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Raju Swami Vs. State

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Court : Delhi

Decided On : Jul-23-2013

Judge : Pradeep Nandrajog

Appellant : Raju Swami

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgement Reserved On: July 18, 2013 Judgement Delivered On: July 23, 2013 + CRL.A. 280/1998 RAJU JAMADAR Represented by: ..... Appellant Mr.Arun Kumar Srivastava, Advocate with Ms.Shalini Mediratta, Advocate. Ms.Saahila Lamba, Advocate, DHCLSC. versus STATE ..... Respondent Mr.Pawan Sharma, Standing Counsel (Crl.). Represented by: CRL.A. 507/1998 RAJU SWAMI Represented by: ..... Appellant Mr.Vikas Gupta, Advocate with Ms.Swati Sukla, Advocate. versus STATE Represented by: ..... Respondent Mr.Pawan Sharma, Standing Counsel (Crl.) CRL.A. 598/1999 KAMAL KISHORE Represented by: Crl.A.280/98 & conn.matters .... Appellant Mr.Arun Kumar Srivastava, Advocate with Ms.Shalini Mediratta, versus STATE Represented by: ..... Respondent Mr. Pawan Sharma, Standing Counsel (Crl.) CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MR. JUSTICE V. KAMESWAR RAO PRADEEP NANDRAJOG, J.

1. The three appellants, Raju Swami @ Raju Madrasi, Raju Jamadar and Kamal Kishore @ Kamo stand convicted for having committed an offence punishable

under Section 302/34 IPC along with co-accused Gaya Prasad.

2. As recorded in the order dated July 23, 2012 passed in Crl.A.No.177/2000 filed by Gaya Prasad, said appeal stood abated on account of death of Gaya Prasad.

3. Accordingly, the above captioned three appeals are being decided.

4. Inspector Ram Janam Singh PW-20A, working in P.S.Welcome, was handed over the Daily Diary entry recorded by the Duty Officer at around 9.53 AM on October 05, 1990 as per which it was recorded that a fight was taking place in the Janta Flats at G Block, Seelampur. As deposed to by Inspector Ram Janam Singh, on reaching the place of the incident he learnt that a victim had been removed to GTB Hospital. He reached the hospital and found that a person named Khalid had been brought to the casualty of the hospital at 10.15 AM by one Gurjeet Singh @ Lovely PW-18, where he was declared brought dead by Dr.Raman Tyagi. Anjum PW-3 was brought at the casualty of the hospital by Ct.Satpal at 11.15 AM and claimed to be an eye witness. Accordingly, he i.e. Inspector Ram Janam Singh recorded Anjums statement Ex.PW-3/A and made an endorsement, Ex.PW-20A/A at 12.45 noon, and despatched the rukka through Ct.Samay Singh who was accompanying him for FIR to be registered. On receipt of the rukka from Ct.Samay Singh , SI Purnima Singh PW-2 registered FIR No.187/1990, Ex.PW-2/A, at 1.00 PM.

5. In the statement Ex.PW-3/A, Anjum stated that he was residing at H.not C-112 (illegible due to paper being torn as record is old) Seelampur and at 9.30 AM in the company of his friend Asif he was present at the hotel of Aslam. His friend Khalid came with a Sikh boy named Gurjeet Singh and told him that in the morning a boy had beaten Gurjeet in Janta Colony and requested him to counsel the said boy, at that, accompanied by Asif, Khalid and Gurjeet he proceeded towards Janta Colony. They reached the colony at 9.45 AM but did not find the boy. As they were returning, 3/4 boys armed with a lathi and a knife attacked them from behind. As he looked back he saw Raju Madrasi with a knife in hand and Gaya Prasad, Kamo and Raju Jamadar with lathies in their hands. He knew them from before. Gaya and Kamo caught hold of Khalid and Raju Madrasi stabbed Khalid in the chest, armpit and back. Raju Jamadar hit him on his leg. He and Khalid fell down and

after assaulting them the assailants fled. Gurjeet took Khalid to the hospital but he died on the way. Asif ran and summoned the police.

6. After the FIR was registered, the Investigating Officer lifted control earth and blood stained earth from the scene of the crime. He summoned a photographer who photographed the scene of the crime. Rough site plan was prepared. Since four accused were named, they were apprehended. The usual story hereinafter. On a disclosure statement made by Raju Madrasi, a knife, stated to be the weapon of offence, was recovered and likewise at the instance of the other co-accused lathies were recovered. And these were cited in evidence as weapons of offence recovered pursuant to disclosure statements made by the accused.

