from one Shamji Nanji and, ultimately, he reached Bhuj on that Bicycle: but, he learnt that Vaghji was not in Bhuj, but he was at Madhapur, an adjoining village. Thereupon, the appellant engaged a taxi car of one Hussain and went to Vaghjibhai and told him that he should accompany him to Mirzapur. Thereafter, the appellant and Vaghji came to Mirzapur and, when Vaghjibhai saw that Punja was lying injured in the shop of the appellant, he advised the appellant to report the matter to the police and consequently, appellant and Vaghjibhai both went to the Police station at Bjuj at about 8-00 or 8-30 p.m. The appellant was then sent to the dispensary for medical treatment and the P. S. I. proceeded to the shop of the appellant and made certain Pan-chnamas and attached certain articles therefrom.

5. The prosecution case is that, after Punja had thrown a weight against the appellant and after appellant had stood up on his 'Thada', appellant fired six' rounds of shots from a pistol which was in appellant's possession and in respect of which he held a licence, that three out of these shots misfired and, out of the remaining three, only one hit the deceased Punja, as a result of which he fell down on the 'Thada' of the appellant's shop and died instantaneously.

6. There is extremely good evidence to show that Punja had received six anti-mortem injuries on 3-10-1959. Three of these injuries were contused lacerated wounds. The medical testimony is that these three wounds could have been caused either with a hard and blunt substance or by a fall. It is not the prosecution case that these three injuries were caused by the appellant. But, those three injuries are consistent with the prosecution case inasmuch as, according to that case, the deceased fell down after he received the fatal shot on the 'Thada' and, therefore, these three injuries can be attributed to the fall of the deceased after he received the fatal shot. The fifth injury, according to the Doctor, was a punctured wound with slight irregular margins 1/4' diameter, 3/4' deep, 4 1/2' below the interior angle of the left scapula. It is also not the prosecution case that this injury was caused by the appellant. According to the Doctor, this injury could have been caused with a sharp pointed instrument. There is no clear explanation in the prosecution evidence as to how the deceased happened to receive this fifth injury. However, there is no doubt that all the aforesaid four injuries were non-fatal injuries and that the appellant was not responsible for any one of them. But, according to the Doctor, there were two more injuries which are described by him as injuries Nos. 4 and 6 in Column 17 of the Post Mortem Notes. The fourth injury was an entry wound 1/4' diameter, 4 1/2' above the medial end of the spine of the left scapula. The sixth injury was a punctured wound, 1/3' diameter with everted margins in the epigastric region 2' below the left lower costal margin about 3 1/2' to the left of mid-line. According to the Doctor, the injuries Nos. 4 and 6 could have been caused by a bullet shot and the bullet, article No. 26, attached from the shop could have caused those two injuries. The Doctor also expressed the opinion that the injury No. 4 was the entry wound and the injury No. 6 was the exit wound. According to the Doctor, these two injuries had ruptured the lung, the heart, the diaphragm and the stomach. According to the Doctor, these two injuries were sufficient in the ordinary course of nature to cause death and death was due to shock and haemorrhage as a result of those two injuries. Thus, on the medical testimony, there is no doubt whatsoever that the deceased Punja received injuries Nos. 4 and 6 on or about 3-10-1959 as a result of which he died.

7. The prosecution case is that the above two injuries were caused on the deceased by the appellant by firing a pistol shot from his pistol, The appellant does

not admit this fact. His case is that after deceased Punja had thrown a weight towards him and, after he had stood up on the 'Thada', the deceased Punja had pressed his testicles and that as a result of this pressure, he had become unconscious and fallen down in his shop. According to him, he knows nothing about the pistol shots. His further case is that, after about 15 minutes, he regained consciousness and found that the deceased was lying on his 'Thada' and that, thereafter, he proceeded to Bhuj'. Therefore, the main point of controversy between the appellant and the prosecution is as to whether the appellant was or was not responsible for the two injuries Nos. 4 and 6 noticed by the Doctor and whether he did or did not fire six pistol shots or any of them in his shop after the aforesaid incident took place between him and the deceased. According to the prosecution, when the appellant went with Vaghji to the Police Station at Bhuj. he carried with him the pistol which he had fired against the deceased Punja and that the appellant produced that pistol in the presence of the Panchas and the same was attached from the possession of the appellant on 3-10-1959 at about 8-30 a.m. The appellant also disputes these facts. According to him, he had not carried his pistol with him, nor did he produce the pistol in the presence of the Panchas. This is another point of controversy between the appellant and the prosecution. According to the prosecution, the pistol smelt of having been recently fired at the time when it was produced and there was one live cartridge inside the chamber of the pistol. The pistol is article No. 24 and the live cartridges alleged to be inside the chamber is article No. 25.

