

(2013) 05 DEL CK 0291

In the Delhi High Court

Case No : Criminal A. No. 1462 of 2010

Albert Ezung

APPELLANT

Vs

State Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 29-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2013) 4 ILR Delhi 2746 : (2013) 3 JCC 1695

Hon'ble Judges : Sunita Gupta, J;Reva Khetrapal, J

Bench : Division Bench

Advocate : P.K. Singh, for the Appellant; Ritu Gauba, APP., for the Respondent

Final Decision : Partly Allowed

Judgement

Revakhetrpal, J.—Challenge in the present appeal is to the judgment dated 23rd October, 2010 and the order on sentence dated 29th October, 2010 convicting the Appellant Albert Ezung for the offence punishable u/s 302 IPC and sentencing him to life imprisonment and fine of Rs. 3,000/- and in default of payment of fine to undergo RI for 3 months. The brief facts of present case are as under:

The complainant Temjen Lungkumar (PW7), who was residing at E-114/115, Gandhi Nagar, Delhi with his friends Sedeivilie (PW10) and Ricky, had organized a party at his house on 9.9.2007 as he along with Sedeivilie and Ricky was leaving for his native place at Dimapur (Assam). The accused (Albert Ezung), his sister Lucy, Kezivilie (the deceased) and others were invited at the party. During the said party, Sedeivilie (PW10) was playing the guitar and others were dancing. The accused asked him to stop the guitar and to switch on the TV. Kezivilie objected to the same and a quarrel ensued between the two. This was at around 3.30 a.m. Both of them were pacified by other friends and shortly thereafter both went to the E-Block park, where Kezivilie told the accused that he would finish him. A scuffle ensued in the course of which the accused gave two blows with a knife on the chest of Kezivilie and ran away. Kezivilie was taken to Hindu Rao

Hospital by the complainant Temjen (PW7) and his friends Seyievio (PW9), Sedeivillie (PW10) and Asakho (DW1) where he was declared brought dead. The duty constable Gobind Singh (PW11) present at the Hindu Rao Hospital corroborates that the deceased was brought by 2 to 3 boys. SI Ved Singh (PW6) at about 7:10 AM on receipt of DD No 5A (EX PW 6/B) along with Constable Ranvir reached Hindu Rao Hospital and obtained MLC of the deceased and met Temjen (PW7). A complaint was lodged by the complainant Temjen (PW7) and on the complaint SI Ved Singh (PW 6) prepared the rukka and FIR (FIR No. 494/07) was registered thereon by Head constable Ranbir Singh at 9 AM. SI Ved Singh (PW6) then went to the place of occurrence i.e. E-Block Park, Gandhi Vihar. The complainant Temjen (PW7) also accompanied SI Ved Singh. In the presence of the complainant Temjen (PW7) and SI Ved Singh (PW6), Investigating Officer, Inspector Sushil Kumar lifted the blood stained hawai chappal/slippers, blood stained earth, earth control and blood sample which were sealed and seized vide memo Ex PW 6/C, Ex PW 6/D, Ex. PW 6/E and Ex. PW6/F. The accused Albert was arrested at the instance of the complainant Temjen (PW7). The accused got recovered the weapon of offence, viz., the knife (Ex PW 6/G) and after completion of investigation he was charge sheeted.

2. On 8.2.2008 the accused was charged for committing an offence punishable u/s 302 IPC to which he pleaded not guilty and claimed trial. The prosecution examined as many as 18 witnesses to bring home the guilt of the accused. The statement of the accused was recorded u/s 313 Cr.P.C. in which all the incriminating evidence was put to him wherein although he admitted that Temjen (PW7), Ricky and Sedeivillie (PW10) had organized a party in which Sedeivillie was playing the guitar, but denied that he had asked Sedeivillie (PW10) to stop the guitar and switch on the TV. The version of the incident given by the accused was that because he had called up Kelly, who was the girlfriend of PW7 Temjen (the complainant), Temjen got angry and came looking for him along with Kezivillie (the deceased). They attacked him and he tried to defend himself. He was not having any weapon; they were having knife. In the fight, Kezivillie received injuries. He had been falsely implicated because Kelly whom he had called was Temjen's girlfriend and Kezivillie was a friend of Temjen. He was not arrested at the instance of the complainant Temjen from near Samrat Hotel, Kingsway Camp as claimed by the prosecution nor he had made any disclosure statement, leading to the recovery of the knife; the police officer had asked him to sign one blank paper. Supplementary statement of the accused was recorded u/s 313 Cr.P.C. on 7.1.2010 in order to put to him the report of the doctor (Ex. PW17/A).