7. Post mortem of deceased Khalid was conducted by Dr.Raman Tyagi who prepared the report Ex.PW-20/A, proved at the trial by Dr.Kishore Singh PW-20, since Dr.Raman Tyagi had left service at the mortuary of the hospital. The post mortem report shows three stab wounds. Two on the chest of Khalid, one of which punctured left lobe of the lung and the second traversing downwards cut an artery in the liver. The third stab wound was muscle deep in the right lumber region. A small incised wound, skin deep, in the right side of the abdomen was also noted. The cause of death was the usual: Cardiac shock due to haemorrhage. Injury No.1 and 2 were opined to be individually and collectively sufficient to cause death. Anjums MLC Ex.PW-20/B would reveal that the doctor who gave 8. him emergency treatment was of the opinion that there was a fracture of a bone in the left leg. Left leg of Anjum was X-rayed. In the unproved medical treatment record lying the judicial file one notices that a fracture of the bone in the left leg of Anjum was detected. It is apparent that Anjum had received a grievous injury. As per Ex.PW-3/A, Anjums statement, on basis whereof FIR was 9. registered, one finds the name of Gurjeet Singh and Asif, who expectedly would be eye witnesses. Not only their statements were recorded during investigation under Section 161 Cr.P.C. but also those of one Shahid, Akila and Tahir Ali who also claimed to be eye witnesses.

10. At the trial Asif was not examined as a witness. Thus, Anjum PW-3, Shahid Ali PW-9, Tahir Ali PW-10 and Akila PW-15 were examined.

11. Gurjeet Singh PW-18 turned hostile substantially, in that, he deposed that he could not identify the assailants. But stood by the version the deceased being attacked at the place where blood stained earth was picked up. Anjum, Shahid Ali, Akila and Tahir not only deposed to the incident but additionally implicated the four accused.

12. Believing their testimony, vide decision dated June 06, 1998, the four accused have been convicted for the offence punishable under Section 302/34 IPC pertaining to the death of Khalid and for the offence punishable under Section 325 IPC for the injury caused to Anjum. Vide order on sentence dated June 28, 1998, for the offence of murder, the accused have been sentenced to undergo imprisonment for life and for the offence punishable under Section 325 IPC they have been sentenced to undergo rigorous imprisonment for four years.

13. It is apparent that our task in appeal would be to note and analyse the testimonies of PW-3, PW-9, PW-10, PW-15 and PW-18.

14. At the forefront of the attack to the testimony of PW-9, PW-10 and PW-15 was the argument that these three persons were subsequently planted as witnesses. This argument was premised on the fact that in Ex.PW-3/A, the statement made by Anjum to the Investigating Officer, the names of said three persons as accompanying the deceased, Anjum and Gurjeet were not disclosed nor was it disclosed that they were present at the spot. As noted hereinabove, in Anjums statement Ex.PW-3/A, he simply states that when he and Asif were sitting in the hotel of Aslam, Gurjeet and deceased Khalid came to the hotel and spoke about an incident having taken place in the morning in which Gurjeet was beaten and all four i.e. Anjum, Asif, Khalid and Gurjeet went to the place where the incident had taken place in the morning.

15. Anjum PW-3 deposed in sync with his statement Ex.PW-3/A with variations such as (i) that all four accused were armed with lathies and while assaulting exhorted each other maro maro; enhe maro which are not to be found in the statement Ex.PW-3/A. (ii) That as a result of lathi blow received by him on his leg since he suffered a fracture he lost consciousness. (iii) That his statement was first recorded in the hospital and then at the police station. (iv) That during course of

the assault Raju Madrasi brought a chhuri from a nearby jhuggi and gave a stab blow to Khalid.

16. Shahid Ali PW-9 deposed that he was in his house in Welcome Colony when a boy told him at around 9.30 AM that a quarrel was taking place involving his brother Khalid. He reached G Block, Janta Colony where he saw Kamo and Gaya Prasad having caught hold of his brother and exhorting Raju Jamadar to use his lathi to ensure that Khalid should not flee. Gaya Prasad and Kamo exhorted Raju Madrasi by shouting mar sale ko chaku se, jo hoga dekha jayega at which Raju Madrasi inflicted knife blows on Khalid and Raju Jamadar hit Anjum on the leg as Anjum fled. He took Khalid to GTB Hospital where he died.

17. Tahir Ali PW-10 deposed that Khalid was his brother-in-law and in his presence Raju Jamadar hit Anjum on the leg and Raju Madrasi inflicted knife blows on Khalid.

