

(2010) 02 CHH CK 0010
In the Chhattisgarh High Court

State of Madhya Pradesh (now Chhattisgarh)

APPELLANT

Vs

Nivedanlal

RESPONDENT

Date of Decision : 23-02-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 100, 102, 105, 302, 96

Citation : (2010) 2 CGLJ 473 : (2010) CriLJ 2647

Hon'ble Judges : Rajeev Gupta, C.J.; Sunil Kumar Sinha, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—Being aggrieved with the judgment of acquittal dated 16th of September, 1988 passed in Sessions trial No. 23/88 by the Sessions Judge, Rajnandgaon, the State has filed this appeal with the leave of the Court.

2. The facts, briefly stated, are as under:

Deceased-Alopabai was aged about 50 years. She was residing in village Jhitiya. Respondent-Nivedanlal was also a resident of village Jhitiya. Their houses were adjacent to each other. Alopabai was the Aunt of the respondent. She belonged to one branch of the family, whereas respondent belonged to another branch. There was partition between the two branches, and they were residing separately, however, the respondent was raising claim over certain area of land which has fallen in the share of the deceased. There was a criminal case between the parties and the relations between them were not cordial. The incident took place at about 11.30 a. m. on 19-10-1987 at an open place when the respondent assaulted the deceased by an axe. According to the post-mortem report (Ex. P/8 proved by Dr. A. K. Gupta P.W. 11), the deceased received the following injuries:

i) Peeling off right side of muscle of right lower jaw at center mandible with fracture of central two teeth. Teeth dislocated and present in oral cavity:

ii) Lacerated wound 6" x 2" up to oral cavity corresponding with fracture site of

injury No. 1;

iii) Lacerated wound 2 1/2" x 1" x bone deep over left ankle of mouth to center of mandible;

iv) Incised wound 3" x 2" x deep up to cervical spine on the center of neck. Trachea, oesophagus and carotid artery cut and

v) Incised wound 1 1/2" x 1/2" 2 1/2" below the left ear.

The Autopsy Surgeon opined that the injuries were ante-mortem caused by hard and sharp object; the injury over the neck was sufficient to cause death in ordinary course of nature; the cause of death was haemorrhage on account of cutting of major blood vessels; and the death was homicidal in nature.

The respondent/accused was charged u/s 302, IPC. The case of the prosecution was based on three sets of evidence. First the eyewitness account of Ashok Kumar (son of the deceased P.W. 1), Shivprasad (P.W. 2), Mangilal (P.W. 6) and Panchram (P.W. 10). Second on extra-judicial confession before Ashok Kumar (P.W. 1), Shivprasad (P.W. 2)... Ramcharan (P.W. 3), Ghanshyam (P.W. 4), Govind (P.W. 5), Harishchand (P.W. 7) and Raghubirram (P.W. 13). Third the seizure of blood-stained tangia from the possession of the respondent under seizure memo (Ex. P/5), which the respondent himself produced in the police station on 19-10-1987 at 3.15 p.m. and the F.S.L. report regarding presence of blood on it.

On trial, Mangilal (P.W. 6) and Panchram (P.W. 10) turned hostile and they did not support the case of the prosecution. The Sessions Judge did not believe the testimonies of Ashok Kumar (P.W. 1) and Shivprasad (P.W. 2). The evidence of extra-judicial confession was also not found to be trustworthy,

The respondent specifically took the plea of right of private defence in his 313, Cr. P.C. statements.

On appreciation of entire evidence on record, the learned Sessions Judge held that the respondent acted in his right of private defence and he did not exceed his such right so as to make him liable for punishment. The respondent, therefore, was acquitted of the charges framed against him.

3. Mr. Sudhir Bajpai, learned Dy. Govt. Advocate appearing on behalf of the appellant/State, argued that it was a proved case u/s 302, IPC; there was no reason to disbelieve the testimony of Shivprasad (P.W. 2); and the Sessions Judge erred in law in holding the present to be a case of right of private defence.

4. On the other hand, Mr. P. K. C. Tiwari, learned Sr. Advocate appearing on behalf of the respondent, opposed these arguments and supported the judgment and finding recorded by the Sessions Judge.

