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STATE OF GUJARAT

v.

BAI FATIMA & ANR.

March 19, 1975

[A. ALAGIRISWAMI AND N. L. UNTWALIA, JJ.]

B *Evidence—Appreciation of—Right of private defence—How established.*

Respondents Nos. 1 and 2 were mother and daughter. The deceased was the brother-in-law of respondent No. 1. For some days before the date of the occurrence, the relations between the two families were none too cordial. On the day of the occurrence there was a scuffle between the respondents and the deceased. A little later, when the deceased was sitting in the house of his father-in-law in the opposite row of houses, respondent No. 1 was alleged to have gone to the deceased with a stick to beat him. Some neighbours intervened and C tried to pacify both the parties. When the deceased was going out, respondent No. 1 put her leg across the legs of the deceased, as a result of which he fell down on his back. Respondent No. 2 immediately caught hold of both the hands of the deceased and respondent No. 1 is stated to have squeezed his testicles and pulled them. Eventually the deceased succumbed to the injury. After the incident respondent No. 1 lodged a complaint before the police stating that the deceased, his wife and his mother-in-law caught hold of her and gave her blows and kicks with a stick as a result of which she fell down.

D Holding that the prosecution case was proved beyond reasonable doubt, the Sessions Judge convicted respondent No. 1 under s. 304, Part-I, I.P.C. Respondent No. 2 was convicted under s. 323 read with s. 144, I.P.C. On appeal, the High Court, even after believing the main part of the occurrence, acquitted respondent No. 1 of the charges levelled against her and consequently respondent No. 2 also on the ground that she must have done so in exercise of her right of private defence inasmuch as she must have squeezed the testicles of the deceased when he was showering blows with a stick on her in order to protect E herself.

Allowing the appeal of the State.

HELD : (1) The trial court was right in believing the evidence of the prosecution witnesses in regard to both the incidents and the occurrence in question forming part of the second incident. The High Court differed from the view of the trial judge on flimsy and unsustainable grounds. [998 D-E]

(2) There was absolutely no basis or material on the record to enable the F High Court to record an order of acquittal in favour of the respondents by extending them a right of private defence. Even going to the maximum extent in favour of the respondents that respondent No. 1 got the blows with a stick at the hands of the deceased and in the second incident it is manifest that her action of assault on him was a deliberate counter-attack to cause him such injury which at least was likely to cause his death. The counter-attack could in no sense be an attack in exercise of the right of private defence. [1000 F-G]

(3) Neither in her complaint before the police nor in the statement under G s. 342, Cr. P.C. was there a whisper by respondent No. 1 of her having squeezed the testicles and private parts of the deceased in exercise of her right of private defence. Not only was the plea of private defence not taken by the respondents in their statements under s. 342, Cr. P.C. but no basis for the plea was laid in the cross-examination of the prosecution witnesses or by adducing any defence evidence. The burden of establishing that plea was not discharged in any way by the respondents even applying the test of preponderance of probabilities in favour of that plea. There is absolutely no material on the record to lead to any such conclusion. [999 G-H]

H *Munhl Ram and Others* v. *Delhi Administration* [1968] 2 S.C.R. 455, followed.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 67 of 1971.

Appeal by special leave from the judgment & Order dated the 17th July, 1970 of the Gujarat High Court in Crl. A. Nos. 287 and 128 of 1969.

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R. H. Dhebar and *R. N. Sachthey,* for the appellant.

A. S. Qureshi, Vinal Deve and *Kailash Mehta,* for the respondents.

The Judgment of the Court was delivered by

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UNTWALIA, J.—There is a locality known as Nani Malokoad in the town of Kaloy, District Mehsena, Gujarat. In this locality is a road (lane) running north to south. Bai Fatima, respondent no. 1 in this appeal filed on grant of special leave by the State of Gujarat, is the wife of Allarakha Hussemkhan. He had a younger brother named Gulabkhan Husseinkhan. The victim of the occurrence is the said Gulabkhan. Both the brothers had their houses adjacent to each other in this lane facing east. The northern one was in occupation of and belonged to the deceased and the southern one was of Allarakha. There are a number of other houses situated around the houses of the two brothers. One such house is of Sardarkhan Muradkhan facing west abutting the road, two houses north of the house of the deceased. Jamiyatkhan is the son of Sardarkhan, father-in-law of the deceased Gulabkhan.

