

(1994) 12 KAR CK 0033

In the Karnataka High Court

Case No : Criminal Appeal s 732 of 1990 and 74 and 75 of 1991

Kempanna

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 15-12-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 307, 96

Citation : (1995) ILR (Kar) 1079 : (1995) 4 KarLJ 180

Hon'ble Judges : Narayan, J;Mirdhe, J

Bench : Division Bench

Advocate : C.H. Hanumantharaya, for the Appellant; C.H. Jadhav, Addl. S.P.P., for the Respondent

Final Decision : Dismissed

Judgement

Mirdhe, J.—Criminal Appeal No. 732 of 1990 is preferred by the appellant who was the accused in the trial Court against the judgment dated 15.10.1990 passed by the Principal Sessions Judge, Kolar in S.C. No. 1 of 1986 convicting the appellant-accused for the offences punishable under Sections 324 and 326 of the Indian Penal Code and sentencing to undergo R.I. for one year and to pay a fine of Rs. 500/-, in default to R.I. for two months for the offence u/s 324 IPC and sentencing to R.I. for two years and to pay a fine of Rs. 2000/-, in default, to R.I. for six months for the offence u/s 326 IPC.

Criminal Appeal No. 74 of 1991 is preferred by the State against the judgment of the Sessions Judge, Kolar, in S.C.,No. 1 of 1986 praying for enhancing the sentence awarded to the respondent-accused for the offences punishable under Sections/324 and 326 IPC.

Criminal Appeal No. 75 of 1991 is preferred by the State against the very judgment passed by the Sessions Judge, Kolar, in S.C.No. 1 of 1986 acquitting the respondent-accused of the offence punishable u/s 307 IPC.

2. Since all these 3 Appeals relate against the same judgment passed by the learned Sessions Judge, Kolar, we have heard these Appeals together and we are passing common order.

3. We have heard the learned Counsel for the accused-appellant Sri C.H. Hanumantharaya and also the learned Additional State Public Prosecutor, Sri C.H. Jadhav fully in this case and perused the records of the case.

4. The case of the prosecution is as follows:

PW.1 Leelamma is the wife of PW.10 Nanjundaiah. The accused Kempanna is the son of senior uncle of PW.10 Nanjundaiah. The lands of PW.10 and the accused are adjoining each other. There are some eucalyptus trees in the lands of the accused as well as PW.10. There was dispute between the accused and PW.10 regarding some of the eucalyptus trees. PW.10 was claiming that the said trees were coming in his land whereas the accused was claiming that the said trees were coming in his land. On 9.4.1985, PW.1-Leelamma was engaged in plucking chillies in the land of PW.10 along with PW.6-Thangamani and other labourers since the morning of that day. PW.2 Badigappa who was engaged to remove the stumps of eucalyptus trees was attending to his work in the land of PW.10. At about 2 p.m. the accused Kempanna went towards K.G.F. on a Suvega moped from Kammasandra on the road adjoining the land. He returned from K.G.F. by about 3.30 p.m. and on seeing PW.2 Badigappa uprooting the stumps of an eucalyptus tree in the land, he parked the vehicle by the side of the road and went near the place where PW.2 was attending to the work of uprooting the stumps of an eucalyptus tree in the land and questioned his authority to uproot the same. When the talk was going on between the accused and PW.2, PW.1 Leelamma who was working with her labourers in the land came there in order to see as what it was about. On seeing PW.1, the accused went away, but returned soon thereafter on his vehicle to the spot again with his gun - MO.5 and told PWs.1 and 2 who were on the spot that the said stump belongs to him and they should not uproot it. PW.1 replied that they had been taking the usufructs of the said trees year after year and that after uprooting the said stump, it will be allowed to lie there only and that the accused can have talks in this regard with PW.10. But the accused told them that he would kill them and he aimed MO.5 at them and fired shots from MO.5, as a result, PWs 1 and 2 sustained injuries to their persons. PW.1 started running and the accused tried to chase her and in that chase, he fell upside down into a water tank and sustained injury to his head. Thereafter, both PWs.1 and 2 were taken to the pump-house in the land by PW.6 and others, where the wounds of PWs.1 and 2 were bandaged. Thereafter, they were brought to the road for being taken to K.G.F. for treatment, and then PW.1 lodged a complaint to the Police and the Police registered a case and investigated into the case and after completion of investigation, they filed the charge sheet against the accused.