18. Akila PW-15 deposed that she was the wife of Ahmad and present in her house at Janta Colony. She heard a noise between 9.00 AM and 10.00 AM. She saw the four accused and two other boys quarrel. She intervened and separated them. Two boys started walking away and suddenly accused Raju Madrasi inflicted blows on one boy. The other three accused were holding ballies in their hands.

19. Gurjeet Singh PW-18 deposed in sync with Anjums testimony in examination-in-chief save and except he said that he could not identify the boys who had assaulted the deceased.

20. There may be some merit in the argument that Shahid Ali PW-9 and Tahir Ali PW-10 could be planted witnesses evidenced by the fact that Shahid Ali is the brother of the deceased Khalid and Tahir Ali is his brotherin-law, and had they witnessed the incident, they would have accompanied the deceased to the hospital and would have met the Investigating Officer in the hospital itself. Their statements would have been recorded soon after the FIR was registered and not with an interval of time, additionally keeping in view the fact that in Anjums statement Ex.PW-3/A there is no mention that when the assault was taking place

the brother and the brother-in-law of Khalid came to the spot. Further, the injuries on the deceased would evidence that everything happened within a few seconds and thus Shahid Alis claim that a boy told him of a quarrel going on and he reaching the place of the occurrence and saw the continued quarrel is improbable. But this criticism may not apply to Akila who is a housewife living in a flat adjacent to the place of incident. However, we find that her claim of intervening in the fight between two boys on the one side and four on the other is not supported by the testimony of any other witness including the complainant Anjum. Besides, it would be difficult to believe that a lady would intervene to separate six boys fighting, three of whom are armed with lathies and one with a knife as claimed by the others.

21. That leaves us with the criticism of the testimony of Anjum. The criticism was with reference to the variations noted by us in paragraph 15 above.

22. Anjums MLC Ex.PW-20/B, shows that he has been brought to the hospital by Ct.Satpal at 11.15 AM. The contents of the MLC have not been challenged. Though not exhibited, we find from the medical treatment record of Anjum that he was sent for X-ray and a fracture in the left leg (due to record being old and hence damaged the bone which was fractured appears to be the fibula) was detected. Obviously, Anjum had received a grievous injury and was brought to the hospital by a police constable. He was 20 years old when the incident took place and could be overwhelmed by the unexpected events which took place. The unexhibited medical record would show that he was administered brufen, an analgesic drug/medicine. His statement Ex.PW-3/A recorded in said physical condition may lack the necessary details. Besides, three out of the four variations pointed out are minor and have to be ignored. The last i.e. as against his statement Ex.PW3/A which is the basis of the FIR where he claimed that Raju Madrasi was already armed with a knife and the other three were armed with lathis, his statement in court that during the course of the fight Raju Madrasi went to a nearby jhuggi and brought a knife with which he caused the fatal injuries to the deceased is relevant; not to discredit Anjum, but with respect to the nature of the offence committed. As we have already observed, when Anjums statement Ex.PW-3/A was recorded, he had been administered an analgesic drug and being in pain it could reasonably be

expected that he would not state the minor details of what happened. But while deposing in court, when composed, he remembered and hence narrated the minute details of the incident.

23. The testimony of Gurjeet Singh and Anjum would evidence that Gurjeet Singh had a problem with some boy, and probably it had to be one of the four accused. An altercation took place between Gurjeet and said boy in the morning. Nurturing revenge against the boy, Gurjeet, in the company of deceased Khalid went to search for Anjum and Asif and found them in the hostel of Aslam. As stated in Ex.PW-3/A, the four i.e. Anjum, Asif, Khalid and Gurjeet went to G Block, Janta Colony, Seelampur to teach the boy a lesson. In all probability they went as aggressors but were overwhelmed as they found that boy in the company of three others. It is a case where the predator went to the den of the prey and the prey became the predator and the predator became the prey. But one thing stands out : the deceased accompanied by three other persons, in all probability went to seek revenge and triggered the incident. It is in this context of the probability of the incident emerging from the circumstances, it assumes importance to note that while deposing in Court, Anjum PW-3 said that during the course of the fight Raju Madrasi went to a jhuggi and brought a knife to inflict injuries on Khalid.

