

Kaliya Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Feb-15-1984

Reported in : 1984CriLJ1236; 1984()WLN89

Judge : D.L. Mehta and; S.S. Byas, JJ.

Appellant : Kaliya

Respondent : State of Rajasthan

Judgement :

S.S. Byas, J.

1. Accused Kaliya Alias Jagdish was convicted under Section 302, I.P.C. and was sentenced to imprisonment for life with a fine of Rs. 1000/-, in default of the payment of fine to further undergo three months' rigorous imprisonment by the learned Sessions Judge, Jodhpur vide his judgment dated January 30, 1979. He has come up in appeal to challenge his conviction and sentence.

2. Briefly stated, the prosecution case, which is short and simple, is that deceased-victim Mahendra Singh Chaudhary was living with his wife PW 13 Smt. Meena, minor son Rajesh aged about 5 years and daughter Shashi aged about 2 years in a room in Hukam Niwas building situate in Sardarpura, Jodhpur. The deceased and the appellant were on inimical terms. At about 7.00 P. M. on February 28, 1978, the deceased, his wife and the two children left their house to go to a temple

as it was the birthday of Kumari Shashi. When the party covered a distance of 10-15 feet and reached near a peepal tree, the party saw the appellant and Narsingh Das (co-accused acquitted) standing there. Accused Kaliya gave a fist blow on the mouth of the deceased and thereafter grappled with him and felled him down. The appellant did not leave the deceased. Somehow or other, the deceased managed to get up and started running in a bid to save himself. The appellant and Narsingh Das ran after the deceased and caught him a few steps away. Narsingh Das caught hold the hands of the deceased and the appellant struck a number of blows to him with the knife he had with him. The victim received multiple injuries, one of which was in his abdomen. The victim fell down P. W. 13 Smt. Meena raised cries and many persons collected there but none could dare to intervene. Both the culprits thereafter made good their escape. There was profuse bleeding from the wounds of the victim and the clothes he was wearing got drenched with it. Smt. Meena also received some injuries when she tried to rescue her husband. She took her husband in a three-wheeler auto-rikshaw to Mahatma Gandhi Hospital, Jodhpur where he was admitted for treatment. One Chandmal on duty at the enquiry cell of the hospital informed police Sardarpura on telephone about the injured condition of the victim. The station house officer Badansingh (PW 17) immediately reached the hospital. Before he could reach there, the victim succumbed to the injuries. The station house officer found Smt. Meena there in the hospital and recorded her statement Ex. P. 16. Ex. P. 16 was treated as the first information report and a case under Section 302, I.P.C. against the accused-appellant and his associate Narsingh Das was registered. The inquest report of the victim's dead body was prepared. His blood-stained clothes were seized and sealed. The site of occurrence was inspected and blood-smeared soil was seized and sealed from there. The autopsy on the victim's dead body was conducted at about 12.15 P.M. on March 1, 1978 by Medical Jurist Dr. Prakash Dayal (PW 9). The doctor noticed the following ante-mortem injuries on the victim's dead body:

1. Incised wound 5 c.m. 1.2 c.m. on the chest on left side at the level of 6th rib and 6th intercostal space. The 6th rib had been partially cut at inferior border at the posto-chondal junction. It was 4.5 c.m. from the midline and was pleural cavity deep. There was about 70 to 100 cc blood in the left pleural cavity. The injury was oblique in direction.

2. Incised wound 2.5 c.m. 0.5 cm. and skin deep in the eppigestic region 1 cm. to the left of mid line. It was transversed.
3. Incised wound 3.5 c.m. 1.5 c.m. about 7.5 c.m. to the left of mid-line and 10.5 cm. above the umblicus. The peritonium had been perforated and the omuntum was protruding through the wound. It was oblique.
4. Incised wound 4.5 c.m. 1.2 c.m. about 12 c.m. from the mid-line and 5.5 c.m. below and lateral to injury No. 3. It was oblique. The omuntum was protruding and the peritonium had been performed.
5. Incised wound 4.3 c.m. 1.6 c.m. about 1.3 c.m. below the umbilicus in the mid line. A loop of intestine about 15 c.m. long was protruding through the wound and it had been perforated at two places about 1 cm. long. The wound was oblique. The mesentry had been perforated at the margin of the intestine at two sides about 0.7 c.m. long. There was about 500 cc blood in the peritonium cavity which was partially clotted.
6. Incised wound 2.5 c.m. 0.5 c.m. just to the right of injury No. 5. It was skin deep and longitudinal.
7. Incised wound 5.5 c.m. 2. c.m. and muscle deep on the antro lateral aspect of left thigh 14 cm. below the anterior superior Iliac spine. It was transversed.
8. Incised wound 1.0 c.m. 0.5 c.m. and skin deep on the anterior aspect of left thigh 2.5 cm. medial to injury No. 7. It was transversed.
9. Incised wound 3 c.m. 1 c.m. and skin deep 2.5 c.m. medial to injury No. 3. It was longitudinal.
10. Incised wound 2.5 c.m. 1 c.m. and muscle deep on the lateral aspect of left thigh 23 cm. below the crest of ileam. It was longitudinal.
11. Incised wound 2.5 c.m. 1 c.m. and muscle deep on the medial aspect of upper part of left thigh. It was longitudinel.

