(1954) 01 CAL CK 0021

Calcutta High Court

Case No: Criminal Appeal No. 34 of 1952

Yusuf Sheikh and Others	APPELLANT
Vs	
The State	RESPONDENT

Date of Decision: Jan. 11, 1954

Acts Referred:

- Penal Code, 1860 (IPC) - Section 147, 148, 3, 304, 321

Citation: 58 CWN 279

Hon'ble Judges: Das Gupta, J

Bench: Single Bench

Advocate: S.C. Talukdar and B.B. Das Gupta, for the Appellant;S.M. Bose, Advocate General and N.C. Sen for the State, for the Respondent

Judgement

Das Gupta, J.

The appellants were tried by the Assistant Sessions Judge, Murshidabad, with the aid of a Jury on different charges. The appellant Yusuf Sk. was tried on a charge u/s 304 of the Indian Penal Code for having caused the death of Mir Hossain; Jearatulla Sk., on three charges u/s 323 of the Indian Penal Code, one for having voluntarily caused hurt to Mohitan Bibi, the second for having voluntarily caused hurt for Abdur Rahid, and the third for having voluntarily caused hurt to Keramatali; Sk. Rahamatulla Sk. on two charges u/s 323 of the Indian Penal Code,-- the first for having voluntarily caused hurt to Mesena Khatun and the second tor having voluntarily caused hurt to Keramatali Sk., and also on a charge u/s 324 of the Indian Penal Code for having voluntarily caused hurt to Abdur Rahid; Takdirali Sk. on a charge u/s 324 of the Indian Penal Code for having voluntarily caused hurt to Abdur Rahid Sk. and on a second charge u/s 323 of the Indian Penal Code for having voluntarily caused hurt to Keramatali Sk; Eadulla on a charge u/s 325 of the Indian Penal Code for having voluntarily caused grievous hurt to Mesena Khatun and also on a charge u/s 323 of the Indian Penal Code for having voluntarily caused hurt to Mir Hossain; Reasatulla Sk. on two charges u/s 323 of the Indian Penal Code,--one for having voluntarily

caused hurt to Mesena Khatun and the other for having voluntarily caused hurt to Mir Hossain. Yusuf, Rahamatulla and Takdirali were also tried on a charge u/s 148 of the Indian Penal Code and Jearatulla, Eadulla and Reasatulla on a charge u/s 147 of the Indian Penal Code. In accordance with the unanimous verdict of the Jury the learned Judge acquitted the accused persons of the charges under sections 148 and 147 of the Indian Penal Code, acquitted Yusuf of the charge u/s 304 of the Indian Penal Code but convicted him u/s 326 of the Indian Penal Code and sentenced him to rigorous imprisonment for six years; convicted Jearatulla on all the three charges u/s 323 of the Indian Penal Code and sentenced him to a fine of Rs. 500 for the first charge and Rs. 100 for each of the other two charges; acquitted Rahamatulla of the first charge u/s 323 of the Indian Penal Code but convicted him on the second charge u/s 323 of the Indian Penal Code and inflicted a fine of Rs. 100, convicted him also of the charge u/s 324 of the Indian Penal Code and sentenced him to pay a fine of Rs. 100, convicted Takdirali of both the charges under sections 323 and 324 of the Indian Penal Code and sentenced him to pay a fine of Rs. 100 u/s 323 of the Indian Penal Code and a fine for a similar amount for his offence u/s 324 of the Indian Penal Code, convicted Eadulla of the charge u/s 325 of the Indian Penal Code and sentenced him to two years'' rigorous imprisonment, convicted him u/s 323 of the Indian Penal Code and sentenced them to pay a fine of Rs. 100, convicted Reasutulla of both the charges u/s 323 of the Indian Penal Code and sentenced him to pay a fine of Rs. 500 for the first charge of having voluntarily caused hurt to Mesena Khatun and a fine of Rs 100 for the other charge. In all the cases the learned Judge also passed sentences of imprisonment in defar.lr of payment of fines. The appeal came up for hearing before a Bench of this Court consisting of Mitter and Sen, JJ. As they did not agree as regards how the appeal should be disposed of, the case has been laid before me under the provisions of section 429 of the Code of Criminal Procedure.

2. The prosecution case was that on the 4th of July, 1951, when Mir Hossain and his brothers came to know that a Jam tree standing near the bank of the tank which was their ejmali property had been cut and one branch of the tree was left lying there, they went to remove that, but were resisted by the accused persons who were armed with lathis and that the different accused persons dealt lathi blows on them while some of the accused dealt lathi blows also on their mother Mohitan Bibi and sister Mesena Khatun who arrived when the assault on them was in progress. It is further alleged that Yusuf picked an axe which was lying there and struck Mir Hossain on the head with the blunt side thereof in flicting injuries which resulted in his "death the following day.

