Janab Ali Shaikh Vs State

Criminal Appeal No. 421 of 1981

Court: Calcutta High Court

Date of Decision: Aug. 27, 1991

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 313#Evidence Act, 1872 â€" Section 103, 105#Penal Code, 1860 (IPC) â€" Section 304, 96

Citation: 96 CWN 560

Hon'ble Judges: Ajoy Nath Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Balai Ray and Amit Talukdar, for the Appellant; Ashraf Ali, for the Respondent

Judgement

Ajoy Nath Ray, J.
I do not think that there is any alternative to dismissing this appeal. The accused Janab Ali Shaikh alias Chatui, hit the

victim Golum Seikh with a "faora" (a heavy implement used to clean an agricultural field) on the head, resulting in the death of Golam. The only

point urged before us is the point of private defence. Four prosecution witnesses stated during investigation that, Golam had aimed a "pachan" (a

stick used to drive cattle) at Chatui; during trial they went back on their story. The investigating officer has given evidence about the stand taken by

the witnesses at, so to say, the Section 161 stage. Mr. Balai Roy on behalf of the accused said that this was enough to establish private defence

resulting in death, when read along with the section 313 examination of the accused.

2. Mr. Roy referred us to the Section 313 statement made by the accused where he said that Golam tried to hit him on the head and that fearing

his own death he tried to block the attempted blow, and in that attempt unfortunately hit the victim. Relying on these materials, Mr. Roy said, on

the authority inter alia of Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, ; also cited, AIR 1977 SC 577 para 10 and Yogendra Morarji

Vs. State of Gujarat, that the right of private defence need not be proved beyond reasonable doubt. It may be proved only to the reasonable

satisfaction of a prudent man; or, like in Civil Cases, on a mere balance of probabilities; or, even, it may take the shape of adducing materials, like

even a Section 313 statement, which have the effect of raising a reasonable doubt in the prosecution case, when looked at from the standpoint of

private defence.

3. This grants a degree of latitude to the accused in law, which is entirely consistent with the general criminal jurisprudence of our country.

However, the right of private defence is to be established by the accused, as a combined reading of the relevant sections of Penal Code and

Section 105 of the Evidence Act will show; that ''establishment'' consists in the doing of the whittled down tasks as are indicated by the Supreme

Court in the above Cases.

4. In this case, however, the defence case does not take off at all, let alone reach the point of raising reasonable doubt in the prosecution case. It is

beyond the pale of reason and law to accord to the Section 313 statement full evidentiary value, and to conclude on that basis alone that Chatui

apprehended that he was about to suffer grievous hurt, in the form of death, at the hands of Golam. If the mere raising of a ''pachan'' even at the

head of a person, is enough to justify, without any more evidence about anything else, the killing of the ''pachan''-holder, then in this country murder

and manslaughter are both legalized acts. It is not the law that the Court must invariably accept every Section 313 statement by the accused to be

sacrosanct. As Chatui was admittedly a man of nature strength and not at all too advanced in age, I asked how old the victim was. Mr. Roy could

not find any evidence or materials as to even that. I think the court below rightly assessed the statement of Chatui''s apprehension of his own death

as recorded in the Section 313 examination to be insufficient in the circumstances to raise any reasonable doubt in the prosecution case.

5. This is what the learned sessions judge wrote near the concluding portion of the judgment, when dealing with the plea of private defence. : -

From cross examination it appears that suggestion has been given to the effect that Golam made an attempt to hit Janab with a pachan and that at

that time Janab hit Golam with the faosa. Panchan is a stick used for driving cattle at the time of ploughing. It has been stated by Janab Ali in his

statement u/s 313 Criminal Procedure Code that he was apprehending death at the time when Golam made an attempt to assault him and in order

to save his life be tried to resist with the faora and it hit Golam resulting in his death. The evidence of the docto would show that there was fracture

of frontal bone, that there was subdural haemotoma with laceration of meninges and brain matter over frontal region. It shows that the blow was

given with sufficient force and it cannot be accepted that accidentally it touched the head of Golam Shaikh at the time of giving resistance to him

when Golam made an attempt to hit Janab Ali with a panache. Learned lawyer for the accused submits that it would be sufficient for the accused to

hit his opponent in case he apprehends any grievous hurt and here in this case Golam Shaikh made an attempt to hit him and thereby accused

Janab Ali in exercise of his right of private defence had the right even to cause his death. In other words right of private defence and accordingly he

can not be said to have committed any offence u/s 304 Indian Penal Code. In the instant case I am unable to accept his contention. For sake of

argument even if it be accepted that Golam made any attempt to hit Janab Ali with a stick it cannot be said that thereby Janab Ali had any

apprehension of any grievous hurt as submitted by the learned lawyer for the accused. At best there could have been simple injury on the person of

Janab Ali and he certainly for that purpose had no right to hit Golam with such force causing fracture of the frontal bone of his head. It clearly goes

to show that this injury was caused by Janab at the heat of the moment and that he is not entitled to get the benefit of the right of private defence as

claimed by him. Accordingly, I find that accused Janab Shaikh committed an offence u/s 304 Part I Indian Penal Code.