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In the month of June, 1968 a complaint was made to the Kalol Municipality by persons of the locality including the deceased and some of the prosecution witnesses that Allarakha, husband of respondent no.1 was discharging dirty water of his house towards East which collects on the road and causes nuisance to the residents of the locality. That had caused friction between the families of the two brothers.

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On 27.6.1968 according to the prosecution story there were two incidents in the Angana i.e. space on the road in front of the houses of the parties—one was at 5:30 p.m. and the other at 6.30 p.m. The prosecution case is that a she-goat of Gulabkhan strayed in the house of Fatima. She began giving blows to the goat. There were altercations between the members of the families of the two brothers. Respondent no.2 who is a married daughter of respondent no.1 and her son Liyakat who was 15 years old on the date of occurrence were also present at the time of this quarrel. They threw stones which hit P.W.3 Nannubibi, wife of deceased Gulabkhan, one Rahematbibi and P.W. 4 Noorbibi—a neighbourer and a close relation of Nannubibi Respondent no.1 is said to have come out with a stick from her house and went to Gulabkhan to strike him. One Allarakha Rehman—a close neighbour came there, caught hold of the stick, quietened respondent no.1 and sent her back to her house The second part of the story is that Gulabkhan and Nannubibi went and sat in the Angana of

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A Jamiyatkhan son of Sardarkhan, father-in-law of Gulabkhan. Respondent no.1 about an hour later went with a stick in her hand and hurled a blow on Gulabkhan. Nannubibi intervened and got the blow on her right hand finger. Gulabkhan directed respondent no.1 to go back to her house by gestures of his hand and he also proceeded and pushed her towards her house. When Gulabkhan reached the Angana
B of his house, respondent no.1 is said to have put her leg across his legs with the result that he fell down on his back. Respondent no.2 caught hold of the hands of Gulabkhan. Respondent no.1 sat on his legs and squeezed his testicles and pulled them. The boy Liyakat is said to have bitten the deceased on the left shoulder. Gulabkhan thereafter was made to recline on a cot. Eventually he died of the shock due to the pressing of his private parts by respondent no. 1. Information was
C sent to the Police Station. A complaint of Nannubibi was recorded at about 10.30 p.m. Liyakat was sent for trial before the Juvenile Court. Respondent nos.1 and 2 were tried by the Sessions Judge, Mehsana.

The learned Sessions Judge held the prosecution story to be proved beyond reasonable doubt in all material particulars. Finding that the injury caused to Gulabkhan in ordinary course of nature may not be
D sufficient to cause his death but was likely to cause his death, he convicted respondent no.1 under section 304 Part-I of the Indian Penal Code and sentenced her to undergo rigorous imprisonment for 7 years. She was further convicted under section 323 and was given a concurrent sentence for 3 months under this count. Respondent no.2 was convicted of an offence under section 323 read with section 114 of the Penal Code and was sentenced to undergo rigorous imprisonment
E for 3 months. The respondents filed an appeal in the Gujarat High Court from the order of conviction recorded against them and the State went up in appeal for their conviction under section 302 of the Penal Code read with section 114 in the case of respondent no.2 The State appeal was dismissed by the High Court and that of the respondents allowed. The State came to this Court and obtained special
F leave from the judgment of acquittal recorded by the High Court in the respondents appeal. The dismissal of the State appeal by the High Court is final.

The three eye witnesses to the occurrence are P.W.3 Nannubibi, P.W.4 Noorbibi and P.W.6 Jenatbibi. The latter two are neighbourers and related to Nannubibi. The Trial Judge believed their evidence. He also believed the evidence of P.W.7 Gulamanabi Shermohmad—a
G close neighbour of the parties to whom an oral dying declaration is said to have been made by Gulabkhan before his death. It may be stated here that P.W.8 Rasulbhai was sitting in the Bazar at some distance from the place of occurrence in the evening of the 27th June, 1968. He got the information at about 9.45 p.m. about the death of Gulabkhan. He rushed to the Police Station and merely informed about his death.