3. The defence of Yusuf was that he was not at the " place of occurrence at all but was away at Ichhapur for treatment of his different ailments. The principal defence of the other accused persons was that they acted in the exercise of their right of private defence of person and property. the Jam tree being the property of Takdirali and Mir Hossain and others having no right thereto.

3. In his charge to the Jury the learned Assistant Sessions Judge made the following statement while speaking about the defence plea of the right of private defence :

...You must remember that when a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon him and the Court shall presume the absence of such circumstances. It follows therefore that an accused is not entitled to the benefit of any exception such as that provided for in section 96 of the Indian Penal Code merely because there is a reasonable doubt in the mind of the Court about the existence of circumstances bringing the case within the exception.

4. The question whether in the case where the burden of proving anything is on an accused person he has to prove it in the same manner where the burden lies on the prosecution, namely, beyond reasonable doubt, or whether the burden of proof required from the accused is less than that at the hands of the prosecution in bringing the case beyond reasonable doubt and that the burden may be discharged by evidence satisfying the Jury of the probability of that which the accused is called upon to establish. has been considered by this Court more than once. In the case of Chang Chung Ching v. King Emperor (1) (49 C.W.N. 229), where the Court had to consider whether the burden laid on the accused by section 3 of Ordinance XXXIII of 1943 had been discharged, this Court laid down the proposition that the correct principle to apply to the case was that laid down by the Court of Criminal Appeal in the English case of Rex v. Carr-Bri-ant (2) [(1943) 1 KB. 607]. namely, "in any case where, either by statute or at common law, some matter is presumed against an accused person unless the contrary is proved, the Jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less that required at the hands of the prosecution in proving the case beyond a reasonable doubt. and that the burden the jury of discharged by evidence the jury of the probability of that which the accused is called upon to establish". In the case of Ashiruddin Ahmad @ Sheik v. The King (3) (53 C.W.N. 237), where the Court had to consider whether there had been a misdirection in the learned Judge''s charge to the Jury, the learned Judges gave their decision in these words :
Our own opinion is that had the matter been properly put to the jury together with the direction that the standard of proof required by the accused was not the standard of proof required from the prosecution, it is highly probable that they would have found in favour of the accused u/s 84 of the Indian Penal Code and by the learned Judge''s misdirection on this point there has been failure of justice.

5. I find that the decision in Ashiruddin Ahmad''s case (3) (53 C.W.N. 237) was cited before the learned Judges constituting the appellate Bench. Mitter. J., thought that they were bound by that decision but Sen. j, thought that Ashiruddin Ahmad''s case (3) (supra) in so far as it laid down that the standard of proof required from the accused was the standard of proof required from the Prosecution, was not binding on them and that it was merely obiter dicta.

6. It seems clear to me that what the Court held in Ashiruddin Ahmad''s case (3) (supra) was that the Judge had misdirected the Jury on two points,--firstly, on the point of explaining the provisions of section 84 of the Indian Provisions of section and secondly, on the point as regards the standard of proof required from the accused when the burwas on the accused They clearly held that by omitting to tell Jury that the standard of proof required from the accused was not the standard of proof required from the prosecution the learned Judge misdirected the Jury. I have not been able to understand how this decision can be said to be an obiter dictum and not binding on the Court.

7. The learned Advocate-General who appeared before me on behalf of the State readily agreed that the decision in Ashiruddin Ahmad''s case (3) (53 C.W.N. 237) as well as in Chang Chung Ching''s case (1) (49 C. W. N. 229) are decisions binding on the Court.

8. In this position I think it would be useless for me to consider the question whether the above cases were rightly decided for, even though I were of opinion that they were not rightly decided, I am bound to follow them and it is not open to me sitting as a third Judge u/s 429 of the Code of Criminal Procedure, to refer the matter to a Division Bench.

9. I am therefore bound to hold that by directing the Jury that "an accused is not entitled to the benefit of any exception such as that provided for in section 96 of the Indian Penal Code merely because there is a reasonable; doubt in the mind of the Court about the existence of circumstances bringing the case within the exception", the learned Assistant Sessions Judge misdirected the Jury.

10. It seems to me that there is another point on which the learned Judge has directed the Jury in a way which cannot 1 e considered proper. On the question of alibi the defence examined a witness, one. Dr. Anil Kumar Bhattacharjee. It appears that they prayed for the examination of another witness, Dr. J. N. Dutt. The doctor however did not appear and was not examined. The learned Judge commented in his charge to the Jury on the non-examination of Dr. J. N. Dutt, but omitted to mention that the doctor had not attended Court in spite of summons being asked for and issued.