8. Therefore, the main points which required to be decided by the learned Sessions judge were two in number. The first was, whether the prosecution had established that the appellant had fired pistol shots and that one of these shots hit the deceased; and the second was, whether the appellant had produced the pistol and that pistol and the live cartridges were attached as a result of the production before the P. S. I. at Bhuj. The learned Sessions Judge felt convinced that prosecution had. established both these points and he held it proved that the appellant was responsible for the murder of Punja. Though the two prosecution witnesses admitted that the deceased Punja had pressed the testicles of the appellant the learned Judge was not prepared to accept their testimony. He held that this was an improvement which the two witnesses had made in favour of the

appellant The learned Sessions Judge, further held that the deceased Punja was the aggressor on the day in question. However, he held that, in firing the shots as the appellant did, he had exceeded the right of private defence and, consequently, the learned Judge, though he held that prima facie, Punja was murdered, held that the crime which was committed was the offence of culpable homicide not amounting to murder and, consequently, he convicted the appellant for the offence under Section 304, Part I, Indian Penal Code.

9. Mr. Bhargushastri contended that the learned Judge was not right in holding that the testimony of Meghji and Mohanlal should not be accepted that the testicles of the appellant were pressed by the deceased on the day in question, (After discussing the evidence of these two witnesses His Lordship proceeds). Under the circumstances, in our judgment, we must decide the present appeal on the basis that the deceased had not merely thrown a weight against the appellant but that he had also pressed his testicles.

10. But, the main point which requires to be decided in the present case is as to whether the appellant had fired a shot or shots from his pistol and whether one of these shots hit the appellant. On this point, the only evidence which the prosecution has led is that of the child witness Jayantilal. The evidence of Jayantilal's mother Kunverbai is that, on that day, she was about to leave for the village Mankuwa and, for that purpose, she had come to a bus stand and from that bus stand, she had sent her son Jayantilal to the shop of the appellant for purchasing sweets. Jayantilal's evidence is that he had gone to that shop on that day and he had seen the appellant 'firing crackers'. He further deposed that, when appellant fired crackers, one Pama was there. The reference is to the witness Frema who was the servant of the appellant. Then he deposed that the carpenter Punja of his village died by the firing of the crackers. The age of this witness has been stated by the learned Sessions Judge to be five years and the learned Judge has also made a note after the examination-in-chief was over to the effect that the witness did not appear to be of full mature understanding. In the cross-examination, only three questions were asked to the witness and nothing more. The witness stated that there were no other, boys present, that he was standing outside the shop, and that he had not got the Peppermints. It appears that the learned Judge had given

oath to this witness and his evidence was recorded on oath.

11. Mr. Bhragushasri's contention was that, having regard to the note which the learned Sessions Judge has made about the immaturity of the understanding and of the witness, the witness was not a competent witness and, therefore, his evidence cannot be considered against the appellant. Section 18, Indian Evidence Act, states:

'All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'.

