

Shiv Dayal Vs. the State

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Court : Rajasthan

Decided On : Sep-13-1968

Reported in : 1968WLN1

Judge : L.S. Mehta, J.

Appeal No. : S.B. Cr. Appeal No. 472 of 1968

Appellant : Shiv Dayal

Respondent : The State

Disposition : Appeal allowed

Judgement :

L.S. Mehta, J.

1. This is a criminal appeal preferred by the accused Shiv Dayal against the judgment of learned Sessions Judge, Bikaner, dated July 25, 1968, convicting the appellant under Section 307 I.P.C. and sentencing him to suffer four years' rigorous imprisonment and to pay a fine of Rs. 100/-, in default of payment fine to further undergo rigorous imprisonment for one month.

2. The prosecution story, in brief, is that the accused Shiv Dayal is a distant relative of the complainant Sohanlal, P.W.I. Shiv Dayal was a teacher. He used to purchase betels from the shop of Dev Kishan injured. Shiv Dayal owed a sum of

Rs. 10 or Rs. 12/-to Dev Kishan. The said amount was demanded by Dev Kishan from Shiv Dayal from time to time. The debtor-promised to make payment of the amount in question several times, but he failed to do so. A day prior to the occurrence the creditor again, asked the debtor to clear off his account. Thereupon Shiv Dayal told him that he would do so next day. In the morning of November 11, 1967, Dev Kishan repeated his demand to Shiv Dayal, who agreed to make payment of the dues in the evening of the day. That day at about 9 30 p.m., both Shiv Dayal, and his brother Shiv Prakash went to Dev Kishan's shop. Shiv Prakash was armed with a lathi and Shiv Dayal with a knife. The former struck two lathi blows on the person of Dev Kishan. The first blow fell on his head and the second struck the dorsum of his left hand. Hearing an outcry, Sohanlal, who was having his dinner inside his house, came out. Seeing Sohanlal, Shiv Dayal took out a knife from his pocket and pierced it into Sohanlal's chest. Sohanlal was injured and fell down According to the medical evidence Sohanlal received the following injuries as given in Ex. P.3:

A clitical stab wound (incised) slightly oblique in transverse direction, wound bleeding and covered over with clotted blood, 2 x 1 x pleuia deep with surgical emphysema on the right side chest of above and medial to the right nipple.

Dev Kishan also sustained a simple injury. The medical report Ex. P. 4 reads that the following injury was found on his person-

A vertebral contused wound 1 x 1/6 scalp deep with swelling around on the left forubal middle part.

Thereafter both the accused Shiv Dayal and Shiv Prakash left the place. Asha, P.W. 4 who was an eye witness of the happening, also left the place without attending on any of the injured persons Sohanlal was removed to the Associated Hospital, Bikaner, where he was operated upon He recovered from his ailment after about 3 weeks. The police registered a case under Sections 307, 326 and 323, I.P.C., against the two accused Shiv Dayal and Shiv Prakash. After necessary investigation, the accused were challanged in the court of Additional Munsiff-Magistrate, Bikaner. The said Magistrate. conducted inquiry in accordance with the provisions of Section 207-A, Cr. P. C. and committed the two accused to

the court of Sessions Judge, Bikaner. Shiv Dayal was to stand trial under Sections 307, 326 and 323, I.P.C.; whereas Shiv Prakash had to face trial under Sections 307/34, 326 and 323, I.P.C. The accused pleaded not guilty to the charges read out to them. In support of its case the prosecution examined 11 witnesses. In his statement, recorded under Section 342, Cr.P.C., accused Shiv Dayal stated that at about 10 in the night of November 11, 1967, he was going to his house. On his way towards home, he was stopped by Dev Kishan, who wanted to beat him. At that time he was all alone. Soon after Sohanlal came out of his house. He too wished to strike a lathi blow on his body This blow accidentally fell on the person of Dev Kishan. Sohanlal was on his Chauki and he was on the road. Sohanlal's feet slipped away and he fell down sustaining injuries. He could not say who inflicted the knife injury to Sohanlal. In his statement recorded under Section 342, Cr.P.C., Shiv Prakash pleaded alibi. In their defence, the accused did not produce any evidence. The trial court acquitted the accused Shiv Prakash of the offence under Section 307/34 and Sections 326 and 323, Penal Code. The court acquitted Shiv Dayal of the offence under Sections 326 and 323, I.P.C. It, however, convicted him of the offence under Section 307, I.P.C., and sentenced him, as aforesaid Hence this appeal.