11. In view of these misdirection''s, it is necessary for me to consider the evidence on record to ascertain whether the misdirection''s have resulted in an erroneous verdict. That there was an occurrence on the 4th of July, 1951, in connection with the dispute over a Jam tree and that in that occurrence Mir Hossain received injuries which resulted in his death and other persons received injuries out of which the injury of Mesena Khatun was a fracture of a finger is not disputed. It is clear from the doctor''s evidence that Mir Hossain had five injuries of which three were abrasions but the other two were lacerated wounds, one on the left side of the top of the head and the other over the top of the head. The doctor''s opinion is that the

death was due to these lacerated wounds. There is no question of not believing the doctor. The only question is whether the Prosecution has proved that Yusuf inflicted these injuries. That Yusuf struck Mir Hossain on the head is the evidence given in Court not only by Mohitan Bibi and Mesena Khatun. his mother and sister, and Keramatulla and Abdur Rahid, his brothers, but also by Elias Sk., Abdul Mannan, Ka-sem Ali, Jinat Sk.. Bahar Ali and Abu Bakkar. These last six persons say that they were in the mosque which is nearby at the time of the occurrence and came there on hearing the hue and cry and saw Mir Hossain being struck on the head by Yusuf.

12. Against this there is the evidence on the side of the defence given by Dr. Anil Kumar Bhattacharjee which, if believed, would totally demolish the Prosecution case as against Yusuf. The doctor has given evidence that he treated Yusuf for several dates commencing from the 4th July, 1951, and that he actually saw the patient on the morning of the 4th July, 1951, at about 8 A.M. He has identified several prescriptions as prescribed by him for that treatment and has identified a book which he has described as his prescription book. One Golam Ehia has also said that Yusuf came to his house at Ichhapur on the 3rd July, 1951, for his own treatment and he was examined by Dr. Anil Kr. Bhattacharjee who was called in by the witness on the 4th July, 1951. On the face of it, the prescription book cannot be accepted as a genuine document. It seems reasonable to hold on even a cursory examination that the entries on the different dates were made at or about the same sitting. It is curious that while Yusuf claims to have undertaken this journey to the distant place of Ichhapur for treatment by a doctor whom he apparently did not know from before, it has not been suggested that he was examined by any doctor nearer home. It is interesting to remember in this connection that the place of his residence is about 8 miles from Berhampore town. It is difficult to believe that a man within easy reach of a doctor of the Berhampore town would undertake a journey to Ichhapur for treatment by a doctor, Dr. A. K. Bhattacharjee--, who, after all, does not appear to be a physician of any eminence.

13. It is important to remember that the occurrence took place in broad daylight. Mir Hossain''s brothers, mother and sister certainly saw the occurrence Is it likely, if not Yusuf but some other person had dealt the blows which killed Mir Hossain, that his mother, sister and brothers would falsely implicate Yusuf and let the real culprit go scot-free ? I can see no reason for such conduct on their part. It appears that Yusuf started proceedings u/s 107 of the Code of Criminal Procedure against Mir Hossain and others. These proceedings were however dropped. It appears further that Yusuf gave evidence in a case brought against Mir Hossain and others u/s 423 of the Code of Criminal Procedure. That case was however brought by Takdirali. If Mir Hossain''s relations had any intention of falsely implicating a man, it would be Takdirali they would try to implicate. I find it impossible to believe that they would falsely implicate Yusuf if anybody else had dealt the fatal blow.

14. On a consideration of the entire evidence I have come to the conclusion that the Jury have rightly decided that Yusuf dealt the blows which resulted in Mir Hossain''s death.

15. The question next arises whether he committed an offence u/s 321 of the Indian Penal Code by this act. In coming to a conclusion on this it is necessary to consider the plea of the right of private defence. The prosecution case is that the Jam tree over which the dispute arose was ejmali. The important circumstance however is that there was no mention of any jam tree in the petition of complaint. If the Jam tree had really been the ejmali property, I am unable to believe that the person who lodged the petition of complaint would not state that clearly. In my judgment, it is 1 because the Jam tree was not the ejmali property but was the property Takdirali as suggested by the defence, that the petition of complaint is entirely silent on any dispute over the cutting of the Jam tree or the cutting of the branches there of. There can be little doubt that it was when some people were cutting the Jam tree on behalf of Takdirali that Mir Hossain and others came there to protest and, if possible, to resist and it was then that the accused party was attacked. I am convinced on a consideration of the probabilities of the case that Mir Hossain and others must have carried some arms with them in coming to resist the act of the accused persons in cutting the Jam tree or, if possible, carrying away some branches. My conclusion therefore is that Yusuf was entitled to inflict some injuries on Mir Hossain in the exercise of the right of private defence of property or person. I am clearly of opinion however that in striking Mir Hossain on the head with the blunt side of an axe he exceeded the right of private defence.. The right of private defence of property did not certainly extend to the causing of this blow. The injuries which some of the accused persons had received clearly show that the complainant''s party were not, armed in such a manner or did not do; any act which could raise a reasonable apprehension of death or a grievous hurt being caused to Mir Hossain.