5. It is also relevant to note that the accused also filed a complaint against PW.1 and that came to be registered in the same police station and the police

investigated into the case and filed the charge sheet against PW.1. PW.1 was tried by the Sessions Court, Kolar, and she has been acquitted of the same in S.C.No. 1 of 1985.

6. It is the case of the prosecution that PWs.1 and 2 were injured due to the firing of the gun by the accused-Kempanna. The prosecution has relied on the evidence of PWs.1, 2 and 6 to prove its case that it is the accused who fired from his gun and caused injuries to PWs.1 and 2. The case of the accused is as he has stated in his statement u/s 313 Cr.P.C. as follows:

7. The evidence of PWs.1, 2 and 6 goes to show that it is the accused who caused the injuries to them with his gun - MO.5. The medical evidence consisting of PWs.3, 7 and 11 corroborates the case of the prosecution that PWs.1 and 2 had sustained injuries. PW.8's evidence discloses that the shot was fired from MO.5 and the injuries sustained by PWs.1 and 2 are the gun shot injuries. The prosecution has proved beyond reasonable doubt that PWs.1 and 2 sustained injuries from the gun shot. The evidence of PWs.1, 2 and 6 proves that it is the accused who fired the gun MO.5 in that incident. The defence taken by the accused also shows that the accused is not disputing his presence on the spot. It is also not disputed by the accused in his statement u/s 313 Cr.P.C. that the shot was fired through the gun, but his case is it was an accidental fire. We are aware that the statement of the accused u/s 313 Cr.P.C. cannot be used for filling up the lacuna in the prosecution case. But at the same time, the Court can look to the defence taken by the accused to see whether it probabalises the case of the prosecution. In this case, from the defence taken by the accused u/s 313 Cr.P.C., it is apparent that the accused was present on the spot and due to the shot fired from MO.5, PWs.1 and 2 sustained injuries.

8. The Points that are required to be considered in this Case are as follows:

1. Whether the accused defence that the shot was fired accidentally by MO.5, has been rightly rejected by the trial Court?

2. Whether in view of the injury sustained by the accused on his person in that accident, he is entitled to the benefit of Section 96 of IPC i.e., right of private defence?

3. Whether the trial Court was justified in acquitting the accused of the offence punishable u/s 307 IPC?

4. Whether the injuries sustained by PW.1 are grievous in nature? and

5. Whether the punishment awarded to the accused is commensurate with the offences proved against him?

9. In view of the evidence that is placed by the prosecution on record consisting the evidence of PWs.1, 2 and 6 and the medical evidence of PWs.3, 7 and 11 and the Fire Arms Expert's evidence PW.8, it is proved beyond reasonable doubt that the injuries sustained by PWs.1 and 2 were due to the shot from MO. 5 which

was in the hand of the accused at that time. The case of the accused is that the fire was due to accident. He has tried to explain it in his statement u/s 313 Cr.P.C. that PW.1 tried to pull the belt of the gun which was on his shoulder and at that time he made the aim of the gun towards the ground and in that process the gun went off. This defence is not the defence that found place in the complaint of the accused filed against PW.1. The complaint is at Ex.P17 (a) and it reads as follows:

There is the report of PW.8 who has stated that MO.5 is provided with a trigger guard and that will prevent any accidental discharge or it will protect the trigger from any external object coming in contact with the trigger. It is also provided with a safety lock and whenever the gun is loaded, the safety mechanism of the gun will be in a locked position. It is further clear from his evidence that if the shooter intend to fire from the gun, then he has to push the safety catch in the forward direction and then he has to press the trigger and then only MO.5 will discharge the shot. It is not the case of the accused Kempanna that the safety catch of the gun was not locked. Therefore, it is difficult to accept the defence of the accused that the shot was an accidental shot. In view of the mechanism of MO.5, it could be used only when the safety catch is pushed forward and thereafter the trigger is pressed. In view of the evidence of PW.8 and the fact that the accused has not mentioned about the fire being accidental fire in Ex.P17(a), we think that the trial Court was justified in rejecting the version put by the accused that the shot from the gun was an accidental shot.

