A ANAND RAMACHANDRA CHOUGULE

v.

SIDARAI LAXMAN CHOUGALA AND OTHERS

(Criminal Appeal No. 1006 of 2010)

B AUGUST 06, 2019

[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Penal Code, 1860:

Alteration of conviction from u/s. 302/34 to s. 304 Part I/34 – C *There was a verbal duel followed by scuffle between the parties – Prosecution alleged that accused persons assaulted the other party, which also led to a homicidal death – Trial court convicted all the four accused u/s 302/34 IPC – High Court held that the assault was made on spur of the moment without premeditation and that* D *both sides had suffered injuries and altered conviction u/s.304 Part I – Two accused were acquitted as their presence was found doubtful – On appeal, held: Parties were related to each other and there was a land dispute between them – The verbal duel was followed by a scuffle is a concurrent finding of fact by two Courts – Accused* E *persons had also lodged an FIR with regard to the same occurrence, which was not investigated – Police failed to explain why the said FIR was not investigated – Further, accused were also admitted in the hospital for treatment with regard to injuries sustained in the same occurrence but the injury report was not brought on record –* F *The facts were suppressed by the prosecution, which creates sufficient doubts and prosecution was unable to answer the same – The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt – No reason to interfere with the order of the High Court.*

G **Dismissing the appeals, the Court**

HELD: 1. On perusal of materials on record, the relationship between parties and the existence of a land dispute regarding which a civil suit was also pending are undisputed facts. The fact that a verbal duel followed by scuffle took place between H **the parties culminating in injuries is a concurrent finding of fact**

by two Courts. The fact that the accused also lodged an F.I.R. with regard to the same occurrence stands established by the evidence of PWs. 19 and 22, the Investigating Officers, who have admitted that the respondents-accused had also lodged BRPS, which was not investigated by them. Similarly, PW 11, the Police Constable, deposed that two of the accused were admitted in the District Hospital and that he was posted on watch duty. The occurrence is of 07.06.2002 and respondents-accused nos. 1 and 2 were discharged on 11.06.2002. Their injury report has not been brought on record by the prosecution and no explanation has been furnished in that regard. [Para 8] [19-A-C]

2. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt. [Para 9] [19-D-E]

3. The fact that a defence may not have been taken by an accused under Section 313, Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. [Para 10] [19-F]

4. The fact that an F.I.R. was lodged by the accused with regard to the same occurrence, the failure of the police to explain why it was not investigated, coupled with the admitted fact that the accused were also admitted in the hospital for treatment with regard to injuries sustained in the same occurrence, but the injury report was not brought on record and suppressed by the prosecution, creates sufficient doubts which the prosecution has been unable to answer. [Para 11] [20-A-B]

A *Sunil Kundu v. State of Jharkhand,* **(2013) 4 SCC 422 : [2013] 5 SCR 924 – relied on.**

State of Uttar Pradesh v. Faqirey **(2019) 5 SCC 605;** *Pulicherla Nagaraju v. State of A.P.,* **(2006) 11 SCC 444 : [2006] 4 Suppl. SCR 633 ;** *State of Rajasthan thr. the Secretary v. Kanhaiya Lal,* **(2019) 5 SCC 639;** *Vijay Ramkrishan Gaikwad v. State of Maharashtra and another,* **(2012) 11 SCC 592 ;** *Raj Kumar v. State of Maharashtra*, **(2009) 15 SCC 292 : [2009] 11 SCR 49;** *Dayal Singh and others v. State of Uttaranchal,* **(2012) 8 SCC 263 : [2012] 10 SCR 157 ;** *Gajoo v. State of Uttarakhand*, **(2012) 9 SCC 532 : [2012] 7 SCR 1033;** *Manoj Kumar v. State of Himachal Pradesh* **(2018) 7 SCC 327 : [2018] 5 SCR 361;** *Partap v. State of U.P.,* **(1976) 2 SCC 798 : [1976] 1 SCR 757 – referred to.**

D **Case Law Reference**

(2019) 5 SCC 605	**referred to**	**Para 3**
[2006] 4 Suppl. SCR 633	**referred to**	**Para 4**
(2019) 5 SCC 639	**referred to**	**Para 4**
(2012) 11 SCC 592	**referred to**	**Para 4**
[2009] 11 SCR 49	**referred to**	**Para 5**
[2012] 10 SCR 157	**referred to**	**Para 6**
[2012] 7 SCR 1033	**referred to**	**Para 6**
[2018] 5 SCR 361	**referred to**	**Para 7**
[2013] 5 SCR 924	**relied on**	**Para10**
[1976] 1 SCR 757	**referred to**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1006 of 2010.