3. The only evidence adduced by the accused in his support was the evidence of DW1 Asakho Chachei. According to this witness, there was a party in the house of Temjen (PW7). The third floor of that house was occupied by the accused and his sister. At about 1.00 a.m., he went to the third floor to sleep. Fifteen minutes later, he heard a lot of noise from the first floor and came rushing down. In one of the rooms, everybody was shouting at the accused but he (DW1 Asakho

Chachei) was unable to get any reply from anyone as to what was wrong. When he asked the girlfriend of Temjen (PW7) (whose name the witness did not remember), she started crying. When he asked the accused, he told him that since he had called the girlfriend of Temjen (PW7) to the party, everybody was angry with him. At that time, Kezivilie told everybody to be quiet. Thereafter, Kezivilie asked the accused as to what was the problem. He (DW1 Asakho Chachei) tried to intervene but Kezivilie pushed him very hard due to which the accused got angry and "must have punched Kezivilie ". Thereafter, the accused and Kezivilie got involved in a scuffle. Accused suffered injury on his head due to fall and Kezivilie started punching him. Thereafter Kezivilie ran away threatening to bring his friends. He (DW1) told the accused to hide himself in a park in order to avoid conflict. After sometime, Kezivilie returned with his friends and in the meanwhile Temjen (PW7) returned after dropping home his girlfriend. Temjen (PW7) took Kezivilie to the park where accused was present. After sometime when they went to the park, they saw the accused and Kezivilie in a scuffle with each other and oozing blood. When they were separated, Kezivilie told them that the accused had stabbed him but accused stated that he had stabbed Kezivilie in self-defence. After sometime, Kezivilie suddenly collapsed.

4. We have heard Mr. P.K. Singh, Advocate on behalf of the Appellant and Ms. Ritu Gauba, learned counsel for the State and perused the evidence on record.

5. Learned counsel for the Appellant contended that the judgment of the learned trial court was wholly unsustainable and suffered from serious infirmities. The evidence of the prosecution had failed to bring home the guilt of the accused. All that it showed was that there was a scuffle and during this scuffle the deceased received injuries. The learned trial court in its judgment failed to bear in mind the fact that the scuffle was between the deceased who was armed and the accused who was unarmed. It was the deceased who had come to attack the accused because he was a friend of the complainant Temjen Lungkumer (PW7) whose girlfriend the accused had telephoned to invite her to the party. The learned trial court erred in placing implicit reliance upon the testimony of PW7 Temjen who was an interested witness and who had come to the spot i.e. the park with the deceased with the specific purpose of attacking the accused. On the plea of self-defence, however, learned counsel claimed that it is not the contention of the accused that he had done it in self-defence and this was purely the imagination of the learned trial court. He further contended that the burden was squarely upon the prosecution to establish the guilt of the accused. Reliance was placed by him in this regard on the judgment of the Supreme Court in V State of U.P. Vs. Ram Swarup and Another, . In particular, reliance was placed on the following observations made by the Court: (SC, page 1572, para 9)

9. The burden which rests on the prosecution to establish its case beyond a reasonable doubt is neither neutralised nor shifted because the accused pleads the right of private defence. The prosecution must discharge its initial traditional burden to establish the complicity of the accused and not until it does so can the

question arise whether the accused has acted in self-defence. This position, though often overlooked, would be easy to understand if it is appreciated that the Civil Law Rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him and by so doing the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the Court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded.

6. Learned counsel contended that it is a well settled proposition of law that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. He referred in this regard to the decisions of the Supreme Court i Sharad Birdhichand Sarda Vs. State of Maharashtra, and S.D. Soni Vs. State of Gujarat,

7. Per contra, learned counsel for the State contended that there was clear, cogent and convincing evidence on record to prove the guilt of the accused. She contended that three of the prosecution witnesses, namely, PW7 Temjen, PW9 Seyievio and PW10 Sedeivilie who were independent witnesses had supported the case of the prosecution in all material particulars. She sought to rebut the contention of the learned counsel for the Appellant that the plea of self-defence was purely a figment of imagination of the learned trial court by referring to certain suggestions put in this regard to PW7 Temjen Lungkumer by learned counsel of the accused in the course of his cross-examination, which needless to state were denied by the witness. Learned counsel for the State also invited the attention of this Court to the plea of self-defence taken by the Appellant in his statement recorded u/s 313 Cr.P.C. to the following effect:

Q.22: Why is this case against you?