16. In view of my conclusion that Yusuf exceeded the right of private defence, I am of opinion that he did commit an offence u/s 326 of the Indian Penal Code and that the misdirections mentioned above have not resulted in any erroneous verdict or failure of justice.

17. In view of my findings mentioned above, I hold that no offence was committed by Jearatulla Sk. by causing hurt to Abdur Rahid and Keramatali Sk. or by Rahamatulla Sk. by causing hurt to Keramatulla and Abdur Rahid or by Takdirali Sk.. by causing hurt to Keramatulla and Abdur Rahid, by Eadulla by causing hurt to Mir Hossain, by Reasatulla by causing hurt to Mir Hossain., as these acts were committed in the exercise of the right of private defence of person and property.

18. My conclusion therefore is that the misdirection mentioned above has resulted in an erroneous verdict as regards these charges.

19. The position is different as regards the charge u/s 323 of the Indian Penal Code against Jearatulla Sk. for causing hurt to Mahitan Bibi and the charge u/s 325 of the Indian Penal Code against Eadulla for causing hurt to, Mesena Khatun. That Eadulla struck Mesena Khatun on her left hand with a lathi is the evidence of Mesena Khatun and others which I have no hesitation in believing. The evidence of Dr. Haradhone Bhaduri shows that there was a facture of the phalange of the middle row of Mesena Khatun''s left finger. I am convinced on a consideration of the evidence that Eadulla caused this fracture by striking her on the hand with a lathi and in striking her he knew it likely that grievous, hurt would be caused. Quite clearly there can be no case of the right of private defence against this girl as the evidence does not make it even remotely probable that she either came to take away the branch of the tree or that any reasonable apprehension of injury arose from any of her acts.

20. The verdict of guilty u/s 325 of the Indian Penal Code against Eadulla is therefore fully justified by the evidence and my conclusion is that the misdirection I have mentioned earlier has not resulted in an erroneous, verdict or failure of justice as regards this charge.

21. There can be no doubt on the evidence of the eye-witnesses that Jearatulla struck Mohitan Bibi and Rasatulla struck Mesena Khatun. As in my judgment the evidence does not even remotely make it probable that these; acts were committed in the exercise of the right of private defence, offences u/s 323 of the Indian Penal Code were committed by these two accused persons. As regards these two charges, the misdirections have therefore not resulted in an erroneous verdict. My opinion therefore is that there is no ground for interfering with the order of conviction passed on the unanimous verdict of the Jury as regards the charge u/s 326 of the Indian Penal Code against Yusuf, u/s 325 of the Indian Penal Code against Eadulla, u/s 323 of the Indian Penal Code against Reasatulla for hurt to Mesena and u/s 323 of the Indian Penal Code, against Jearatulla for hurt to Mahitan. The order of conviction for these. offences will therefore stand. The learned Judge sentenced Yusuf to rigorous imprisonment for six years. In consideration of the fact that he acted in the exercise of the right of private defence and without premeditation, I think a sentence of four years'' rigorous imprisonment would meet the ends of justice. I therefore reduce the sentence passed on Yusuf to a sentence of rigorous imprisonment for four years. In view of the circumstances mentioned above, the sentences passed for the charge u/s 325 of the Indian Penal Code against Eadulla, u/s 323 of the Indian Penal Code against Jearatulla and u/s 323 of the Indian Penal Code against Reasatulla also appear to me too severe. I reduce the sentences to a fine of Rs. 200 u/s 325 of the Indian Penal Code against Eadulla Sk., in default rigorous imprisonment for six months, to a fine of Rs. 100 against Reasatulla Sk., in default rigorous imprisonment for three months, and to a fine of Rs. 100 gainst Jearatulla Sk. under section) 323 of the Indian Penal Code, in default rigorous imprisonment for three months. Yusuf Sk. will forthwith surrender to his bail and

serve out the sentence. Jearatulla, Rahamatulla, Eadulla, Reasutulla and Tojdir are acquitted of the other charges and the sentences thereunder set aside.