From this section, it appears that every person is a competent witness unless the Court is of the opinion that, by reason of any of the causes mentioned in the section, a person is prevented from understanding the questions put to him or from giving rational answers to those questions. Therefore, when a Court has got to deal with a child witness, before deciding that the witness is a competent witness, the court must come to the conclusion that, by reason of his age, the child is not intellectually deficient i.e. that it cannot understand the questions put to him or give rational answers to those questions: The section does not deal with the understanding of person in respect of the particular topics on which his deposition is to be recorded, but the section deals with the general intellectual capacity of the child, and, if the Court is satisfied about the general intellectual capacity of the child to give evidence, then, the witness would be a competent witness and it would be the duty of the Court to assess the evidence of that child on the particular topics deposed to by him, and decide for itself if the child had sufficient intellectual capacity, to understand the matters deposed to by it and whether the evidence given by it was credible, reliable and trustworthy. Therefore, the mere fact that the learned Judge has made a note that the witness is not of full mature understanding does not necessarily mean that the witness was an incompetent witness in the sense that he was not able to understand the questions put to him or to give rational answers thereto. The learned Judge has explained the above note in his judgment by slating that, when the witness stated about the firing of

crackers and the incident having taken place in the morning, those statements were clue to the fact that the witness did not understand the difference between morning and evening and the difference between crackers and pistol shots. But, apart from these two deficiencies which affect his testimony on the merits, there is nothing in Jayantilal's testimony or anything else on the record which would go to show that the witness was an incompetent witness, in the sense that he was not able to understand the questions put to him or to give rational answers thereto.

12. However, there is nothing on the record to show that the learned Judge had himself asked any questions to witness Jayantilal before putting him in the witness-box to satisfy himself that he was able to understand the questions and to give rational answers thereto. It is true that the law, as it stands, does not cast a duty upon a Judge, to ascertain by way of *voire dire*, the competency of a person to be a witness. In a large majority of cases, the presumption would be that the person is a competent witness. But, when the Court has got to deal with a child witness who is only five years old, it would not be proper to rely on any such presumption. In such a case, it is desirable that the Judge should undertake a *voire dire* with a view to satisfy himself that the witness is a competent witness. Of course, the view which the judge would form at this preliminary enquiry would not be the final view and the Judge might have to change that view if the examination and the cross-examination revealed his incompetency. In the absence of a *voire dire* in this case, we have to form an opinion about the competency of Jayantilal on the answers given by him in his deposition. One material which exists on the record is the observation made by the learned Judge that he himself had put a certain number of questions to witness Jayantilal to satisfy himself that he was not a tutored witness. The learned Judge has in another part of the judgment also mentioned that he was impressed by the way in which the witness had given his evidence. Unfortunately, the learned Judge has not kept a record of the questions put by him to witness Jayantilal, and, the failure to do so has created a handicap and has precluded us from attaching the weight which, otherwise we would have done if the record of questions and answers had been preserved. The trial Courts must remember that, in appealable cases, it is the view of the appellate Court which must finally prevail and, when the appellate Court has to decide a matter, it must decide it on its own views and not on the views of the trial judge on the

questions involved in a case. Therefore, in all such cases, if any questions are asked by a Judge, it is always advisable that a record of those questions must be kept, so that the appellate Court may not be handicapped in the discharge of its own duties.

13. However, we have carefully considered the evidence of Jayantilal as a whole, and, in doing so, we have also borne in mind the fact that the learned cross-examiner did not make any attempt to show that witness Jayantilal was suffering from any general intellectual incapacity or deficiency which would make him an incompetent witness. We have also borne in mind the fact that the witness did not understand the difference between morning and evening and pistol shots and cracker shots. But, from the answers given by him to questions on a large number of matters, it does appear that the witness did understand the questions put to him and he was able to give rational answers on those questions and, in our judgment, he was a competent witness.

14. It also appears from the record that the learned Judge did not make any attempt to ascertain whether the witness Jayantilal understood the nature and the significance of the oath which was given to him. In our judgment, in a case of the present type where the Judge has got to deal with a child of a very tender age, it is always advisable that he should keep a record or make a note somewhere on the record that he had satisfied himself that the witness knew and understood the nature, the significance and the sanctity of the oath given to him. If he has asked any questions on the subject, it is also advisable that a memorandum of the same should be kept on the record. Having regard to the fact that witness Jayantilal was only five years old, prima facie, it appears to be doubtful whether the witness understood the importance and consequence of an oath or an affirmation. Under the circumstances, we have decided to read the evidence of Jayantilal on the basis that he did not understand the nature and significance and sanctity of oath and we have preferred to proceed on the basis that his evidence was without any affirmation. But, having regard to the proviso to Section 5, which has been added by the legislature by Act No. 39 of 1939, it cannot now be disputed that even if the evidence of a child below twelve years of age is not on oath, the evidence is still admissible and forms part of the record. Under the circumstances, in spite of the

aforesaid infirmity in the evidence of Jayantilal, in our judgment, that evidence does constitute evidence against the appellant and must be considered on its own merits.