3. Learned Counsel for the appellant raised in the course of his arguments the following two points:

1. that the 4 prosecution eye witnessess, Sohanlal, P.W. 1; Devkishan P.W. 2; Ram Ratan, P.W. 3; and Asharam, P.W. 4; are not reliable and that they have already been disbelieved by the trial court in so far as the prosecution of Shiv Prakash is concerned; and

2. that the accused Shiv Dayal, if at all inflicted injury to Sohanlal, he did so in the exercise of the right of private defence of his person. Learned Deputy Government Advocate supported the judgment of the trial court.

4. I now take up the evidence of the 4 eye witnesses. I agree with learned Counsel for the appellant that these 4 witnesses have not given their evidence with clean hands. Shiv Prakash is said to have held Sohanlal, when the latter was stabbed by Shiv Dayal. The trial court, while examining this aspect of the matter, noted at

page 11 of the certified copy of the judgment, available on the record, that he had no option but to draw the inference that this part of the statement of the witnesses is an afterthought and that they have been forced or persuaded to give such a statement to implicate Shiv Prakash for commission of the offence under Section 307/14, I.P.C. All the witnesses have stated that Dev Kishan received two lathi blows. This part of the version of the witnesses is negated by Dr. G K. Bhatnagar, P.W. 5. He has unequivocally stated that he noticed only one injury on the body of Dev Kishan. His injury report is marked Ex. P. 4. Again, all the witnesses have said that the blood came out of the injury of Sohanlal. This version stands contradicted by S.H.C. Mohanchand Sharma, P.W. 10, who has pointed out in the course of cross-examination that when he inspected the site, he did not find any blood on the ground. There is another significant factor which needs mention. Sohanlal, P.W. 1, has deposed that when he came out of his house, he did not see any knife in the hand of Shiv Dayal. On seeing him, Shiv Dayal took out a knife from his pocket and then inflicted an injury to him. Contrary to this, the other eye witnesses Dev Kishan, Ram Ratan and Asharam have categorically said that Shiv Dayal was already holding a knife in his hand. Thus, there are vital infirmities in the statements of the aforesaid four witnesses.

5. The statement of Asharam does not inspire any confidence whatever. He is a chance witness. He happened to be there simply for taking betel. He admits that he did not go near Sohanlal after he had received an injury, nor did he talk to him or other witnesses and that he left the place soon--after the event. This conduct on the part of Asharam appears to be unnatural. Strangely enough, Asharam did not relate this mishap to any other person, and surprisingly enough, nor even to the members of his own family. In *Bihari Singh Madho Singh v. State of Bihar* (1), Hon'ble Bose, J., speaking for the Supreme Court, observed that if the Chowkidar, who was an eye witness, did not talk to anybody about the occurrence and if he did not inform any of the many persons he must have seen subsequently, his conduct must be considered as an impossible one. Asharam was confronted with his police statement Ex. D. 3, at portion marked E to F, wherein he deposed that he came to the rescue of the complainant. His reply was that he did not make such a statement. Again, he was confronted with another portion marked G to H of his statement Ex. D. 3, in which he deposed that Sohanlal and Dev Kishan were taken

to the hospital, Bikaner by Ran Ratan and Prem Ratan. He declined to have given such an account. He had further to face with portion marked I to J in EX. D. 3 in which he stated that several persons had collected on the spot. His only answer was that he did not make any such deposition. Thus, the statement of Asharam has to be rejected in toto.