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It is also necessary to note here that respondent no.1 had received some injuries on her person in either of the incidents which took place

on the evening of 27th June, 1968. Prosecution did not explain the injuries on her person but the Trial Judge inferred that they must have been caused in the first incident which took place at 5.30 p.m. and not in the second which was the subject matter of the charge against the respondents.

The High Court has held in favour of the prosecution on the main part of the occurrence, namely, squeezing of the testicles of the deceased by respondent no.1 as a result of which he died. Yet it has disbelieved the prosecution case in regard to some other aspects. It has not accepted the prosecution story that there were two incidents in the evening. Nor has it accepted the version that shortly after the first incident Gulabkhan and Nannubibi had gone to the Angana of Jamiyatkhan. The story of falling down of the deceased by the tripping of his legs by respondent no.1 has been discarded by the High Court. So also the evidence of P.W.7 Gulamnabi. Even after believing the main part of the occurrence the High Court has exonerated respondent no. 1 of the charges levelled against her and consequently respondent no.2 also on the ground that she must have done so in exercise of her right of private defence in as much as she must have squeezed testicles of the deceased when he was showering blows with a stick on respondent no. 1 in order to protect herself.

In our opinion there are two many conjectures, surmises and contradictions in the judgment of the High Court. The respondents had not examined any witness to give any counter version of the occurrence or to justify the assault on testicles of the deceased which resulted in his death. The High Court has said in its judgment :—

(1) "There is also no doubt that since some days prior to the date of the incident the relations between the deceased and the family of accused no.1 were not cordial."

(2) "There is no doubt that a quarrel did arise on that day" (meaning thereby the date of occurrence "between the deceased and accused no. 1 in respect of a goat."

(3) "It is very reasonably clear that the squeezing of the testicles of the deceased was in all probability the act of accused no.1"

(4) "There is further no doubt that the deceased did die on account of squeezing of his testicles in the evening that day at round about 8.30 p.m."

On the findings aforesaid if the claim of right or private defence put forward on behalf of respondent no.1 was untenable as we shall show hereinafter it was wholly so, then it is plain that the High Court ought not to have interferred with the order of conviction recorded by the Trial Court. Even in face of the said findings the High Court criticized the prosecution case as regards some details of the occurrence or the incidents and rejected a good portion of it. We shall briefly show that the said rejection by the High Court was wholly unjustified.

A There were two incidents according to the prosecution case which happened in the evening at an interval of about an hour. High Court says it was not so and says so without any basis. The prosecution did not stand to gain anything by splitting up the evening incident in two parts. Even in the First Information Report, Ext.32 recorded at 10.30 p.m. in the night the two incidents were separately narrated. B There was absolutely no reason for the High Court to interfere with the findings of the Trial Court in that regard.

The High Court does not accept the prosecution story that deceased Gulabkhan had gone to the Angana of Jamiyatkhan and respondent no. 1 went there as an aggressor with a stick in her hand. This story has been discarded on the ground that it is not mentioned in the First C Information Report nor in the statements of the other two witnesses before the police. We may observe again that the prosecution did not stand to gain anything by unnecessarily or falsely introducing the story of Gulabkhan's going to the Angana of his father-in-law. The main occurrence happened in the Angana of Gulabkhan. The places are so very near that the story of Gulabkhan going to the Angana of his father-in-law was not an important one to be remembered by the wit- D nesses to be recited before the police. It mattered little whether respondent no.1 went as an aggressor to the Angana of the deceased or a bit further North to the Angana of Jamiyatkhan.

High Court also discarded the story of the tripping of the legs of Gulabkhan because it is not mentioned in the First Information Report. But then it ought to have been noticed that no such contradiction was to E be found in the evidence of P.Ws 4 and 6 in Court and their statements before the police. It must, therefore, be presumed that they had given out the tripping story before the police.