From the Judgment and Order dated 30.11.2007 of the Division Bench of High Court of Karnataka at Bangalore in Criminal Appeal H No. 22/2005

With

Criminal Appeal No. 1007 of 2010.

Joseph Aristotle S., Mrs. Priya Aristotle, Rijuk Sarkar, Mrs. Farah Hashmi, Shanthakumar Mahale, Rajesh Mahale, Advs. for the Appellant.

Anil V. Katarki, Anil C. Nishani, Madhan Kanur, Ms. E. R. Sumathy, Advs. for the Respondents.

The Judgment of the Court was delivered by

NAVIN SINHA, J.

1. The present two appeals have been preferred by the complainant and the State respectively. The challenge is to the orders of the High Court, by which the respondents nos.3 and 4 have been acquitted, and the conviction of the respondents nos.1 and 2 to life imprisonment under Section 302/34 of the Indian Penal Code,1860 (hereinafter referred to as 'IPC') has been altered to one under Section 304 Part I/34 sentencing them to seven years.

2. The complainant and the accused are related to each other. There was a land dispute between them. A civil suit is also stated to have been pending. On 07.06.2002, the deceased along with others were returning to their village. When they reached near the house of one Yeellappa Patil, the accused persons are alleged to have assaulted them leading to homicidal death. The trial court convicted all the four accused. The High Court in appeal concluded from the materials on record that the assault was made on the spur of the moment without premeditation and that both sides having suffered injuries the conviction ought to be altered under Section 304 Part I, IPC. Two of the accused were acquitted as their presence was found to be doubtful.

3. Learned counsel for the appellants submitted that the High Court erred in altering the conviction to one under Section 304 Part I, IPC. The assault was premeditated. The accused were armed with axe, *koita* and bamboo sticks. PWs. 2 and 3 were injured witnesses. There was no material in support of the plea of self defence or that the assault took place on the spur of the moment. No such defence was taken under Section 313, Cr.P.C. by the accused. PWs. 4 and 5 were also eye witnesses. Minor contradictions and discrepancies in the evidence of the prosecution witnesses were insufficient to doubt the prosecution case. Relying upon ***State of Uttar Pradesh vs. Faqirey***, (2019) 5 SCC 605, it was submitted that the conviction ought to be restored to one under Section 302, IPC.

A 4. Reliance was also placed on ***Pulicherla Nagaraju vs. State of A.P.,*** (2006) 11 SCC 444, and ***State of Rajasthan thr. the Secretary vs. Kanhaiya Lal,*** (2019) 5 SCC 639, in support of the submission that a single assault on the head sufficient to cause death, without provocation in a sudden quarrel or fight justified conviction under Section 302, IPC. Reliance was further placed on ***Vijay Ramkrishan Gaikwad vs. State of Maharashtra and another,*** (2012) 11 SCC 592, to submit that even if this Court were to uphold the conviction under Section 304 Part I, IPC, the sentence ought to be enhanced to ten years.

5. Relying on ***Raj Kumar vs. State of Maharashtra***, (2009) 15 SCC 292, it has been submitted that if the accused took a plea of self defence, burden was on them under Section 105 of the Indian Evidence Act, 1872 to demonstrate that their case would come under any of the general exceptions under the IPC.

6. If the First Information Report lodged by the accused with regard to the same incident was not exhibited by the prosecution or evidence with regard to hospitalization and injury reports of the accused were also not placed, relying on ***Dayal Singh and others vs. State of Uttaranchal,*** (2012) 8 SCC 263 and ***Gajoo vs. State of Uttarakhand***, (2012) 9 SCC 532 it was submitted that at best it may be a case of defective investigation which cannot dent the credibility of the prosecution case with regard to the premediated murderous assault with a common intention.

