SAURASHTRA HIGH COURT

State (Saurashtra)

Vs

Bhima Devraj

Criminal Appeal No. 81 of 1954

(Shah, C.J. and Baxi, J.)

19.01.1955

JUDGMENT

Baxi, J.

1. The facts out of which this appeal arises are very simple. Respondent 2 is the wife of respondent 1 and respondent 3 is his cousin and lives in a house opposite to theirs. At about 4-30 P.M. on 10-7-1953 Jetha Gova entered the House of respondent 1. The respondents mercilessly beat him and then threw him out into the street. He was picked up by some persons and taken home where he died at about 6 P.M. The deceased had 7 incised wounds, two contused wounds and 3 contusions besides several echhymosis. He had in all 21 injuries. One of the incised wounds was on the left parietal region of the head and the bone was fractured. This was a fatal injury and there was no chance or survival. But the rest of the injuries were simple hurts and the Medical Officer who conducted the post-mortem examination, gave the opinion that but for the head injury, the deceased would have recovered within about 15 days.
The beating was seen by two persons Arjan Velji Ex. 5 and Bhanji Vashram Ex. 7 who were at Arjan's shoo at the time and who on hearing that the deceased was being beaten went to respondent 1's house. The door of the house was closed but they saw the occurrence through a window. According to them the deceased was lying in the fali (Court-yard) and the respondents were beating him. Arjan was able to identify all the respondents, while Bhanji identified respondents 1 and 2 only. According to them respondent 1 was beating the deceased with an iron shod stick, the respondent 2 with an Ada or a thick piece of wood and respondent 3 with a simple stick. On these facts they were tried by the Sessions Judge on a charge under Section 302 read with S. 34, I.P.C. No common intention has been proved and Section 34 does not apply. The respondents would therefore be liable for the actual injuries caused by them to the deceased. They were seen beating the deceased with blunt instruments only and as there was no evidence to connect any of them with the incised wounds and particularly with the heavy injury, the learned Sessions Judge acquitted them of the charge under Section 302, I.P.C. and held that they could be convicted under Section 324, I.P.C. only and this finding is not challenged before us on behalf of the prosecution.

2. The respondents denied their guilt in the committing Magistrate's Court and reserved their

explanation for the Session Court. In the Session Court respondents 1 and 2 admitted giving blows to the deceased but pleaded self-defence. The version of respondent 1 was that he was upstairs while his wife was cleaning the fall. The deceased attempted to commit rape on her and he came down and beat him with a simple stick. Respondent 2 stated that while she was taking out fodder from a shed in the fall, the deceased entered the house and assaulted her with the intention of committing rape on her. She cried out whereupon her husband came down and beat him with simple stick. She admitted that she also beat him with a thin stick and denied that she had used an Ada. The incised wounds on the deceased are explained by respondent 2 who stated that the crowd which had collected outside got excited at the outrage and beat him with axes and Kharapias. But with this part of the explanation we have no concern and it is not borne out by evidence. She alleged that Jetha gave her a blow with an iron shod stick. The Sessions Judge disbelieved this story and it was not pressed before us. Respondent 3 denied his presence.

3. The learned Sessions Judge rejected the defence version that the deceased had attempted to commit rape on respondent 2 or had assaulted her with the intention of committing rape but he held that as the prosecution was unable to assign any motive for the deceased's entry in the house, their explanation was not unreasonable and it might well be that he might have entered the house with the intention of outraging the modesty of respondent 2. He held that the defence had thereby succeeded in creating a reasonable doubt about their guilt and acquitted them. The State has filed this appeal against the respondents' acquittal.

4. The learned Sessions Judge has not been able to state his findings very clearly. In one portion of his judgment he speaks of the right of private defence against an assault with the intention of committing rape and refers to clause 3 of Section 100 though he definitely rejected this defence. In para 16 of his judgment he refers to a suggestion thrown out by the prosecution during arguments in a bail application that the deceased was in criminal intimacy with respondent 2 and expressed the view that even if it was so respondent 2 had the right to refuse herself to him and she and her husband had the right of defending her against his assault. But there is not an iota of evidence to suggest that there was any such intimacy between them. He refers to Exception 1 to S. 300. I.P.C. and speaks of grave and sudden provocation which respondent 1 might have received on seeing the deceased and his wife in a compromising position. But he failed to notice that after having cleared the respondents of the charge of murder, there was no scope for referring to any execution mentioned in S. 300, I.P.C. The judgment discloses some confusion of thought but the learned Judge's ultimate finding appears to be clear enough. He observes as follows at the end of para 17 of his judgment :-

> "I am not releasing the accused because I believe the theory of rape; I am of the opinion that even though the accused have failed to prove the theory of self-defense, in law, they have succeeded in raising a reasonable doubt that the deceased may have come there with criminal intent and he may even have come there with the purpose of assaulting the honour of accused 2 (respondent 2). As this theory is neither improbable nor fantastic, all the accused are entitled to the benefit of reasonable doubt on the charge under Section 324."