The High Court has not thought it safe to rely upon the evidence of the three eye witnesses none of whom was found to be disinterested in the prosecution. The comment is that Allarakha Rehman and F Mansabu who lived in the house opposite to the deceased have not been examined by the prosecution. According to the prosecution case the said Allarakha had merely quietened respondent no. 1 in the first incident and Mansabu came after the second incident was over. In material particulars we find the evidence of the eye witnesses very convincing and natural. In our opinion the High Court was not justified in thinking that it was not safe to rely on their evidence wholly G and specially when the main part of the occurrence which fastened the guilt on respondent no.1 was not disbelieved.

Absence of any details in the statement recorded at the police station on the basis of the information given by P.W. 8 Rasulbhai unnecessarily led the High Court to remark that no one knew upto 10.00 H p.m. as to how Gulabkhan died. This contradicts the earlier findings of the High Court that he died as a result of the squeezing of his testicles by respondent no.1 Rasulbhai, according to his evidence did not get the details of the occurrence and so did not give any to the police.

The High Court has given 3 or 4 reasons for discarding the evidence of P.W.7 Gulamnabi to whom the oral dying declaration is said to have been made by the deceased. The first reason given by the High Court is that when this witness went near Gulabkhan the three women who claimed to have witnessed the occurrence were sitting near him; none of them related the story to Gulamnabi. When he put a question to Gulabkhan who being in a position to give the answer gave it, it was not necessary for him to talk to the women thereafter. Gulamnabi was the person who had gone to call Dr. Rao to examine Gulabkhan. Dr. Rao came at 8.30 p.m. and declared him to be dead. It was not necessary for Gulamnabi to relate the details of the occurrence to Dr. Rao as he himself had not witnessed it. Another reason given for discarding the evidence of Gulamnabi is with reference to the evidence of Rasulbhai that upto 10.00 p.m. no one knew the exact reason for the death of Gulabkhan. Having accepted the prosecution story about the cause of his death it was unnecessary to dilate upon the matter any further. The High Court has not disbelieved the lodging of the complaint before the police on the statement of Nannubibi at 10.00 p.m. The last reason given is the non-examination of Dr. Rao by the prosecution. His evidence was of no use to it and the comment of the High Court is not, therefore, justified.

We have unhesitatingly come to the conclusion that the Trial Court was right in believing the evidence of the prosecution witnesses in regard to both the incidents and the occurrence in question forming part of the second incident. The High Court differed from the view of the Trial Judge on flimsy and unsustainable grounds.

Now we come to deal with the question of right of private defence. It is no doubt true that the prosecution did not explain the injuries on the person of respondent no.1. P.W.5 Dr. S. C. Masalia who had examined the injuries on the side of the prosecution also examined Fatima, respondent no.1 when she was sent to him by the police. Fatima Bibi had lodged a complaint before the police which was found to be a non-cognizable offence at about 8.00 p.m. on 27-6-1968. That is Ext.44. In this complaint she stated that her young one of the goat had gone in the Angana of Gulabkhan. Three persons named in the complaint were Gulabkhan, Bai-bibi, mother-in-law of Gulabkhan and Nannubibi, his wife. The two ladies caught hold of her *Odhana* and began to give her blows of kicks and fists. Gulabkhan gave stick blows on the right hand and so she fell down on the ground and began to shout. The injuries found on the person of Fatima Bibi were 5 in number. Three contusions on the right forearm, one contusion on posteric-parietal part of right side of scalp and one contusion on scapular part of right side of back. The injuries were all of minor character. In her statement under section 342 of the Code of Criminal Procedure, 1898 respondent no. 1 stated almost the same story and added that Gulabkhan was drunk while he was abusing her. Neither in Ext.44 nor in the statement under section 342 there was a whisper by by respondent no.1 of her having squeezed the testicles and the private part of Gulabkhan. Nothing was stated to give any inkling of her having squeezed the testicles of Gulabkhan

A in exercise of her right of private defence to protect her from further assault. Nor was any evidence adduced in Court to give any counter version of the occurrence. No foundation was laid to enable the court to acquit the respondents granting them a right of private defence. It did require a pure conjecture and imagination to hold the respondents not guilty by extending to them the right of private defence.