10. The learned Counsel for the accused submits that the evidence led by the prosecution itself goes to show that the accused had sustained injuries and the prosecution had failed to explain those injuries. His submission that in view of the failure of the prosecution to explain those injuries, the accused is entitled to a benefit of doubt in this case. It is also his contention that though the accused might not have been able to prove the defence taken by him, still from the circumstances emerging from the prosecution evidence in this case, it can be held that the accused fired the shot from MO.5 in a sheer self defence as he was being assaulted by PW.1 with a spade. PW.7 the Doctor's evidence discloses that the accused had also sustained injuries when he was produced before PW.7 for his examination. The nature of the injury sustained by him is simple. He had only one incised wound on the scalp of his head. PW.1 has stated in her evidence that after firing shot from MO.5, the accused ran away and then he fell into the water tank in their land and sustained injuries on his head. This version that the accused sustained the injuries while he was running away after the incident, is not mentioned in the complaint Ex.P1. This is a material improvement made by PW.1 in her evidence. Therefore, the version of PW.1 that the accused sustained injuries while running away after the incident cannot be accepted. It also cannot be disputed in this case that the defence of the accused that it is PW.1 who caused the injuries with her spade on his head is not accepted by the Court as the same Court has acquitted PW-1 of the offence of assaulting the accused with the spade in S.C.No. 1 of 1986. In view of these features of the case, whether

the prosecution was required at all to explain the injuries in this case - has been considered in the case of Hare Krishna Singh and Others Vs. State of Bihar, The Supreme Court has observed as follows:

"The obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused."

The Supreme Court has further said:

"Where all the eye-witnesses have stated that the accused had fired on the deceased as a result of which he died and the prosecution witnesses have been believed by both the lower Courts, the prosecution would not be obliged to account for the injury sustained by the accused and the failure of the prosecution to give a reasonable explanation of the injury would not go against or throw any doubt on the prosecution case."

11. The evidence of PWs.1, 2 and 6 is fully corroborated by the medical evidence given by PWs.3, 7 and 11 and the evidence of Forensic Expert PW.8 and it is also a fact in this case that PW.1 who was prosecuted on the allegation that it is she who assaulted the accused with the spade has been acquitted in the Sessions Case. Therefore, the prosecution is not required to explain the injury that is sustained by the accused since the prosecution has proved beyond reasonable doubt by the evidence of PWs.1, 2, 3, 6, 7, 8 and 11 the guilt of the accused. Therefore, the case of the prosecution cannot be disbelieved merely on the ground the prosecution has not come forward with any explanation regarding the injury sustained by the accused. The learned Counsel for the accused further argued that in view of the fact that the accused had sustained injuries in the same incident, he went and filed a complaint. The learned Counsel for the accused submitted from the circumstances that since the accused sustained an injury in the same incident and that the spade was also found there, the possibility of the accused having fired the gun MO.5 in his self defense cannot be ruled out in this case. The self defense need not be specifically pleaded in the case. The accused is entitled to take up the plea of defence that is available to him from circumstance available in the evidence of the prosecution witnesses. But his defence of self defense will not be acceptable because he had come to

the spot armed with MO.5 - gun and there were only two persons at that time PWs.1 and 2. It is also in the evidence that some workers were working in the land also. When the accused had come with a loaded gun as against unarmed persons, it is difficult to accept his version that he fired the gun in his self defense.