5. We have heard the learned Counsel for the parties at length and have also perused the records of the sessions case.

6. Admittedly, out of 4 eye-witnesses, Mangilal, (P.W. 6) and Panchram (P.W. 10) have turned hostile and they have not supported the case of the prosecution. So far as Ashok Kumar (P.W. 1 son of the deceased) is concerned, he has also been rightly disbelieved by the Sessions Court. Ashok Kumar (P.W. 1) deposed that as soon as he came out from his house he saw that respondent-Nivedanlal was assaulting his mother by a tangia. He very specifically deposed that Nivedanlal gave one blow on the neck of his mother by the tangia. The First Information Report (Ex. P/I) was lodged by Ashok Kumar (P.W. 1). In the FIR (Ex. P/I), he mentioned that when he was working at Bawal Station, at about 12 in the noon Jitendra Kumar Sahu came there and told that Nivedanlal has committed murder of his mother by assaulting her by a tangia. On this information, he went to his village and saw the dead body of his mother. When he asked Nivedanlal, Nivedanlal replied that as he has killed his mother, on one day, he will kill him also. At that time many villagers (named in the FIR) were present there. The FIR was the first hand information given by this witness to the police. According to the version of the FIR, the said information was based on the* information received by this witness through Jitendra Kumar Sahu. That is to say that as per the FIR he was not an eye-witness. We find that he has been confronted with the version of the FIR marking it as A to A, but he denied to lodge the report in such a manner. Therefore, it is clear that Ashok Kumar (P.W.1), who was not an eye-witness according to his own version in the FIR, has improved the story to become an eyewitness and was rightly disbelieved by the Sessions Judge.

7. Shivprasad (P.W. 2) is a resident of same village. He deposed that on the fateful day at about 11.30 a.m. when he was returning to his house, he heard the cries of his uncle Biharilal and saw that the respondent gave a tangia blow on the neck of the deceased. The incident took place on a way which was in between the bayara (threshing place) of the deceased and the respondent. He immediately rushed to the scene of occurrence. The respondent was holding an axe. The axe was blood stained. He claimed that he would identify the axe. He identified the axe as Article A. He very specifically deposed in para 4 of his evidence that when he saw, deceased Alopabai was lying on the ground and in that position the respondent assaulted her by an axe. He further deposed that he had a talk with the respondent, who said that Alopabai used to quarrel with him, he had to kill her and he has killed her today. He also deposed that at that time the respondent was wearing a baniyan and towel. This witness was subjected to a lengthy cross-examination by the defence, but the defence has not been able to elicit any such circumstance in his cross-examination on which either his testimony may be discarded or it may be said that he was falsely implicating the appellant in crime in question. The learned Sessions Judge has disbelieved the testimony of this witness only on the ground that there was delay in recording his 161 statement which was recorded one day after the incident though he was available to the police from the very beginning. The reason assigned by the Sessions Judge for disbelieving the testimony of this witness does not appear to be correct. This was not a case in which a blind murder was being investigated.

In the FIR, it was disclosed that the respondent had assaulted the deceased. Even in the inquest (Ex. P/3) it was mentioned by the Investigating Officer that the deceased was murdered by the respondent by assaulting her with tangia. Shivprasad (P.W. 2) was a party to inquest and all the Panchas, including P.W. 2 disclosed to the Investigating Officer the fact of murder committed by the respondent. The FIR was lodged at about 2.30 p.m. on 19-10-87 in the police station which is at a distance of 15 km. Therefore, the proceedings of inquest must have taken place in the evening of 19-10-87 and in these circumstances, if the statement of eye-witnesses were recorded on the very next day, that would hardly make any difference so as to throw out the testimony of the eye-witness on this account alone. Therefore, in our considered view, the learned Sessions Judge completely erred in law in discarding the testimony of P.W. 2 Shivprasad. According to the evidence of P.W. 2, it was clearly established that the respondent assaulted the deceased with tangia and the last blow was given on the neck of the deceased while the deceased fell down and she was lying on the ground.

8. So far as extra-judicial confession is concerned, if the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction.

9. In the present case, there is evidence of confession of the respondent before Shivprasad (P.W. 2), Ramcharan (P.W. 3), Ghanshyam (P.W. 4), Govind (P.W.5), Harishchand (P.W. 7) and Raghubirram (P.W. 13). Almost all the witnesses deposed that the respondent made confession while he was holding the axe in his hand which was bloodstained. Though the confession part is vague in the evidence of Ramcharan (P.W. 3), Ghanshyam (P.W. 4) and Harishchand (P.W. 7) but it is very much clear in the evidence of Shivprasad (P.W. 2) and Raghubirram (P.W. 13). Even if we do not take it as a basis for conviction but the same fully corroborates the evidence of eye-witness Shivprasad (P.W. 2).

10. Now we shall look into right of private defense claimed by the respondent.

11. The respondent in answer to question No. 115 of the examination of the accused replied as under:

(Vernacular matter omitted.... Ed).