Though the learned Judge does not say so in so many terms we understand him to mean that he considered that the respondents beat the deceased in the exercise of the right of private defence

against an indecent assault on respondent 2. Mr. C.N. Shah for the respondents contended before us that respondent 3 was not in the house and was wrongly committed and that the deceased having entered the house with the intention of committing an indecent assault on respondent 2 his entry amounted to a house trespass and they were entitled to the benefit of exception contained in S. 104, I.P.C. The learned Advocate-General contended that the learned Session Judge's order was based upon a misconception of the law relating to the burden of proof in cases where the accused claimed the benefit of an exception. He contended that after the prosecution established the guilt, it was for the accused to affirmatively prove the exception and he was not entitled to be acquitted if there was a doubt that the circumstances which bring his case within the exception might have existed. The respondent could not therefore be acquitted on the mere supposition without satisfactory proof that the deceased might have entered the house with a criminal intent.

5. Before we deal with the question of law we shall shortly dispose of Mr. Shah's contention that the prosecution had failed to prove that respondent 3 was in the house when the deceased was beated and administered beating to Mm. There is no substance in this plea. He was identified by the eye-witness Arjan and Arjan has been believed by the learned Sessions Judge. Nothing was urged against him except that his evidence was inconsistent with the medical evidence about the injuries on the deceased person. It was argued that the deceased had only two contused wounds and 3 contusions and it was inconceivable that if three persons had conjointly beaten the deceased with sticks and Ada the injuries received by him could be so few in number. Arjan it was urged should not therefore be believed. But Arjan is corroborated by Bhanji, who is the Secretary of the Local Gram Panchayat and whose evidence cannot be doubted. The deceased had in all 14 injuries which could be caused by a hard blunt substance and the evidence of Arjan and Bhanji is therefore not inconsistent with the medical evidence. The learned Sessions Judge analysed the evidence of prosecution witnesses in detail and we see no reason to differ from his conclusion that respondent 3 was concerned in administering the beating to the deceased.

6. Reverting to the question about the burden of proof the law is that the burden of proving that the accused committed the offence is on the prosecution. If there is any doubt left in the mind of the Court on this point, the accused is entitled to the benefit of the doubt and the prosecution fails. If the prosecution satisfies the Court that the accused committed the offence and the accused pleads an exception in defence, S. 105, Evidence Act casts the burden of proving the exception on him and enacts that the Court shall presume the absence of circumstances which bring his case within any of the exceptions. If the materials before the Court fail to satisfy the Court about existence of these circumstances but merely create a doubt whether such circumstances exist or not, the accused fails in discharging the burden and he must be convicted. In *Government of Bombay v. Sakur*[1], it was held that it was for the prosecution to satisfy the Court that the accused had committed the act with which he was charged. If that is established then in the same way it was for the accused to satisfy the Court of the existence of circumstances which might bring his case within the exception. In that case though the accused did not plead the right of private defence in so many words he made a statement which suggested that defence and their Lordships held that there was evidence in the case upon which the jury could come to a conclusion, that the accused had made out the right of private defence.
This decision was followed in *Danubha Vanubha v. State*[2], where the accused pleaded grave and sudden provocation. He led no evidence in support of his plea and his explanation was held to be inherently incredible. It was therefore held that he had not discharged the burden of proving the

exception which lay on him. In *Nishikanta Ghosh v. Calcutta Corporation*[3], P.N. Mookerjee, J. negatived the contention that the onus lay on the prosecution not only to establish the guilt of the accused but also to show affirmatively a negative state of things, viz., that conditions did not exist which would entitle him to any protection under the law. The learned Judge observes at p. 405 :

> "To this broad argument, I am unable to accede. I am not inclined to hold that where in a statute provisos are engrafted on main parts of penal sections to the effect that under certain conditions the offence or offences, mentioned in the said penal portions, would not be deemed to have been committed, the onus is on the prosecution to show the absence or non-existence of those Conditions and such onus must be discharged before a person can be convicted of the said offence or offences. In my view, the onus with regard to such provisos is on the accused and it is for him to establish affirmatively the conditions thereunder in order that the said provisos may be attracted to the case and their benefits made available to him."

With respect we agree with the law laid down in these decisions which is in accordance with the plain terms of S. 105, Indian Evidence Act. The view that the Court is entitled to review the prosecution evidence as a whole and if even after the accused's explanation is rejected it finds that there is a doubt whether the accused had made out the circumstances which brought his case within the exception, he should be acquitted does not appeal to us. That view was taken in *Sarwan Singh Chatter Singh v. The State*[4], following Woolmington's case, (*Woolmington v. Director of Public Prosecutor*[5],) which was also followed in *Emperor v. U Damapala*[6], and by the majority of the Judges in *Parbhoo v. Emperor*[7], *(G).* In Sakur's case the Bombay High Court expressed itself against resorting to English decisions in construing Indian statutes in the following terms :

> "In our view cases decided in England on the basis of English law ought not to be applied rigidly to the construction of an Indian statute unless there is a corresponding statute in England and here what we are dealing with is not the Common Law of England but that the combined effect of Sections 3 and 105,
> Evidence Act, where proof receives a statutory definition and it is stated that a Court shall presume the absence of circumstances bringing a case within the exception unless the accused discharges the burden of proving the existence of such circumstances."