A: Because I called up Kelly the girlfriend of Temjen for that reason Temjen get (sic. got) angry and came looking for me along with Kezivilie. They attacked me and I tried to defend myself. I was not having any weapon. They were having knife. In the fight he received injuries.

8. Learned counsel for the State further contended that the decisions relied upon by Mr. P.K. Singh, Advocate with regard to the burden of proof were of no avail in that it is beyond cavil that though the burden of proof does not shift, the onus most certainly does shift. The onus was upon the accused, though not as onerous, to prove by a preponderance of probabilities the defence taken by him, which he had squarely failed to discharge.

9. We first propose to deal with the contention of the Appellant's counsel that the testimony of PW7 Temjen, PW9 Seyievio and PW10 Sedeivilie who are the alleged eye-witnesses is wholly unreliable and that the said witnesses have

virtually denied the version set forth in the First Information Report. A look first at the testimony of PW7 Temjen Lungkumar on whose complaint the First Information Report was lodged. In his testimony, PW7 Temjen identified his signatures on the complaint Ex. PW7/A which he stated was in his handwriting. He deposed that during investigation he had showed the spot to the police. The police had marked some places at his instance, taken blood samples and seized the hawai chappals from the spot, i.e., the park. To be noted at this juncture that hereinafter in his testimony PW7 Temjen was hostile to the prosecution to the extent that he denied that he had in his supplementary statement (Ex. PW 7/B) stated that he had joined the investigation, that he remained with the Investigating Officer for searching the accused who was eventually arrested from the bus stand Kingsway Camp at his instance and that he was present when the accused made his voluntary statement recorded by the Investigating Officer and got recovered the weapon of offence, i.e., the knife from the bushes in the park near NDPL office, E-Block, Gandhi Vihar, Delhi and his blood stained clothes which he had subsequently washed and the seizure of the aforesaid articles was effected in his presence. In his testimony in Court he stated that he saw the accused at the police station when he gave his complaint to the SHO, PS Timarpur, and that he had identified the knife and the clothes of the accused, which he was wearing at the time of the incident, when the same were shown to him by the police at the police station. Although declared hostile and extensively cross-examined by the learned Addl. P.P. he denied all the suggestions put to him with regard to his participation in the investigation. He however admitted that he had stated before the police that there was a lot of blood spread on the spot and volunteered to state that the accused had stabbed Kezivilie with knife in the right side upper abdomen, which may be near chest also. He also identified the knife Ex. P1 and accepted as correct the suggestion put to him that Kezivilie had died in the hospital due to the injuries caused by the accused person.

10. It may be noted at this juncture that learned counsel for the accused laid great stress on the fact that in the course of his cross-examination, the witness stated that he had given his complaint to the SHO in PS Timarpur in the evening time on 9.9.2007. The contention of the learned counsel for the Appellant in this regard was that it was incongruous that whereas the first information of the crime was recorded in the evening of 9.9.2007, the FIR had been registered in the morning at 9.00 a.m. Learned counsel for the Appellant also laid great stress on the fact that PW7 Temjen in his cross-examination admitted that the fact of plugging out of the TV and taking it to another room of the accused was not mentioned in his complaint Ex. PW7/A. We shall advert to these aspects of the matter a little later on, though at this stage we may note the answer to one of the suggestions put in the course of cross-examination to this witness which shows that the accused had in fact taken the plea of self-defence before the trial court:

It is wrong to suggest that the deceased casually came to the park with my kitchen knife and intended to stab the accused Albert.

11. The version of the incident as given by PW9 Seyievio Sachu is as follows. He deposed that at the time of the incident he was residing at D-289, IInd Floor, Gandhi Vihar, Delhi. Kezivilie (deceased) was also residing with him at the said place. On 9.9.2007, Temjen (PW7) had organized a farewell party at his house and he along with Kezivilie reached the house of Temjen in the early morning to attend the farewell party. After attending the said party, he came back to his room and in the morning Kezivilie came to his room and informed him that some misunderstanding had taken place in the party and he again went to the place of the party. He along with Asakho Chachei, Sedeivilie and Ricky was coming down from the party place and they were on the stairs when they heard the noise of shouting from a nearby park. They ran towards the park and saw the accused and Kezivilie present there. Kezivilie was seen by him in a "stabbed condition" and blood was oozing out. Kezivilie informed him (PW9) that the accused had a knife in his hand and he had stabbed him. He further deposed that he caught hold of the accused by his hand. The accused was having knife in his hand. Someone came from behind at that time and pushed the accused. Thereafter, he took Kezivilie to one side, but Kezivilie collapsed and ultimately died on the way to Hindu Rao Hospital.