It is on this plea, taken by the respondent in his 313, Cr. P.C. statement the Sessions Judge held that the present was a case of right of private defence and the respondent has not exceeded the aforesaid right.

12. Right of private defence falls in the category of General Exceptions define under Chapter IV of the IPC. Section 96 provides that nothing is an offence which is done in the exercise of the right of private defence. This plea, however, extends not only to the person exercising the right; but to any other person. Sections 96 and 98 confer a right of private defence against certain offences and acts and Section 99 provides acts against which there is no right of private defence. It clearly provides that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though the act, may not be strictly justifiable by law. It further provides that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt. If done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law and further that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Extent to which the right may be exercised, it provides that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 provides that the right of private defence of the body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assault if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein, namely, "First - such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly - such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused. Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body as well as property. It commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until there is reasonable apprehension. In other words, the right is co-extensive to the reasonable apprehension of the danger to the body continues. Therefore, if a claim is being made that the accused acted in exercise of power of right of private defence, he must show that there were prevailing circumstances giving rise to reasonable apprehension that either the death or grievous hurt would be caused if the right is not exercised.

13. In case on hand, as stated supra, respondent contended that deceased came to the place where he was working and she started abusing him. Thereafter the deceased picked up tangia against him and said that she would kill him. It is on this only, he also picked up a tangia and blow it, on which, the deceased fell

down. We are unable to accept the said plea raised by the respondent. The aforesaid plea is falsified by the version of the respondent himself. How in the process of blowing the tangia in the above manner, one can receive 4-5 injuries as has been received by the deceased. Even if we take the defence to be reliable, the deceased, on the first un-intentional blow, would have fallen on the ground and there was hardly any chance to receive more than one injury. Moreover, only on making a gesture or picking a tangia by the deceased who was aged about 50 years, whether the respondent would have a right either to kill the deceased or to cause grievous hurt to her ? We do not find that there were circumstances giving rise to reasonable apprehension to the respondent that either death or grievous hurt would be caused to the respondent if he does not exercise the right of his private defence. We further note that the respondent had not received any injury in the incident. We also note that there is seizure of only one tangia which was seized from the possession of the respondent under Ex-P/5. If the deceased was also holding a tangia, then the said tangia must have been seized from the place of occurrence. Even no questions have been asked either from the eye-witnesses or from the Investigating Officer regarding the tangia allegedly held by deceased. After going through the entire material available on record, we do not find the plea of right of private defence to be acceptable.

14. In *Budh Singh and Others Vs. State of U.P.*, , the Apex Court held vide para 9, that in a matter of appeal against acquittal, the High Court does not ordinarily set aside a judgment of acquittal in a case where two views are possible, although the view of the Appellate Court is a more probable one. However, while dealing with a judgment of acquittal, it is free to consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. It is also entitled to consider as to whether in arriving at a finding of fact, the trial Court has failed to take into consideration admissible evidence and has taken into consideration evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of the scrutiny of the Appellate Court.

15. In *V.N. Ratheesh Vs. State of Kerala*, , the Apex Court held that there is no embargo on the Appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The Apex Court said that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and other to his innocence, the view which is favourable to the accused should be adopted. The Apex Court further said that the paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilt is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the Appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the

accused really committed any offence or not. The Apex Court referred to the decision rendered in the matter of Bhagwan Singh and Others Vs. State of Madhya Pradesh, . It was further held that the principle to be followed by Appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

16. In Ramesh Babulal Doshi Vs. State of Gujarat, , the Apex Court said that "While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions".

17. We have examined the entire evidence available on record in light of the above principles laid down by the Apex Court. In our considered view, the plea of right of private defence was not acceptable and in the facts and circumstances of the case, the respondent was having no such right and it was proved beyond all reasonable doubts on the evidence of eye-witness Shivprasad (PW-2) corroborated by the evidence of extra-judicial confession made by the respondent before the aforesaid witnesses, that the respondent gave multiple tangia blows even after the deceased fell down on the ground, thereby making him liable for punishment u/s 302 IPC. The Sessions Judge completely erred in law in rejecting the above evidence and accepting the casual plea of right of private defence raised by the respondent.

18. For the foregoing reasons, the judgment of acquittal passed by the Sessions Court is set-aside. The appeal filed by the State against the acquittal of the respondent is allowed. The respondent is convicted u/s 302 IPC and sentenced to undergo rigorous imprisonment for life. He is directed to surrender forthwith for serving the sentence imposed against him. He shall be entitled to set off the period already undergone by him.