7. Learned counsel for the respondents-accused submitted that there was no premediated attack. The parties being related, and the existence of a land dispute between them, when they met near the house of Yellappa Patil a verbal duel ensued followed by a scuffle in which both sides received injuries. The F.I.R. lodged by the respondents, their admission to the Hospital for treatment and injury reports have all been suppressed by the prosecution. The fact that the defence may not have been taken under Section 313, Cr.P.C. was inconsequential as the prosecution had to prove the charge beyond all reasonable doubt. Reliance was placed on ***Manoj Kumar vs. State of Himachal Pradesh***, (2018) 7 SCC 327, to submit that in absence of a premediated plan to attack, a sudden quarrel in the background of civil dispute with regard to land pending between the parties, the order of the High Court calls for no interference.

8. We have considered the respective submissions and perused the materials on record. The relationship between parties and the existence of a land dispute regarding which a civil suit was also pending are undisputed facts. The fact that a verbal duel followed by scuffle took place between the parties culminating in injuries is a concurrent finding of fact by two Courts. The fact that the accused also lodged an F.I.R. with regard to the same occurrence stands established by the evidence of PWs. 19 and 22, the Investigating Officers, who have admitted that the respondents-accused had also lodged BRPS Cr. No.79/02 – marked Exhibit D-10, which was not investigated by them. Similarly, PW 11, the Police Constable, deposed that two of the accused were admitted in the District Hospital, Belgaum and that he was posted on watch duty. The occurrence is of 07.06.2002 and respondents-accused nos. 1 and 2 were discharged on 11.06.2002. Their injury report has not been brought on record by the prosecution and no explanation has been furnished in that regard.

9. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

10. The fact that a defence may not have been taken by an accused under Section 313, Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In ***Sunil Kundu v. State of Jharkhand***, (2013) 4 SCC 422, this Court observed:

> "28…When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."

A 11. The fact that an F.I.R. was lodged by the accused with regard to the same occurrence, the failure of the police to explain why it was not investigated, coupled with the admitted fact that the accused were also admitted in the hospital for treatment with regard to injuries sustained in the same occurrence, but the injury report was not brought on record and suppressed by the prosecution, creates sufficient doubts which the B prosecution has been unable to answer.

12. We find it difficult to concur with the submission on behalf of the appellants that the failure of the prosecution to investigate the F.I.R. lodged by the accused with regard to the same occurrence or to place their injury reports on record was merely a defective investigation. We C are of the considered opinion that the failure of the prosecution to act fairly and place all relevant materials with regard to the occurrence before the court enabling it to take just and fair decision has caused serious prejudice to them. A fair criminal trial encompasses a fair investigation at the pre-trial stage, a fair trial where the prosecution does D not conceal anything from the court and discharges its obligations in accordance with law impartially to facilitate a just and proper decision by the court in the larger interest of justice concluding with a fairness in sentencing also. The observations in ***Dayal Singh*** (supra) are pertinent as follows:

E "22. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the court. It cannot be considered a case of bona fide or unintentional omission or commission. It is not a case of faulty F investigation simpliciter but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot-free…"

13. The contention with regard to burden of proof on the defence under Section 105, Indian Evidence Act,1872 is best answered by ***Partap vs. State of U.P.,*** (1976) 2 SCC 798, observing as follows: G

"14. We have carefully scrutinised the judgments of the courts below. In our opinion, their finding in regard to the plea of self-defence is clearly erroneous. They appear to have overlooked the distinction between the nature of burden that rests on an H accused under Section 105 of the Evidence Act to establish a

plea of self-defence and the one cast on the prosecution by Section 101 to prove its case. It is well settled that the burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability."

14. ***Dayal Singh*** (supra) is distinguishable on its own facts as it did not relate to suppression of materials with regard to the accused during the trial in addition to the failure to investigate. A defective investigation shall be completely different from no investigation at all coupled with suppression of the injury report arising out of another F.I.R with regard to the same occurrence.

15. ***Gazoo*** (supra) is also distinguishable on its facts as it related only to failure in obtaining the serologist report.

16. We also cannot find fault with the acquittal of accused nos.3 and 4 by the High Court giving them the benefit of doubt after consideration of the evidence of P.W. 5 vis-à-vis that of P.Ws. 2 and 3.

17. We, therefore, find no reason to interfere with the order of the High Court. The appeals are dismissed.

Ankit Gyan Appeals dismissed.