

Naranbhai Devabhai Vs. State

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Court : Gujarat

Decided On : Dec-02-1960

Reported in : (1961)2GLR142

Judge : V.B. Raju, J.

Appellant : Naranbhai Devabhai

Respondent : State

Judgement :

V.B. Raju, J.

1. This is a criminal revision application against the judgment of the Additional Sessions Judge of Surat Shri B.K. Soonawala in Criminal Appeal No. 9 of 1960 against the judgment of the second Extra Assistant Sessions Judge of Surat in Sessions Case No. 95 of 1939. The application is by the original accused No. 2. The charge against him at the Sessions trial was under Section 304 read with Section 34 of the Indian Penal Code for causing the death of one Makan Chhiba. The trial court convicted accused No. 2 under Section 325 read with Section 34, Indian Penal Code and also some other co-accused. In appeal, the learned Additional Sessions Judge set aside the convictions of accused Nos. 1, 3 and 4, and as regards accused No. 2, he altered the conviction from Section 325 read with Section 34, Indian Penal Code, to one under Section 304, part II, Indian Penal Code. The learned Additional Sessions Judge held that the main prosecution

witnesses, upon whom the prosecution relied, namely Makan Daji and Rama Khalpa were unreliable witnesses and that their evidence should be discarded. He however relied on the statement of accused No. 2 made under Section 342 Criminal Procedure Code and convicted accused No. 2 the present applicant under Section 304 Part II Indian Penal Code.

2. In revision it is contended by Mr. Jafrabadwala that having disbelieved the prosecution witnesses the learned Additional Sessions Judge was not right in relying on the statement of accused No. 2 under Section 342 Criminal Procedure Code. He also contended that the learned Additional Sessions Judge was also wrong in altering the conviction of accused No. 2 from Section 32-5 read with Section 34 Indian Penal Code to one under Section 304 Part II Indian Penal Code.

3. As regards the second contention it is obvious that the learned Additional Sessions Judge has erred in altering the Conviction from Section 325 read with Section 34 I.P. Code to one under Section 304 Part II I.P. Code. It is true that original charge was under Section 304 read with Section 34 I.P. Code but the trying Court namely the extra Assistant Sessions Judge passed the conviction only under Section 325 read with Section 34 I.P. Code and it cannot be said that the offence under Section 304 I.P. Code is a minor offence as compared to the offence under Section 325 I.P. Code. The learned Government Pleader Mr. Choksi concedes that the learned Additional Sessions Judge erred in altering the conviction from Section 325 read with Section 34 to one under Section 304 Part II I.P. Code. It is not open to a Judge in appeal to change the conviction from one offence to another offence which is not a minor offence. I therefore accept the contention of the Learned Counsel for the applicant that the learned Additional Sessions Judge erred in altering the conviction of the applicant from Section 325 read with Section 34 to one under Section 304 Part II Indian Penal Code.

4. The second contention of the Learned Counsel for the applicant is that having disbelieved the evidence of the two main prosecution witnesses namely the alleged eye-witnesses Makan Daji and Rama Khalpa the learned Additional Sessions Judge was not right in relying on the statement of accused No. 2 recorded under Section 342 Criminal Procedure Code. This contention cannot be

accepted. Once an accused has been properly examined under Section 342 Criminal Procedure Code the court is justified in looking at the examination of the accused which has been properly recorded. When the accused was examined the question whether the prosecution witnesses were unreliable or not was not for determination by the Judge. At this stage there was prosecution evidence which justified the examination of accused No. 2 under Section 342 Criminal Procedure Code and the questions put to him cannot therefore be regarded as improper. If the examination was proper merely because at the time of the judgment the learned Additional Sessions Judge finds the evidence of the prosecution witnesses to be unreliable the examination of the accused which had been properly taken under Section 342 Criminal Procedure Code does not cease to be a matter which can be taken into consideration. I therefore reject this contention of the Learned Counsel for the applicant.

5. But even if we take the statement of the applicant under Section 342 Criminal Procedure Code into consideration that does not justify the inferences drawn by the learned Additional Sessions Judge the learned Additional Sessions Judge in his judgment has observed as follows:

Both the alleged eyewitnesses are unreliable and therefore their evidence has to be discarded totally. That leaves us only with the statement of the accused No. 2. Accused No. 2 has admitted that while the deceased raised his stick to give the second blow he started whirling his stick at which the deceased fell down on the ground. Therefore it is admitted by him that it was his hand that resulted in the death of the deceased. The injuries on the deceased have been described by Dr. Desai (ex. 273) and there were as many as eight injuries on the person of the deceased as noted in Para 7 of the judgment of the court below. Therefore it would not be possible to convict the accused merely for grievous hurt under Section 325. It will be seen in this case from the number of injuries inflicted upon the deceased that the accused No. 2 far exceeded the right of private defence of person and property given to him in law.

6. If we look at the statement of accused No. 2 taken under Section 342 Cri. Pro. Code we find that there is no admission that he caused eight injuries to the

deceased or that he had caused the death of the deceased. What is stated by the accused in his examination was merely that the deceased came to him and started abusing him and gave him a suck below on his right shoulder and when the deceased again raised his stick to give a second blow he (accused No. 2) started whirling his stick at which the deceased fell down on the ground. This is what was admitted by accused No. 2 in his examination. The learned Additional Sessions Judge was therefore not justified in inferring from the statement of the accused that he had admitted having caused 8 injuries to the deceased or having caused the death of the deceased. According to the learned Additional Sessions Judge himself accused No. 2 had the right of private defence and it cannot be said from his statement that this right had been exceeded. There was no reliable evidence even according to the learned Additional Sessions Judge to come to the finding that accused No. 2 has; exceeded his right of private defence. The conviction of the applicant under Section 325 read with Section 34 Indian Penal Code is also therefore erroneous and this is conceded by the learned Government Pleader.

I therefore set aside the conviction of the applicant under Section 304 Part II and acquit him in this case. Bail bond to be cancelled.

7. I might also mention that the learned Additional Sessions Judge has framed points for determination in his judgment which are not correct. The learned Additional Sessions Judge should note that when the charge against accused persons B C & D is under Section 302 read with Section 34 Indian Penal Code for having caused the death of Q the points for determination should be as follows:

(1) Is Q dead?

(2) If so is it proved that his death was caused as a result of a criminal act done by H C and D?

(3) If so is it proved that the criminal act was in furtherance of the common intention of B C and D?

(4) If so was the common intention of B C and D such as to fall under Clause 1 or 2 or 3 of Section 300 Indian Penal Code? Otherwise what was the common

intention?

(5) Did any of the accused individually cause the death of the accused Q.

(6) Is the accused B guilty under Section 302 read with Section 34 Indian Penal Code.

(7) If not is he guilty of any lesser sentence?

(8) Similar to (6) for C

(9) Similar to (7) for C.

(10) Similar to (6) for D.

(11) Similar to (7) for D.

Points Nos. 4 and 5 framed by the learned Additional Sessions Judge are as follows:

(4) If not which of the accused is responsible for his death?

(5) Is it proved that accused No. 2 in the exercise in good faith of the right of private defence of person and property inflicted the injuries on the deceased?

8. Point No 4 assumes that one of the accused was responsible for the death of the deceased. Point No. 5 and the question of good faith do not arise in a case where the charge is under Section 304 I.P. Code. It is not clear whether point No. 5 assumes that accused No. 2 inflicted the injuries on the deceased. It is conceded by the learned Government pleader Mr. Choksi that these two points for determination have not been correctly framed. The learned Additional Sessions Judge should note the correct points for determination.