15. Having regard to the fact that Jayantilal is a child witness, we must scrutinise his evidence very minutely and carefully and especially we must be satisfied that there has been no coaching or tutoring of that witness. (Then after discussing evidence his Lordship concluded):

16-20. Under the aforesaid circumstances, in our judgment, the evidence of Jayantilal is reliable and is sufficient to establish that the appellant was the person who had fired a pistol shot which hit Punja and which caused his death.

21. The version of the appellant, that he had become unconscious as a result of the pressure on his testicles, is not credible. Having regard to the fact that no injury was noticed on his testicles, it is quite clear that the pressure on the testicles could not have been so hard as to render him unconscious. That part of the version of the appellant is undoubtedly improbable and unbelievable and, under the circumstances, we have come to the conclusion that the prosecution evidence is sufficient to establish that the appellant was responsible for the two bullet wounds Nos. 4 and 6 on the deceased.

22. As regards the plea of self-defence, Mr. Bhargushastri is right in saying that, though the appellant had not actually pleaded self-defence, it is open to him to show from the prosecution evidence itself that the appellant had caused the fatal wound under such circumstances as gave him the right of private defence.

23. There is no doubt whatsoever that the burden of proving the right of private defence is on the appellant. But, if he fails to establish it, then, the appellant would be criminally responsible for the bullet wounds. Unfortunately, the appellant precluded himself from establishing the right of private defence by taking up the attitude in the trial Court that he had become unconscious after his testicles were pressed and that he regained consciousness 15 minutes thereafter when he found that the appellant was lying injured. The witnesses Mohanlal and Meghji do not throw any light on this aspect of the case and, therefore, we are left with the

following facts and the question for consideration is whether those facts do establish that the appellant had the right of private defence and that, when he fired the fatal shot, he did so in the exercise of that right. The facts are that deceased Punja became angry on the demand of the dues by the appellant; that he picked up a weight and threw it against the appellant; and that he pressed the appellant's testicles. These facts undoubtedly show that Punja was the aggressor and that he intended to do harm to the appellant. But, these facts only prove the commencement of the right of private defence. In order that the right of private defence may be established, it is not sufficient for the accused, merely to establish that the right had commenced. He must also further establish that the right had not ended. In other words, in order that the right of private defence may be held to have been established, it is necessary for the defence to prove that reasonable apprehension which had been created in the mind of the appellant as a result of the act of the aggressor, had continued at the time when the impugned injury was caused. No attempt appears to have been made by the defence to prove this fact. The only witness who could have thrown light on this subject is Jayantilal. No questions have been asked to him on the subject. The appellant has thought it fit to give a statement which stops short at the point where his testicles were pressed. Under the circumstances, in our judgment, the prosecution evidence as such does not establish that the reasonable apprehension which had been created in the mind of the appellant as a result of the acts of Punja had continued at the time when the fatal shot was fired. Under the circumstances, in our judgment, it is impossible to hold that the appellant had fired the fatal shot in the exercise of the right of private defence. In that view of the matter, there is no question of any application of Exception 2 to Section 300 of the Indian Penal Code and, in our judgment, the learned Judge was wrong in applying that Section to the facts of the present case. But, though this is so, in our judgment, it does not make any difference to the actual offence brought home against the appellant, because the testimony of Meghji and Mohanlal and the admitted facts in the case do establish that a sudden quarrel and fight arose between the appellant and Punja and it was in the course of that sudden quarrel and fight, that passions were excited on both the sides and the pistol shot was fired by the appellant. Consequently, the appellant is entitled to the benefit of Exception IV to Section 300, I. P. Code and

he has been rightly convicted for the offence under Section 304, Part I of the Indian Penal Code and Section 21 of Indian Arms Act and the appeal must fail and must be dismissed.

24. The appeal fails and is dismissed.

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