12. Incised wound 4.5 c.m. 0.7 cm. and skin deep on the left lateral aspect of chest at its middle. It was longitudinal.

13. Abrasion 1.5 c.m. 0.7 c.m. on the bridge of nose.

14. Lacerated wound 1 c.m. 0.7 c.m. and muscle deep on the lower lip on left side with fracture dislocation of the lateral-incisor and canine teeth of upper and lower jaw with laceration of the gum at the site.

15. Bruise 7 c.m. 3.5 c.m. on the lateral aspect of left arm at its middle.

3. Injuries Nos. 1 to 12 were stated to have been caused by a sharp edged weapon like knife while the remaining three injuries numbers 13 to 15 were stated to have been caused by some blunt impact on a hard surface during scuffle. In the opinion of Dr. Dayal, the cause of death was shock as a result of perforation of intestines and haemorrhage. He was also of the opinion that injury No. 5 was individually sufficient in the ordinary course of nature to cause the death. He was further of the opinion that death could also be the result of the cumulative effect of the remaining injuries. The postmortem examination report issued by him is Ex. P. 10. The injuries of Smt. Meena were also examined and an abrasion was found in her left wrist region. The injury report issued by him is Ex. P. 11. Both the culprits after committing the offences, absconded and could not be arrested for some days. On 15.3.1978, the police Sardarpura received a message on telephone from Banner that the accused-appellant and Narsingh Das were arrested there under section 109, Cr. P. C. Sub Inspector of Police Yashpal Singh (PW 11) went there and took both of them in police custody. He prepared the arrest memos. The blood stained clothes of the culprits were recovered in consequence of the information furnished by the Knife which was alleged to have been used in the commission of the murder, was also recovered in consequence of the information furnished by accused-appellant Kaliya. The blood-stained articles were sent for chemical examination and human blood was detected on most of them. Some injuries were found on the person of Kaliya at the time of his arrest. His injuries were examined at Jodhpur on 20.3.78 by Dr. B.K. Chaudhry (PW 10). The following eight abrasions were noticed on his person.

1. Abrasion (healed) 1.0 c.m. 2. on the left parietal region of the scalp.
2. Abrasion (healed) 1.0 c.m. 0. on the back of, the neck.
3. Abrasion (healed) 0.5 c.m. on the left shoulder.
4. Abrasion (healed) 0.5 c.m. 0.2 c.m. on right scapular region.
5. Abrasion (healed) 0.2 c.m. 0.2 c.m. on the right side of the chest.
6. Abrasion (healed) 0.5 c.m. 0.1 c.m. on the right index finger on the proximal tailings palmer aspect.
7. Abrasion (healed) 0.4 c.m. 0.2 c.m. on the back of left fore-arm at its middle 1/3.
8. Abrasion (healed) 3.0 c.m. 0.1 c.m. on the left knee joint anteriorly.

All the injuries were designated as simple caused by some blunt object. The duration of the injuries was found near about within 10-15 days at the time of examination. The injury report prepared by Dr. Chaudhary is Ex. P. 12. On the completion of investigation, the police submitted a challan against the accused appellant and his associate Narsingh Das in the Court of the Chief Judicial Magistrate, Jodhpur, who in his turn committed the case for trial to the Court of Session. The learned Sessions Judge framed a charge under section 302, against accused Kaliya and under section 302/34, I.P.C. against co-accused Narasingh Das, to which they pleaded not guilty and demanded the trial. Accused Narsingh Das pleaded alibi and stated that he was not at the scene of occurrence when the incident is alleged to have taken place. Accused Kaliya admitted his presence on the spot but denied to have committed the murder of victim. According to him, the victim made an assault on him with a knife. Both of them grappled with each other. When the deceased victim made an attempt to stab him, he snatched away the knife from his hand and struck some blows with it to the victim to save his own life. A right of private defence was thus claimed. During trial, the prosecution examined nine witnesses and filed some documents. In defence, the accused examined three witnesses. On the conclusion of trial, the learned Judge found no incriminating material against accused Narsingh Das. He was consequently

acquitted. The learned Judge found no truth or substance in the defence put forward by accused Kaliya. The charge against him was held duly proved. He was, therefore, convicted and sentenced as mentioned at the very outset. Aggrieved against his conviction and sentence, the accused-appellant has taken this appeal.

