

KESHORAM GORA

v.

STATE OF ASSAM

February 1, 1978

[S. MURTAZA FAZAL ALI AND P. N. SHINGHAL, JJ.]

Indian Penal Code—Sec. 99—302—304 Part II—Causing murder in exercise of right of private defence—Exceeding right of private defence—Evidence of hostile witness—Admission of accused—Exculpatory and inculpatory part if separable.

The appellant alongwith his brother Someshwar was prosecuted under section 302 read with section 34 of the I.P.C. for causing death of one Kalinath. According to the prosecution Kalinath was uprooting pulses from his land when the accused Keshoram and his brother Someshwar appeared on the scene armed with shels along with their father and brother and attacked the deceased. The deceased received a number of injuries as a result of which he fell down and died. F.I.R. was lodged by P.W. 3 Ramakanta Bora at about 11 a.m. In the F.I.R. however only the name of P.W. 1 Upendra Chandra Bora was mentioned as a witness. The defence of the accused was that the actual occurrence took place in the land belonging to the father of the accused Kanwal Chandra and when the deceased tried to assault the ploughmen of the accused the accused injured the deceased in exercise of their right of private defence. The Sessions Judge was of the view that as the prosecution itself presented two contradictory versions it failed to prove the manner in which the occurrence took place and accordingly acquitted the accused.

In an appeal the High Court accepted the evidence of the eye witnesses and over-ruled finding of the Sessions Judge that the prosecution had itself given two contradictory versions of the occurrence.

Partly allowing the appeal,

HELD : 1. The Sessions Judge treated the evidence of two hostile witnesses as the spokesmen of the prosecution case. It is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone. However, once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness. In these circumstances, the Sessions Judge was not at all justified in treating the version given by P.Ws. 5 and 7 as the version of the prosecution itself.

[790 C-E]

2. The principle of '*Falsus unus falsus omnibus*' does not apply to criminal trials and it is the duty of the Court to disengage truth from falsehood, to sift the grain from the chaff instead of taking an easy course of rejecting the prosecution case in its entirety merely on the basis of a few infirmities.

[790 F-G]

3. The accused has clearly admitted that he did assault the deceased with a sharp cutting weapon as a result of which the deceased Kalinath fell down. The prosecution evidence therefore has to be judged in the light of the admissions made by the accused. [791 B & C]

4. It is well settled that where a confession or admission is separable there can be no objection to taking one part into consideration which appears to be true and reject the other part which is false. [791 D]

Nishi Kant Jha v. State of Bihar [1969] 2 SCR 1033; relied on.

5. It would appear from the evidence of P.W. 5, that the land in which the assault took place belonged to father of the accused. Although this witness was declared hostile this part of the statement made by him is amply corroborated.

ted by the testimony of independent witness, namely PW 6. The Police did not find blood marks either in the land of the deceased or in the land of the accused. From the evidence of PW 6 it appears that brother of the accused Someshwar was first assaulted by Kalinath. The appellant, therefore, assaulted Kalinath in the land of his father after Someshwar was assaulted by the deceased. The evidence of the other eye witness who has given the one sided version of the assault by the accused on the deceased cannot be accepted in toto. However, neither the appellant nor Someshwar received any injuries. There can be no doubt that the appellant exceeded the right of private defence. The Court, therefore, altered the conviction of the appellant from one under section 302/34 to section 304 Part II. [791 F-H, 792 A, C, D & E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 466 of 1976.

Appeal from the Judgment and Order dated 13-8-1976 of the Assam High Court in CrI. A. No. 3/1971.

P. H. Parekh and *Kailash Vasdev* for the Appellant.

S. K. Nandy for the Respondent.

The Judgment of the Court was delivered by

FAZAL ALI, J. This appeal is directed against the judgment of the Assam High Court dated 13-8-1976 by which the High Court allowed the appeal and after reversing the judgment of the Sessions Judge acquitting the appellants, convicted the accused Keshoram Bora and Someshwar Bora under section 302/34 and sentenced them to imprisonment for life. The appellant Keshoram Bora has preferred this appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1973 as also under section 379 of the Code of Criminal Procedure, 1973.