12. PW10 Sedeivilie gave a somewhat similar version of the incident as that given by PW7 Temjen. He stated that he was playing the guitar at the farewell party organized by Temjen and they were all singing and dancing when the accused asked him to stop the guitar and switch on the TV. This led to a verbal duel in which Kezivilie supported him (Sedeivilie) and thereafter the matter was sorted out. After sometime, he heard a shouting in the park and he alongwith Seyievio and Asakho Chachei rushed to the park. It was in the early morning but it was dark. He saw that the accused and Kezivilie were grappling with each other and Temjen (PW7) was trying to separate them. Seyievio (PW9) was also trying to separate them and when they were separated, he saw Kezivilie was already injured and blood was oozing out from his front side. They took the injured to the Hindu Rao Hospital where he was declared brought dead. Nothing was elicited from this witness in his cross-examination to discredit his testimony in any manner.

13. From the aforesaid evidence on record, two things emerge quite clearly. The first is that there was a farewell party at the house of the complainant PW7 Temjen which was attended apart from others by the accused and the deceased. The second is that undoubtedly a quarrel took place between the accused and the deceased at the party. The prosecution would have us believe that the genesis of the quarrel was a dispute between the accused and the deceased as to whether Sedeivilie should continue to play the guitar or the TV should be switched on. It is the case of the defence on the other hand that the genesis of the dispute was that the accused had made a call to the girlfriend of the complainant (PW7 Temjen) in response to which she came to the party. This was not appreciated by the complainant leading to a dispute between the accused and Kezivilie who was a friend of the complainant Temjen (PW7). We are inclined

to believe the latter version for the reason that PW7 Temjen himself in his testimony stated:

At that time accused Albert came to me and asked me my reaction in case he call my girl friend next morning. The name of my girlfriend was Kelly and on the next moment I was shocked to see he opened the door and Kelly was inside. Objected to by Ld. Defence counsel. Thereafter I entered another room I saw Kezivilie, accused, Ricky and Asakho. I saw that Ricky and Asakho were separating Kezivilie and accused Albert as they had been fighting and had injury marks on them. I then requested both accused and Kezivilie to maintain calm or lest (sic. else) leave my place. I then left my flat and went outside to the house of Kelly but unable to contact her on phone, I went in a park nearby and sat there. In the meanwhile, Kezivilie was coming outside my house and he also came to park and sat besides me. Thereafter accused Albert came and started hurling abuses on Kezivilie. As I tried to intervene, accused Albert pushed me and took out a knife and stabbed Kezivilie....

14. Undeniably, PW7 Temjen was present at the time of the incident and also took the deceased to the hospital and, therefore, is the most material witness. We are however not inclined to believe the testimony of this witness with regard to the real reason for the unfortunate incident for, in our opinion, even assuming there was a dispute about the playing of the TV or the guitar, it was too trivial a matter to lead to the commission of the offence. The real reason as is borne out by the testimony of PW7 Temjen himself appears to be the call given by the accused to the girlfriend of PW7 inviting her to the party and her acceptance of the said invitation. This must have irked and annoyed PW7 Temjen and his friends, one of whom was the deceased Kezivilie, resulting in an aftermath which possibly none of them had imagined. There is, however, no manner of doubt in our mind that Kezivilie met with an unfortunate end at the hands of the accused and this is also borne out by the testimonies of PW9 Seyievio and PW10 Sedeivillie who were natural witnesses to the occurrence and who tried to intervene in the scuffle which was taking place and who had seen Kezivilie in "stabbed condition" with blood oozing out. If the said witnesses are to be believed, they tried to intervene unsuccessfully while the accused and the deceased were grappling with each other and had subsequently taken the injured Kezivilie to the hospital where he was declared brought dead.

15. The medical evidence on record, in our opinion, also lends authenticity to the case of the prosecution. According to the postmortem report Ex. PW13/A, death of the deceased was due to haemorrhage and shock consequent to the injuries caused by a sharp-edged weapon. External injury No. 1 and its corresponding internal injuries were found to be sufficient to cause death in the ordinary course of nature. The body of the deceased was having two stab wounds, one stab wound of 2.1 cm x 0.9 cm x 2 cm deep and another stab wound of 0.9 cm x 0.7 cm x 1.5 cm. It is also borne out by the report Ex. PW17/A that such injuries were possible by means of knife Ex. PW1 produced by the Investigating Officer

for the examination of the expert. Thus, the medical evidence fully corroborates and confirms the testimony of the prosecution witnesses.