12. Another argument of the defence that is required to be dealt with at this stage is that the offence alleged against the accused will fall not u/s 326 IPC, but it will fall u/s 325 IPC. In attracting the provisions of Section 325 IPC, the accused must have caused grievous hurt on grave and sudden provocation. The accused's evidence discloses that accused saw PW.2 uprooting the stump of the tree and then he went and questioned him and there appears to be some exchange of words between PWs.1 and 2 on one hand and the accused on the other. That cannot be said to be a grave provocation so as to make the accused to use his gun. We are therefore of the opinion even u/s 325, the offence will not fall.

13. The next point is whether the trial Court was justified in acquitting the accused of the offence punishable u/s 307 IPC. In this regard, the grievance of the State which has preferred the State Appeal - the learned Additional State Public Prosecutor submitted that looking to the fact that the accused came armed with loaded gun and caused injuries to PWs,1 and 2, the intention to cause the murder of PW.1 is manifest. But this argument cannot be accepted for reason that if the accused had any intention to cause the death of either PWs. 1 and 2 he would have aimed and fixed the gun at their vital parts. But the injuries are caused 19 their non-vital parts of their bodies. Looking to the distance at which PWs.1 and 2 were standing, it would not have been difficult for the accused to take an aim at their vital parts and finished them off if he had such intention. Hence, we are of the opinion that the trial Court was justified in acquitting the accused of the offence punishable u/s 307 IPC.

14. The next contention to be considered is that the offences alleged against the accused may not fall u/s 326 IPC. His contention is that missing of the segment of the bone of PW.1 cannot be a ground to hold that the offence falls u/s 326 IPC. The evidence of PWs.7 and 11 discloses that the x-ray was taken of the injury of PW.1 and it discloses that the segment of the bone was missing. The Supreme Court in a Ruling reported in the Case of HORILAL AND ANR. v. STATE OF UTTAR PRADESH 1970 14 MLJ has held as follows:

"To amount to a fracture, it is not necessary that a bone should go through and through or that the crack in the bone must extend from the outer to the inner surface or there should be displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone or there is rupture or fissure in it, it would amount to a fracture within the meaning of Section 320(7). Where the injuries are found to be bone deep and as cutting the underlying bone and the bones and the tibia bone shaft have been cut, these would certainly amount to fractures, as required by Section 320(7), Indian Penal Code. When the medical

evidence also is clear that the injuries which are inflicted by a dangerous weapon, such as a kanta are grievous, the conviction u/s 326, Indian Penal Code is perfectly justified."

Therefore, in view of the medical evidence on record in this case which clearly goes to show that the segment of bone of PW.1 was missing and the fact as disclosed from the evidence of the prosecution that PW.1 was an inpatient in the Bowring Hospital from 12.4.1985 to 14.6.1985 i.e., for more than 21 days, we think the trial Court was justified in convicting the accused for the offence punishable u/s 326 IPC.

15. Now coming to the question of punishment, the trial Court has awarded R.I. for two years and a fine of Rs. 2000/- for the offence u/s 326 IPC and for R.I. for one year and a fine of Rs. 500/- for the offence u/s 324 IPC. The trial Court has taken into consideration the age of the accused and also the fact that there are no previous convictions against the accused and it has awarded the sentence. The sentence awarded to the accused in view of the circumstances of the case that he went armed with a gun and fired the gun causing grievous injuries to PW.1 and simple injuries to PW.2 appears adequate and just. No grounds to interfere with that portion of the judgment also.

16. At the time of passing of the judgment by the trial Court, the age of the accused was 63 years. He is a retired school teacher. There are no previous convictions against him. But the facts and circumstances of the case do not permit us to reduce the sentence awarded to him by the trial Court. The accused will be 67 years of age as on this day. Looking to his age and the fact that he is a retired school teacher, we feel that the Government should consider sympathetically the application of the accused if filed by him for remission of the sentence. Hence, we proceed to pass the following Order:

17. All the Appeals are dismissed confirming the judgment of the trial Court. We direct the copy of this Judgment be sent to the Chief Secretary, Government of Karnataka, Vidhana Soudha, Bangalore, for necessary information and action in this case if the accused files an application for remission of sentence.