B In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow :

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

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(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

D Question is in which category the present case falls ?

In *Munhi Ram and others* v. *Delhi Administration*(1) Hegde, J delivering the judgment of this Court has said at page 458 :

> "It is true that appellants in their statement under section 342 Cr. P.C. had not taken the plea of private defence, but necessary basis for that plea had been laid in the cross-
> E examination of the prosecution witnesses as well as by adducing defence evidence. It is well-settled that even if an accused does not plead self-defence, it is open to the Court to consider such a plea if the same arises from the material on record—see *In Re-Jogali Bhaige Naiks and another*—A.I.R. 1927 Mad. 97. The burden of establishing that plea
> F is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

In the instant case not only the plea of private defence was not taken by the respondents in their statement under section 342 but no basis for that plea was laid in the cross-examination of the prosecution witneses or by adducing any defence evidence. In our opinion the
G burden of establishing that plea was not discharged in any manner by the respondents even applying the test of preponderance of probabilities in favour of that plea. There is absolutely no material in the records of this case to lead to any such conclusion. We do not think that the Trial Judge was right in assuming that respondent no. 1 must have received the injuries in the first incident. It may well be that
H she received the injuries in the second incident. Since prosecution did not come forward to show in what manner she received these

(1) [1968] (2) S.C.R. 455.

injuries, assumption can be made to the farthest extent in favour of the respondents that respondent no.1 received the injuries with a stick, may be at the hands of Gulabkhan or any other person on his side. But surely the assumption could not be stretched to the extent it has been done by the High Court. The High Court is not right in saying that by the tripping of the legs Gulabkhan would have fallen on his face and not on his back. A man may fall on back or on face depending upon the side and the angle of the tripping. The other error committed by the High Court is when it says :

> "It appears to us to be more probable that while the quarrel was going on in the Angana of the deceased and the deceased was delivering blows of stick on the accused no. 1, she squeezed his testicles in order to liberate herself from his attack. It appears that she did so while the deceased was standing and giving blows on her."

The deceased was wearing a pant and it is impossible to imagine that the squeezing of the testicles could be done by respondent no. 1 to the extent of causing his death soon after the squeezing when Gulabkhan was in a standing position. In that position he could have at once moved back and liberated himself. The extent of squeezing done in this case was possible only if respondent no. 1 could sit on his legs after he had fallen down at his back. This lends further support to the prosecution story that respondent no. 2 caught his hands from behind meaning thereby from towards the side of his head, in the front being respondent no. 1 on his legs. In our opinion, therefore, there was absolutely no basis or material in the records of this case to enable the High Court to record an order of acquittal in favour of the respondents by extending them a right of private defence. Even going to the maximum in favour of the respondents that respondent no.1 got the blows with a stick at the hands of Gulabkhan and in the second incident it is manifest that her action of assault on him was a deliberate counter-attack to cause him such injury which at least was likely to cause his death. The counter-attack could in no sense be an attack in exercise of the right of private defence.

In material particulars the evidence of the three eye witnesses as also the evidence of dying declaration of the deceased before P.W. Gulamnabi is so convincing and natural that no doubt creeps into it for the failure of the prosecution to explain the injuries on the person of respondent no. 1. The prosecution case is not shaken at all on that account. In our judgment this is a case which falls in the third category

A as enumerated above. In agreement with the Trial Court, we hold that the guilt of both the respondents have been proved beyond any reasonable doubt.

For the reasons stated above, we allow this appeal, set aside the order of the High Court and restore that of the Trial Court as against B respondent no. 1 as respects her convictions and sentences and as against respondent no. 2 only in regard to her conviction. It is no use sending the young girl back to jail for a few months. While maintaining her conviction under section 323/114 of the Penal Code, we reduce her sentence to the period already undergone.

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P.B.R. *Appeal allowed.*