6. Similarly, P.W. 3. Ram Ratan has admitted in his statement that he was possessed of a stout body and was a famous wrestler of Bikaner City. It was expected of him that he would have intervened in the matter had he been actually present on the spot just at the time of the incident. But he did not do so. Circumstances show that Ram Ratan, who lives just in the neighbourhood of the place of occurrence, might have come later on. He is closely related to Dev Kishan. He admits that Dev Kishan's grand-father and his own grand father were real brothers. It is on account of such relationship that he has tried to show that he was available on the scene of the event just at the moment when Sohanlal was stabbed by Shiv Dayal. It is for these reasons that the testimony of the aboves-named four eye witnesses cannot be said to be convincing or credible.

7. P.W. 1 Sohanlal has deposed in his statement that at the time of the incident a large number of people assembled there. The prosecution has picked up only two witnesses Ram Ratan, P.W. 3, and Asharam, P.W. 2. It is not understood why other independent witnesses including the people of the locality, have not been produced on behalf of the prosecution. As has been observed by their Lordships of the Supreme Court in *Habeeb Mohammed v. The State of Hyderabad* (2), it is the bounden duty of the prosecution to examine material witnesses, particularly, when no allegation has been made that, if produced, they would not speak the truth. Not only does an adverse inference arise against the prosecution case from the non-production of witnesses in view of illustration (g) to Section 114 of the Evidence Act, but the circumstance of their being withheld from the court casts serious reflection on the fairness of the trial. It is also laid down by the Judicial Committee of the Privy Council in *Stephen Seneviratne v. The King* (3), that witnesses essential to the unfolding of the narrative, on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Here the

prosecution has examined only two such witnesses. Ram Ratan and Asaram, apart from the injured persons and their testimony for the reasons enumerated above is not worthy of credence. No reason has been assigned by the prosecution as to why other respectable persons of the neighbourhood were not produced.

8. It is also significant to note that the accused Shiv Dayal had 4 injuries on his person. This is borne out by Ex P 16, and Mohan Chand, P.W. 10 None of the prosecution witnesses has explained them. That shows that truth has been screened from the reach of the court. There may be some credence in the story of Shiv Dayal,. There may be possibly that Shiv Dayal was attacked first. At any rate, such a possibility cannot be overruled, When, how and by whom the injuries on the person of Shiv Dayal were caused remain mystery. In *Moti and Ors. v. State* (4), a Division Bench of this Court has observed that injuries caused to the accused have to be explained by the prosecution, and that these injuries, taken along with other circumstances of the case, constitute an important factor, which would throw a doubt on the truthfulness of the prosecution story. It is thus plain that the prosecution has not unfolded the true state of affairs.

9. Having regard to the facts and the circumstances of the case, I find myself entirely unable to agree with the conclusion which learned trial court arrived at as regards the guilt of the accused Shiv Dayal.

10. I may now switch over to the second point raised on behalf of the accused appellant, regarding the right of exercise of private defence of person. In this connection, it may be pointed out that here the aggrieved party was Div Kishan and not Shiv Dayal. The former has stated that Shiv Dayal promised to pay his dues during Diwali as also in the morning of the date of the occurrence. Thereafter he agreed that he would pay them in the evening of the day. The witness has further said that prior to the incident there was no quarrel or any verbal altercation between the parties. Sohanlal P.W 1 has admitted that the accused is his collateral. There is no suggestion whatever that whenever any demand was made Shiv Dayal felt resented or he extended any intimidation or threat or hurled abuses at him or exhibited any temper. That shows that Shiv Dayal never felt agitated or ruffled. Failure to make payment despite demands is very likely to have

exasperated the disgruntled or frustrated creditor. Viewing this case from this angle, it is possible that it was Dev Kishan who first set the ball rolling and started administering beating to the accused. The trial court has also held that normally the accused persons would not have come to beat the victims and that no extraordinary circumstances had been brought on the record for the drastic action by the accused in that view of the matter the trial court held that the cause of the quarrel was something else and that the same was suppressed by both the sides.