4. We have heard Shri B.R. Purohit, learned Counsel appearing for the appellant and Shri Niyazuddin Khan Public Prosecutor. We have also gone through the case file carefully.

5. In assailing the conviction, Shri Purohit raised two contentions i.e.

(1) the offence made out according to medical evidence is not that of murder under section 302 but under Section 304 part-I I.P.C.

2. the plea of the accused relating to the right of private defence was wrongly rejected by the court below.

6. In reply, the learned Public Prosecutor submitted that the injuries found on the victim's dead body were on vital parts. One of them was in the abdomen which according to doctor Dayal was sufficient in the ordinary course of nature to cause the death. The other injuries were also collectively sufficient to cause the death. As such, the offence made out is covered by Clause 3rdly and the offence would be, therefore, of murder under Section 302, I.P.C. It was also submitted that the right of private defence was not available to the appellant as he was an aggressor. We have taken the respective contentions into consideration.

7. PW 9 Dr. Dayal in his examination-in-chief deposed that injury No. 5 of the victim was sufficient in the ordinary course of nature to cause death. He further deposed that the remaining injuries were-also collectively sufficient to cause the death. In cross-examination he stated that in the ordinary course of nature the man would not survive after receiving injury No. 5 but only if expert treatment was made available immediately to him, he might have survived. Learned Counsel for the appellant, in view of this statement of Dr. Dayal, wants us to take out the offence from Section 300, I.P.C. But we are unable to accept his contention. Explanation (2) of Section 299 IPC clearly lays down that where death is caused

by bodily injury, the person who caused such bodily injury shall be deemed to have caused the death of him although by resorting to proper remedies and skillful treatment the death might have been prevented. We have given our anxious consideration to the testimony of Dr. Dayal. In our opinion, there is nothing in it to take out the case from Clause 3rdly of Section 300, I.P.C. If the bodily injury inflicted is sufficient in the ordinary course of nature to cause the death, clause 3rdly would at once spring up to cover the case within the ambit. As such, injury No. 5 is sufficient to bring the case within the four corners of Clause 3rdly. Apart from that, the remaining injuries were also collectively sufficient to cause the death. The victim was inflicted as many as 12 incised wounds on the different parts of his, body. Again, the intention of the accused to commit the victim's murder is apparent looking to the number of injuries, parts of the body where they were inflicted and the weapon namely the knife used. We are, therefore, of the opinion that the offence resulting from the death of the victim is that of murder unless the case is covered by any of the Exceptions enumerated in Section 300, I.P.C.

8. The principal contention is that the plea of right of private defence was wrongly dismissed by the trial Court. Since some injuries were found on the person of the appellant, the contention should be examined at some length. PW 10 Dr. Chaudhary, who examined the appellant on 20.3.78 while he was under arrest, found as many as 8 injuries on his person caused by some blunt object. One of these injuries was on the parietal region. The injuries were found healed and their duration was stated to be of 10-15 days. In cross-examination, Dr. Chaudhary admitted that in estimating the duration of injuries, a margin of a week on both the sides is possible. The occurrence took place on February 28, 1978. As such the injuries found on the person of appellant Kaliya could be of the same duration as that of the deceased-victim. The appellant was shown to Dr. Chaudhary during trial when his evidence was being recorded. A scar on the left parietal region of the appellant was noticed by him which according to him was fresh of nearly one to two months duration. He further admitted that abrasions do not leave permanent scar. He further admitted that injuries Nos. 4, 5 and 6 could have been caused by some pointed object like knife.

9. Keeping these injuries of the appellant in view, the evidence of the eyewitnesses may be examined in an attempt to find out whether a right of private defence was available to the accused. Five ocular witnesses were examined by the prosecution viz., PW 2 Ram Lai, PW 3 Sri Krishna, PW 5 Dalpat, PW 13 Smt. Meena and PW 16 Rajesh. The first three are hostile while Smt. Meena is the wife and Rajesh is the son of the deceased-victim. PW 3 denied his presence at the scene of occurrence and stated that he saw no occurrence taking place in his presence. The witness was declared hostile and was confronted with his police statement recorded under Section 161, Cr.P.C. during trial. He remained firm on his denial and despite cross-examination by prosecution, nothing could be elicited from him which may be helpful to it.