A detailed narrative of the prosecution case is contained in the judgment of the High Court and it is not necessary for us to repeat the same all over again.

According to the prosecution, Kalinath Bora was uprooting pulses from his land on 19th December, 1967 at about 9 a.m. when the accused Keshoram Bora and Someshwar Bora appeared on the scene armed with 'Shels' along with their father and brother and attacked the deceased. The deceased received a number of injuries as a result of which he fell down. F.I.R. was lodged by P.W. 3 Roma Kanta Bora at Police Station Dhing at about 11 a.m. on the same day. In the F.I.R., however, only the name of P.W. 1 Upendra Chandra Bora was mentioned as a witness. The police arrived on the scene of the occurrence and after the usual investigation submitted a charge-sheet against the accused as a result of which they were committed to the court of Sessions, but ultimately acquitted as indicated above.

The defence of the accused was that the actual occurrence took place in the land belonging to the father of the accused Kamal Chandra when the deceased tried to assault the ploughmen of the accused and in order to protect them the appellant Keshoram Bora assaulted the deceased with a pointed weapon resulting fatal injuries to him. The

A accused thus pleaded that the complainant had come armed and trespassed in the field of the accused and wanted to assault his men as a result of which the appellant assaulted the deceased in self defence.

The learned Sessions Judge was of the view that as the prosecution itself presented two contradictory versions, hence the prosecution failed to prove the manner in which the occurrence took place and accordingly acquitted the accused.

B

The central evidence against the accused consisted of P. Ws. 1, 2, 4, 5, 6, 7 and 9. This evidence was sought to be corroborated by an oral dying declaration said to have been made by the deceased to P.W. 4 in the presence of P. Ws. 1 and 2 as also by an extra judicial confession made by the accused to Roma Kant Bora, P.W. 3. Both the High Court and the Sessions Judge disbelieved the evidence furnished by the dying declaration and the extra judicial confession. The High Court, however, accepted the evidence of the eye-witnesses and overruled the finding of the Sessions Judge that the prosecution had itself given two contradictory versions of the occurrence. We have heard counsel for the parties and have gone through the judgment of the High Court and of the Sessions Court and we find ourselves in complete agreement with the reasons given by the High Court in accepting the prosecution case. The Sessions Judge appears to have treated the evidence of two witnesses, namely, P. W. 5 and 7 as the spokesmen of the prosecution case when in fact these witnesses had been declared hostile by the prosecutor and the court granted permission to the prosecution to cross-examine these witnesses. While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone it is equally well settled that when once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness. In these circumstances, therefore, the Sessions Judge was not at all justified in treating the version given by P.W. 5 and 7 as the version of the prosecution itself. The High Court, therefore, rightly set aside the findings of the learned trial Judge on this point.

E

F Learned counsel for the appellant submitted that a material part of the prosecution case having been rejected the High Court was wrong in convicting the appellant on the residue, particularly when he had been acquitted by the trial Court. It is now well settled that the principle *Falsus unus falsus omnibus* does not apply to criminal trials and it is the duty of the court to disengage the truth from falsehood. to sift the grain from the chaff instead of taking an easy course of rejecting the prosecution case in its entirety merely on the basis of a few infirmities. In the instant case, the High Court has clearly found that the evidence of P.W. 1, 2, 4, 6, and 8 proves beyond reasonable doubt that the occurrence had taken place according to the manner alleged by the prosecution. Even the appellant in his statement under section 342 Cr. P.C. stated as follows :—

G

H “Rahim and Mohammad were ploughing in our land. They told me that while they were ploughing, Kalinath with a dao prevented them and so, they stopped ploughing. At that time Kalinath was not there. I asked both of them to

plough again. They began to plough. Kalinath alias *Kalinath* again came there with a dao. He uttered sic "who are you" and chased me raising a dao to assault me. Looking hither and thither I could find nobody. As soon as he came near me by raising dao, I having found no means, started assaulting him with the holanga taken for bringing paddy. After a little while he fell down. My elder brother, Someshwar also arrived there."