11. It is a matter of common experience that a person who is desperate or of an aggressive mood, would not rest content with the striking of one blow. He would in the heat of his anger hit several blows. In this case had Shiv Dayal been the aggressor. He would not have felt satisfied by administering only one blow. This circumstance does not reflect that Shiv Dayal had the mood of an aggressor. Again, if Shiv Dayal made an unprovoked attack, Dev Kishan, who was an easy victim could not have conveniently escaped his assault in the first instance.

12. According to Sohanlal knife was taken out from his pocket by Shiv Dayal at the spur of the moment. This fact shows that Shiv Dayal did not want to make use of the weapon at the initial stage of the quarrel against Dev Kishan, who was easily available. This fact demonstrates that there were other compelling circumstances under which the knife had to be handled and which the prosecution has failed to unfold.

13. Now the question arises how had the right of private defence of person arisen against Sohanlal, who came to the spot subsequently. Suffice it to say that the right of private defence of a person arises to the accused not only against the Person who actually gives the blow in the first instance, but against all the members of the party. In support of this proposition a reference is made to *Mod Singh v. The State* I.L.R. 1954 Raj. 7.

14. Shiv Dayal sustained 4 injuries on his person. This is borne out, as stated above, by Ex. P. 16 and P.W. 10, Mohanchand's statement. There is also a relevant finding to this effect in the judgment of the trial court. At page-16, the trial Judge has stated there is no doubt that Shiv Dayal had injuries on his person and that these injuries were not explained by the prosecution at all. The injuries on the

person of Shiv Dayal ought to have received due consideration by the trial court. This is a very fatal infirmity which adds weight to the other infirmities.

15. Be that as it may, there is no manner of doubt that the case in hand furnishes valuable date, on the basis of basis of which the accused can claim to have excised right of private defence of his person in *Narain Singh v. The State of Punjab* 1963 P.L.R. Lxv 561, it, it was observed by their Lordships of the Supreme Court that where a person accused of committing an offence sets up at his trial the plea that he is protected by one of the exception general or special, in the Indian Penal Code, or any other law, the burdern of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. Here the prosecution has not by any reliable evidence established affirmatively that the accused has done an act which rendered him liable for the offence under Section 307, I.P.C. The answers given by the accused in his statement, recorded under Section 342, Cr. P.C. merit consideration. Likewise in *Bhanwar Singh v. The State* I.L.R. 1953 Raj 567, it has been observed that the accused is entitled to the benefit of general or special exception where a reasonable doubt arises on the whole of the case against him. Where is here, it is found that the accused has acted in the exercise of his right of private defence, the court is bound to take cognizance of this fact, though the right of private defence, the court is bound to take cognizance of this fact, though the right of private defence was not specifically pleaded by him. It is thus apparent that the plea of self-defence can be raised for the first time before this court, if the facts on the record justify the same. I may also advert to a Division Bench decision of this Court reported in *Mod Singh v. The State* (supra), in which Wanchoo C.J., observed that although the accused might not have set up the right of private defence in so many words, he was entitled to the benefit of the right, if it was established from the prosecution evidence itself. In this case, the accused has not setup explicitly the right of private defence in so many words, but the case of private defence of the person of the accused is, in my opinion, established from the evidence of the prosecution itself and, particularly, from the statement of P.W. 10 Mohanchand, who has said that he noticed 4 injuries on the person of the accused. With this line of reasoning, I am of the opinion that the accused Shiv Dayal had the right of

private defence of his person.

16. In the result, I allow this appeal, set aside the order of learned Sessions Judge, Bikaner, dated July 25, 1968, and acquit the accused-appellant of the offence under Section 307, I.P.C. Fine, if paid, must be refunded to him. The accused is directed to be released forthwith, if he is not needed in any other case.

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