10. PW 2 Ram Lai deposed that at the time of incident he was sitting outside on the Chabutara of his house along with PW 3 Shri Krishna and PW 5 Dalpat. Shri Krishna went away to take food. All of a sudden he heard the noise and saw two persons fighting with each other. They were accused Kaliya and the deceased-victim Mahendra Singh. They were grappling with each other. Co-accused Narsingh Das was also present there. Mahendra Singh was landing blows to Kaliya. Kaliya was lying down. Mahendra Singh and his wife Smt. Meena were beating him. Thereafter Kaliya started beating Mahendra Singh with some weapon which he could not see. Smt. Meena raised cries. Kaliya got up and took to heels. Mahendra Singh got up and again fell down after covering some distance. As he was hostile to the prosecution, he was confronted with his police statement Ex. P.5. He refused to give the said statement during investigation. In cross-examination by the accused-appellant he admitted that deceased-victim Mahendra Singh had some weapon in his hand but he could not ascertain what that weapon was. PW 5 Dalpat deposed that he was sitting with Ram Lal (PW2) on the Chabutara. Deceased-victim Mahendra Singh and the appellant Kaliya grappled with each other. Mahendra Singh had knife with him and struck blows with it to Kaliya but he could not notice where that injury was inflicted. Kaliya but down and got up instantly. He snatched away the knife from Mahendra Singh and struck blows to Mahendra Singh with it. Co-accused Narsingh Das was also present there. Both the accused thereafter took to heels. He too was hostile to the prosecution and was confronted with his police statement Ex. P. 8.

11. The evidence of the above three witnesses thus speaks heavily against the prosecution, If what they stated in the trial court is accepted as true. It gives a complete defence to the accused-appellant. But looking to, the nature of injuries sustained by the victim, we are unable to accept their testimony at the face value.

12. We are then left with the evidence of PW 13 Smt. Meena and her son Rajesh (PW 16). Rajesh was a child hardly of 5 years at the time when he gave the statement in the trial Court. The learned Sessions Judge, after making a preliminary examination, found him a competent witness but no oath was administered to him. Though he denied that his father Mahendra Singh caused any injury to the appellant, there are various reasons to induce us that what he stated should not be depended upon. He is a child witness and can be easily tutored to state anything. He deposed that the accused-appellant struck a fist blow first of all to his father Mahendra Singh. When he was asked whether he stated this fact before police, he kept quiet and did not answer the question. Again, he was asked as to how he guessed that the appellant would pick up the quarrel with his father, the witness remained laughing and did not answer the question despite repeated efforts by the prosecution. It would be, therefore, dangerous to accept the testimony of this minor child of the age of 5 years, as gospel truth. The manner in which he recited the prosecution story gives an impression that he has been tutored to give a particular statement. He could not explain the injuries sustained by accused-appellant Kaliya.

13. PW 13 Smt. Meena is no doubt a highly interested witness. She deposed that she, her son Rajesh, daughter Ku. Shashi aged 3Vb years and husband Mahendra Singh (victim) left their house to go to a temple. Near a Peepal tree not far away from their house, they met the appellant and co-accused Narsingh Das. Kaliya struck a fist blow on her husband's mouth and thereafter grappled with him and felled him down. Accused Narsingh Das took up a stone to strike with it to Mahendra Singh. She intervened and Narsingh Das beat her. Mahendra Singh and Kaliya were fighting with each other. Mahendra Singh got up and tried to run away. Accused Kaliya followed him. Accused Narsingh Das caught hold of Mahendra Singh and accused Kaliya struck blows to him (Mahendra Singh) with a knife. Many persons collected there but none tried to resque her husband. Now,

according to her no injuries were caused to accused Kaliya. Further, according to her, Kaliya never fell down. She gave no explanation as to how appellant Kaliya sustained multiple injuries on his person. The failure on her part in explaining the injuries of accused Kaliya is a circumstance which cannot be lightly ignored or passed-over.