16. PW15 Ms. Anita Chahari examined 8 exhibits received by FSL Rohini and the FSL expert opinion (Ex. PW15/A and 15/B) further corroborates the case of the prosecution that blood was detected on the exhibits including knife and half pant of the accused along with other articles which were lifted from the spot, such as blood stained earth and chappals of the deceased. No explanation was given by the accused about the blood appearing on his half pants which were worn by him at the time of the occurrence or on the other articles. Thus, the learned trial court rightly concluded that the ocular, medical and scientific evidence on record completely corroborates the case of the prosecution and establishes the guilt of the accused.

17. The basal question which arises in the present case is whether or not the Appellant can be held guilty of offence punishable u/s 302 IPC or whether keeping in view the fact that the occurrence had taken place without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel, the Appellant is entitled to the benefit of Exception 4 of Section 300 of the Indian Penal Code.

18. From the facts of the instant case, in our view, it cannot be said that the Appellant had the intention to inflict such injuries as would cause the death of Kezivilie. There was no previous enmity between the Appellant and Kezivilie and as a matter of fact they were good friends and Kezivilie was therefore an invitee to the party of the Appellant. Things turned sour for no rhyme or reason. Ostensibly, the cause of dispute was whether Sedeivilie (PW10) should continue to play the guitar or whether he should stop and the television installed in the room should be switched on. However, if PW7 Temjen Lungkumer is to be believed, an additional reason had arisen for quarrel at the party. The deceased had of his own accord invited the girlfriend of PW7 Temjen, namely, Kelly and this had irked and annoyed PW7 and his friends including Kezivilie. Be that as it may, there was a scuffle at the party. Stage two of the quarrel arose when the party came to an abrupt end. If PW7 is to be believed, the accused came to the park where he and Kezivilie were sitting and started hurling abuses on Kezivilie. As he (PW7) tried to intervene, the accused pushed him and took out a knife and stabbed Kezivilie on the right upper side of his abdomen. On the other hand, if the version of DW1 Asakho Chachei is to be believed, a dispute had broken out at the party with everybody shouting at the accused. He saw that the girlfriend of Temjen was weeping and the accused and Kezivilie had got involved in a scuffle. The accused hit Kezivilie on his head and on his falling started punching him. Thereafter, Kezivilie ran away threatening to bring his friends. The accused also left the place. After sometime, Kezivilie returned and PW7 Temjen took him to the park where the accused was present. A second scuffle took place between the accused and Kezivilie in the course of which the accused stabbed Kezivilie who suddenly collapsed.

19. It is apparent from the aforesaid that as per both versions, a quarrel had suddenly erupted between the accused and the deceased, who were young boys in the heat of passion. The quarrel had all the trappings of a "sudden fight" in which the accused who was armed with a knife caused injuries to the deceased. It was dark at that time and possibly on account of the darkness the injuries landed on a vital part of the body of the deceased. Two blows were inflicted by the accused only one of which viz., Injury No. 1 was opined to be sufficient in the ordinary course of nature to cause death. The manner of infliction of these injuries with all the attendant circumstances cannot be termed to be either cruel or unusual. The accused had not premeditated to cause the death of the deceased. His intention at best could be to teach him a lesson.

20. On an overall conspectus of the facts and circumstances, we are, therefore, of the opinion that all ingredients of Exception 4 to Section 300 are clearly attracted [See Sukhbir Singh Vs. State of Haryana, State of Himachal Pradesh Vs. Wazir Chand and Others, and Prakash Chand Vs. State of H.P., In the last case, the law with regard to Exception 4 to Section 300 was succinctly summed up as follows:

6. For bringing in operation of Exception 4 to Section 300 IPC it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

21. The inevitable conclusion is that we hold that the offence is not covered by Section 302 IPC. We, therefore, alter the conviction of the Appellant to one u/s 304, Part I IPC. Custodial sentence of 8 years with fine of Rs. 3,000/- in default to undergo Rigorous Imprisonment for three months would, in our opinion, meet the ends of justice. The accused shall be entitled to benefit of period of remission and period undergone in accordance with law. The appeal is partially allowed in the above terms.