We respectfully agree with the above observations and would prefer to adopt the plain language of S. 105, Indian Evidence Act.

7. The next question is whether the respondents have discharged that burden. The Indian Evidence Act does not prescribe any minimum standard of proof. Section 3 of that Act defines the word "proved" and says that a fact is said to be proved if either the Court believes it to exist or consider its existence so probable that a prudent man might safely act upon the supposition that it exists. No doubt the burden of proof of an exception is not so heavy in the case of an accused person as it is on the prosecution to prove the guilt but as pointed out in Sakur's case that

is only another way of stating that in the one case a prudent man may not consider it safe on a consideration of all the circumstances of the case to act upon the supposition that a particular fact exists while in the other case he may consider it to be safe to act upon the supposition that it exists. But the burden of proving the exception is nevertheless on the accused and it is for him to discharge that burden. He can do so either by specifically pleading the exception and leading evidence in support of his plea or by pointing out materials upon which it can be safely assumed that the exception has been made out. If he cannot affirmatively prove the exception but merely succeeds in creating a doubt as to whether circumstances which entitle him to plead the exception might or might not exist, he has failed to discharge the burden and he must be convicted.

8. Applying the above principles to this case we find that the prosecution has not been able to unfold the whole story. The thread has been taken up from the middle and all that is proved is that the deceased was beaten by the respondents in the house. There is no evidence to show what happened when the deceased entered the house or what preceded the attack. But it is safe to hold that something must have happened between the deceased and the respondents which must have been sufficiently serious to provoke them to beat the deceased so mercilessly that he died. No previous relations between the respondents and the deceased are alleged except that 5 years before the occurrence the deceased was respondent 1's servant. The respondents' story that the deceased attempted to commit rape on respondent 2 or assaulted her with the intention of committing rape was rejected by the Sessions Judge but it may well be an exaggeration on their part, which, our daily experience shows complainants, accused and witnesses are prone to. The respondents might have been advised to put their case as high as possible but their story does appear to contain a substratum of truth. The fact that the woman joined in the beating suggests that the incident had something to do with her. If the prosecution could have suggested any other reason, for the deceased's entry in the house, we would have been in a position to judge whether the respondents had made out a case for self defense. But all that we know from prosecution evidence is that the deceased was mercilessly beaten by them in the house and in the light of their explanation it may be safely assumed that he must have entered with the intention of outraging respondent 2's modesty and must have done something to manifest that intention. He was therefore committing a house trespass and the respondents had the right of private defense against it.

9. But the learned Advocate-General pointed out that even so the respondents had exceeded that right. The learned Sessions Judge held that the respondents continued to beat the deceased after he had fallen down. This is deposed to by both Arjan Velji and Bhanji Vashram. We therefore accept the learned Sessions Judge's finding. The respondents had no right to beat the deceased after he fell down and the beating which they administered him thereafter was not protected. Mr. Shah for the respondents next contended that the deceased was in the house all along and the respondents' right of private defense continued so long as he continued to be in the house. Now under Section 105, I.P.C. the right of private defense of property against criminal trespass continues so long as the offender continues in the commission of the criminal trespass. It cannot be said that after the deceased fell down he continued the trespass. Whatever intention he entertained at the time of entering the house, it had disappeared and he continued on the premises not because he intended to commit an offence but because he was physically unable to get out. We are therefore satisfied that after the deceased fell down the respondents' right of private defense came to an end. We must however remember that the deceased had entered the house with the intention of outraging the modesty of respondent 2 and did something to manifest that

intention. This would give the respondents grave and sudden provocation which was sufficient to deprive them of their power of self control and they can therefore be convicted under Section 334, I.P.C. only and not under Section 324, I.P.C.

10. In the result the appeal is allowed. The Sessions Judge's order acquitting the respondents is set aside. The respondents are convicted under Section 334, I.P.C. and sentenced to one month's rigorous imprisonment each.

Shah, C. J.

11. I agree.

Appeal allowed.

Cases Referred.

[1]1947 Bom 38 (AIR V 34) (SB)
[2]1952 Sau 3 (AIR V 39)
[3]1953 Cal 401 (AIR V 40)
[4]1954 Pepsu 160 (AIR V 41)
51935 AC 462
61937 Rang 83 (AIR V 24) (FB)
[7]1941 All 402 (AIR V 28) (FB)