6. I whole heartedly agree with the learned additional sessions judge. His honour approached the case in a manner fully balanced and reasonable.

The only material about the accused apprehension of being killed at the hands of Golam, as found in the Section 313 statement has been rightly

assessed by the lower court a not throwing any reasonable doubt on the prosecution case; after such an assessment, as, at least impliedly made in

para 7 of the impugned judgment, even the last straw of the technical and legal defence of the accused gives way; this is what was said in para 7 : -

7. Considering all facts, circumstances and evidence of the case I hold that the prosecution has been able to establish beyond reasonable doubt a

charge u/s 304 Part I Indian Penal Code against accused Janab Ali Shaikh Alias Chatui. I find him guilty for offence u/s 304 Part I Indian Penal

Code. He is convicted thereunder.

7. I also think that the sentence duly imposed was quite in order. The appellant shall surrender to his bail bond within a fortnight hereof and serve

out the sentence.

A.M. Bhattacharjee, J.

8. I agree, and as a result the appeal shall stand dismissed and the conviction of the accused-appellant u/s 304 Part, Indian Penal Code and the

Sentence of four year rigorous imprisonment imposed therefor shall stand affirmed.

9. Nothing is an offence which is done in the exercise of the right of private defence, as provided in Section 96 of the Penal Code and under the

provisions of Section 105, Evidence Act, the burden of proving that it was so done is upon the accused. But even without Section 105, the same

result would follow from Section 103 also, whereunder ""the burden of proof as to any particular fact lies on that person who wishes the Court to

believe in its existence"". Therefore, even do hors Section 105, if the accused desires the Court to believe that he acted in the exercise of his right of

private defence and thus committed no offence because of the provisions of Section 96 of the Penal Code, the burden of proud shall lie on him

even u/s 103, Section 105 was, therefore, not that necessary save to emphasise the same rule as in Section 103, but for criminal cases only.

10. The burden of proving guilt is on the prosecution only in the sense that the prosecution fails if no evidence is adduced at all. The burden of

proving exercise of right of Private Defence or any other exception is on the defence only in the sense that the defence fails if no evidence is

adduced to that effect, where Prosecution is otherwise established. But it can in no case mean that the burden on the prosecution must be

discharged by the prosecution alone by and through prosecution evidence only or that the burden on the defence must be discharged by the

accused alone by cross-examination or adducing defence evidence. Conviction even on defence evidence only is no less permissible than acquittal

on prosecution evidence.

11. If a defence of Private Defence irresistible shows its head from the prosecution evidence only, the prosecution fails, even though the accused

has remained absolutely muta and dumb and the jargon that the burden of proof in such a case lies upon the accused would become mere

logomachy. Nor can it be ruled as a strait-jacket formula that once a plea of private defence appears to require consideration, the (sic) is on the

prosecution to prove that the accused exceeded his right or that the burden is on the accused to prove that he did not so exceed. Some of the

authorities, both textual and judicial, have indulged in such legal verbiage. The question of burden or onus then loses all significance and it is for the

Court to decide, on the materials on record, whether produced by the Prosecution or the Defence, as to whether the right of private defence has

been exceeded or not exceeded.

12. In the case at hand, it is apparent, as amply demonstrated by Ray, J., that the right of private defence, which could show its head at some

stage, has clearly ducked because of excessive exercise.

13. I have, however, my doubts as to whether the conviction was rightly made under Part I of Section 304 of the Penal Code. It is difficult to

ascertain on the materials on record that the accused had any intention to cause death or cause such bodily injury as was likely to cause death. On

the evidence on record I would have thought that the conviction under Part II of the Section 304 of the Penal Code have been proper. I, however,

need not pursue this point as even in that view of the matter, I would have found no reason to interfere with or alter the sentence imposed. The

appeal, therefore, must fail and the appellant, if on bail, must surrender to serve out of the Sentence.

A.M. Bhattachargee, J.

I agree.