14. There are then some outstanding features in her testimony. She deposed that before some time of the occurrence, Rajesh (PW 16) told her and her husband that Kaliya was standing in the street to pick up the quarrel yet the deceased-victim and she dared to go out. The explanation that she took the entire matter easily and did not apprehend that accused Kaliya would make an assault, does not appeal to our reason. In cross-examination she admitted that there was no enmity between appellant Kaliya and his husband Mahendra Singh. It may be recalled that the prosecution case entirely rests on her testimony. Now, the various roles assigned to accused Narsingh Das by this witness relating to his catching hold of the victim, inciting and exhorting appellant Kaliya to stab the victim etc. have been disbelieved and discarded by the learned Sessions Judge. In view of this, when part of the prosecution story relating to one accused has been found untrue, prudence requires that the residue of the prosecution story relating to appellant Kaliya must be examined and scanned with extra care and caution, applying all the checks and balances available on record.

15. It is true that the burden to make out a plea of self defence rests on the accused. But the burden is not as heavy as it is on the prosecution, to prove the charge. The accused is not required, to prove his defence to the hilt. He can discharge the burden lying on him by showing a preponderance of probabilities in his favour. In the instant case, as discussed above, he has sustained multiple injuries on his person including some on vital parts like head and chest, probably some of which were caused by a knife, in the occurrence. The star witness Smt. Meena (PW 13) has furnished no explanation as to how he (accused) received injuries. The fact that the accused had injuries on his person, is an important circumstance which has to be taken into account in judging the plea of self defence. Though there is no universal rule that whenever injuries are found on the person of the accused, the plea of self defence must be accepted. It all depends

upon the circumstances of the case whether the accused was exercising the right of self defence and the non-explanation of the injuries on the person of accused by the eye-witness is an important circumstance probalizing this plea.

16. Here the accused was nearly a young lad of 19 years at the time of the commission of the offence vide his arrest memo Ex. P. 13 and the injury report Ex. P. 12. The incident took place on a busy thoroughfare. There was no bad blood between the victim and the appellant before the incident to prompt the latter to commit the murder. If he intended to finish the victim forever, he would have used knife at the very inception. He would have also not chosen a thoroughfare for striking the blows to the victim with a knife. He used the knife only after he had received injuries is apparent from the fact that the victim could not be in a position to strike blows to the accused after sustaining knife injuries. Taking all these factors into consideration it cannot be ruled out that the accused acted in self defence after when he sustained injuries.

17. Now, there are two aspects of the right of private defence. The first is that it gives a complete defence to the accused and thus totally absolves him from the penal consequences of his act. In order to make out an absolute and effective plea of private defence, one of the essential requirements is that the harm caused by the accused must not be more than it is necessary to inflict for the purpose of defence. This aspect is covered by the provisions of Sections 96 to 102 of the Penal Code. The second aspect is that if the right of private defence is there but harm, more than the necessary demanded by the given situation in a case, is caused then it does not constitute a plea of self defence but brings down the criminality to a lesser offence e.g. from that of manslaughter under Section 300 to that of culpable homicide not amounting to murder under Section 304, I.P.C. We may point out that if there is no right of private defence, there can be no question of exceeding that right. If the said right is there, no person exercising his right of private defence can inflict more harm on the assailant than is necessary for the purpose of his defence.

18. In considering whether in any particular case the person exercising his right of private defence exceeded his right and caused more harm than was necessary the

Court should place itself in a position of the accused under the particular circumstances and not judge the matter as a cool-by-stander or take a detached view of the matter. The accused is not expected to modulate his defence step by step. When the exigencies of the situation demands to retaliate by force, the accused is not expected to measure the strength of his blow nor can he be expected to strike a blow for a blow. In determining the question whether more harm than necessary has been caused, what is to be taken into consideration is the apprehension in the mind of the accused and not the actual assault. In the instant case, no doubt, the right of private defence was available to the accused. But the circumstances point out that he caused more harm than was necessary for the purpose of his defence. He inflicted as many as twelve incised wounds to the deceased-victim. In the given circumstances, we are of the opinion that the accused caused more harm than was necessary. In protecting himself, he exceeded the powers given to him by law. As such his case is covered by exception (2) of Section 300 and the offence made out is punishable under Section 304 Part I, I.P.C.

19. For the reasons discussed above, we are unable to maintain the conviction and sentence of the appellant under Section 302, I.P.C. The offence made out against him is that under Section 304 Part I, I.P.C

20. In the result, we partly allow the appeal of accused Kaliya and set aside his conviction and sentence under Section 302, I.P.C. He is convicted under Section 304 Part I, I.P.C. and is sentenced to ten years' rigorous imprisonment with a fine of Rs. 100/-, in default of the payment of fine to further undergo one month's like imprisonment.