A

B

It will appear from the categorical admission made by the accused that he did assault the deceased with a sharp cutting weapon which he calls "holanga" as a result of which the deceased Kalinath fell down. The justification pleaded by the accused is that he did so in order to protect his ploughmen from being attacked with a dao. A perusal of the statement of the accused clearly reveals that he does not dispute having fatally assaulted the deceased, but has pleaded self defence. The prosecution evidence, therefore, has to be judged in the light of the admission made by the accused. It was submitted by counsel for the appellant that it was not open to the court to take the inculpatory part into consideration and reject the exculpatory part. It is submitted that an admission can be taken either as a whole or not at all. It is well settled that where a confession or an admission is separable there can be no objection to taking one part into consideration which appears to be true and reject the other part which is false. In the case of *Nishi Kant Jha v. State of Bihar*⁽¹⁾ this Court observed as follows :

C

D

"In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Ex. 6 the High Court had acted rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime."

E

In the instant case, the circumstances are almost identical with the facts of the case of this Court cited above. Here also, even the prosecution evidence proves that the deceased was assaulted with a "holanga" as a result of which he died. The only bone of contention between the prosecution and the defence case is as to the situs or the place where the assault took place. According to the prosecution, the occurrence took place in the land of the deceased. It would, however, appear from the evidence of P.W. 5 that the land in which the assault took place belonged to Kamal Singh. Although this witness was declared hostile, this part of the statement made by the witness is amply corroborated by the testimony of an independent witness, namely, P.W. 6 Ananta Kumar Bora who also says that the land belonged both to Kalinath and Kamal Singh. The police does not appear to have found blood marks either in the land of the deceased or in the land of the accused which would have been a conclusive factor to determine where the occurrence took place.

F

G

H

(1) [1969] 2 S.C.R. 1033.

A Furthermore, from the evidence of P.W. 6 it appears that the accused Someshwar first assaulted the deceased with a lathi and thereafter Someshwar and the appellant surrounded him and the appellant pierced him with a 'shel'. In this connection P.W. 6 has deposed as follows :

B "I saw 'shels' in the hands of Keshoram and Someshwar. Between them, there was Kalinath, Someshwar was first assaulted on the hands. I cannot say with what it was assaulted. Kalinath had a lathi in his hands measuring about 2 cubits. As soon as Someshwar was assaulted, Someshwar fell down on the ground. Keshoram pierced Kalinath with a shel."

C There was some controversy regarding the translation of the sentence "Someshwar first assaulted on the hands". We have, therefore, consulted the original and on a proper reading of the original it seems to us that what the witness stated was that Someshwar was first assaulted on the hands by the deceased Kalinath, with a lathi and as soon as Someshwar was assaulted he fell down and then the appellant Keshoram pierced Kalinath with a shel. Taking this statement of P.W. 6 with the admission of the appellant it is absolutely clear that **D** the appellant undoubtedly assaulted the deceased in the land of his father after Someshwar was assaulted by the deceased.

E The evidence of the other eye-witnesses who seem to have given one sided version of the assault by the accused on the deceased cannot be accepted in toto. It seems to us that the deceased must have entered the land of the accused and either tried to assault or may have assaulted Someshwar with a lathi which provoked the appellant to assault the deceased purporting to act in self defence. As however neither the appellant nor Someshwar received any injuries, there can be no doubt that the appellant exceeded the right of private defence. Thus, on the acceptable evidence in the case, the accused can only be convicted of an offence under section 304 Part II of the Penal Code for having exceeded the right of private defence.

F For the reasons given above, we would, therefore, allow this appeal to this extent that the conviction of the appellant is altered from one under section 302/34 to that under section 304(2)/34 and the sentence is reduced from life imprisonment to 5 years rigorous imprisonment. As Someshwar is reported to have died, it is not disputed that the appeal has abated in so far as he is concerned.

P.H.P.

Appeal allowed in part.