24. In the decision reported as 1935 AC 46.Woolmington vs. The Director of Public Prosecutions, Viscount Sankey L.C. observed:When evidence of death and malice has been given (this is a question for the jury), the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all, the evidence are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

25. He further observed :Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to

his guilt; he is not bound to satisfy the jury of his innocence.... Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any stationary exception. If, at the end of and on the whole of the case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

26. A Full Bench of the Rangoon High Court, followed the aforesaid dictum of law, in the opinion reported as AIR 193.Rangoon 83 Emperor vs.Udamapala and held that the ratio therein is not in any way inconsistent with the law in British India, and that indeed the principles there laid down form valuable guide to the correct interpretation of Section 105 of the Evidence Act. The Full Bench laid down that even if the evidence adduced by the accused fails to prove the existence of circumstances bringing the case within the exception or exceptions pleaded, the accused is entitled to be acquitted if upon a consideration of the evidence as a whole the Court is left in a state of reasonable doubt as to whether the accused is or is not entitled to the benefit of the exception pleaded.

27. This decision has been followed in India consistently. In the decision reported as AIR 196.SC 60.K.M.Nanavati vs. State of Maharashtra, at page 616 and 617, it was observed:In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that Section the Courts shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such

circumstances as proved till they are disproved. XX XX XX XX XX XX This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients, of the offence with which the accused is charged; that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary then real. Indeed, there is no conflict at all.

28. In the decision reported as AIR 199.SC 145.Vijayee Singh & Ors. vs. State of UP, in para 25 of the opinion, it was observed as under:The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross examinations, probabilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a preponderance of probability in favour of his plea.

29. In the opinion reported as AIR 200.SC 290.Kashi Ram & Ors. vs. State of M.P. & Ors. in paragraph 23 and paragraph 24 it was observed as under: Section 105 of Evidence Act, 1872 provides that the burden of proving the existence of circumstances which would bring the act of the accused alleged to be an offence within the exercise of right of private defence is on him and the Court shall presume the absence of such circumstances. However, it must be borne in mind that the burden on the accused is not so heavy as it is on the prosecution. While the prosecution must prove the guilt of the accused to its hilt, that is, beyond any reasonable doubt, the accused has to satisfy the standard of a prudent man. If on the material available on record a preponderance of probabilities is raised which renders the plea taken by the accused plausible then the same should be accepted and in any case a benefit of doubt should deserve to be extended to the

accused (See Dahyabhai Chhaqnabhai Thakkar Vs . State of Gujarat AIR 196.SC 1563.State of Punjab Vs. Gurbux Singh and Ors. - (1995) Suppl. 3 SCC 734.Vijayee Singh Vs . State of U.P. - : AIR 199.SC 145.. In Vijayee Singh's case this Court emphasised the difference between a flimsy or fantastic plea taken by the defence which is to be rejected altogether and reasonable though incompletely proved plea which casts a genuine doubt on the prosecution version and would therefore indirectly succeed. "It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence which is reasonable".

24. The High Court was also not right in criticising and discarding availability of plea of self defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313 Cr. P.C. and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the crossexamination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr. P.C. or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh's case (supra). It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

30. The origin of the incident is therefore emerging, in the instant case, as follows: Gurjeet had a quarrel with a boy (whom he does not name), but has to be one out of the four accused. He went searching for extra hands to teach the boy a lesson. The first helping hand was extended to him by deceased Khalid. Two were not enough. They wanted more. Gurjeet and Khalid went to Anjum and Asif who agreed to extend a helping hand. All four went looking for the boy who had

troubled Gurjeet in the morning and teach him a lesson. To their misfortune they found that boy in the company of three others. The four were the four accused. A quarrel ensued. Raju Madrasi went to the jhuggi and got a knife and stabbed the deceased.

31. It is not a case where evidence emerges that the four accused came pre-mediated and were searching for the deceased. Circumstances probabalise that during a fight triggered by the deceased, Gurjeet and Asif, in the heat of passion Raju Madrasi picked up a knife and stabbed the deceased. It would thus be a case attracting exception-4 to Section 300 of the Penal Code thereby making out the offence committed to one of culpable homicide not amounting to murder.

32. Ordered accordingly.

33. We dispose of the three appeals altering the conviction of the appellants from that of having committed murder of deceased Khalid. Pertaining to the death of Khalid we convict the appellants for the offence of culpable homicide not amounting to murder; maintaining the conviction of the appellants for the offence punishable under Section 325 IPC, we sentence the appellants to undergo imprisonment for both offences for the period already undergone and the sentences would be deemed to run concurrently.

34. Copy of this order be sent to Superintendent, Central Jail Tihar.

35. TCR be returned. (PRADEEP NANDRAJOG) JUDGE (V. KAMESWAR RAO) JUDGE JULY 23 2013 skb

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