P L D 1984 Lahore 370

Before Riaz Ahmad, J

MUHAMMD RASHID-Appellant versus

THE STATE-Respondent

Criminal Appeal No. 387 of 1972, decided on 26th March, 1984.

Penal Code (XLV of 1860)-

-- Ss. 302 & 100, Exception 4-Criminal Procedure Code (V of 1898), S. 342--Private defence, right of-Statement of accused under S. 342, Cr. P. C. to be taken into consideration in its entirety-Such statement cannot be bifurcated so as to part thereof only with a view to strengthen one's conclusion and to reject other part-Direct or indirect evidence led by prosecution to prove its version, absent Nothing on record to negative or contradict statement of deceased Court in circumstances to fall back on statement of accused-Deceased elder than accused by 10 years taking him to his Dhari where he wanted to commit sodomy on accused aged 13/14 years-Absence of cut mark on shirt of deceased and its existence on bunian showed that deceased had put off his shirt and that in fact deceased coerced accused to submit to him for sodomy-Accused aged 13/14 years in fit of agitation and provocation, when being forced on knife point by deceas ed for satisfaction of his unnatural lust, held, justified to kill deceased Accused not a catamite and not causing more harm than it was necessary while resisting dirty design of deceased to commit sodomy on him . Apprehension by accused that death or grievous injury would be suffered by him in case of his refusal to surrender to accused, justified Held, accused killed deceased in exercise of his right of private de fence-Conviction and sentence set aside.-[Private defence, right of].

Rahim Bux v. The Crown P L D 1952 F C 1 and Muhammad 1drees v. The State P L D 1965 Lah. 553 ref.

Muhammad Nasim Khan for Appellant.

Inayatullah Cheema for the State.

Dates of hearing:14th and 17th March, 1984.

JUDGMENT

The appellant Muhammad Rashid alongwith his brother Niamat Ali stood their trial before the learned Additional Sessions Judge, Kasur on a charge under section 302 read with section 34 of the P. P. C., for causing murder of one Abdur Rashid aged 25 years. At the conclusion of the trial the learned Additional Sessions Judge vide his order dated 5-5-1972 acquitted Niamat Ali of the said charge, but convicted the appellant Muhammad Rashid under section 304, Part II of the P. P. C., and was

sentenced to undergo R. I. for a term of five years. A fine of Rs. 1,000 was also imposed upon the appellant, and it was ordered that in default of the payment of fine the appellant would further undergo R. I. for a term of six months.

2. The appellant Muhammad Rashid who was aged 13/14 years at the time of occurrence ha3 assailed his conviction and sentence through this appeal. The sentence was suspended by this Court Vide its order dated, 20-6-1972-

3. The occurrence resulting into the death of Abdur Rashid deceased took place at about 9.00 p. m. on 25-1-1971 in the area of village Burj Mohlam which is situated within the area of Police Station, Pattoki, at a distance of two miles from the police station.

4. The first information report was lodged by the deceased while alive at 8-20 a. m. on 26-1-1971 at Police Station Pattoki. In brief the F. I. R. revealed the following facts: -

Niamat accused had illicit relations with Nusrat Perveen daughter of Muhammad Din.

Two months perior to the occurrence Niamat accused asked the deceased to fetch the clothes for him from the house of Nusrat Perveen, but the deceased refused to do so causing annoyance to Niamat accused, and thus Niamat had threatened the deceased with dire consequences. On account of fear the deceased left the village and went to Pattoki to live with his material uncle. On the fateful day the deceased had returned to village at about 5-00 p. m. to see his parents. At about 9-00 p m. he came out his house to ease himself, and when he reached near the Chauk nearby his house, he came across Niamat and his brother Rashid appellant and was abused by both of them. Niamat accused held the deceased in his grip and attempted to throw him on the ground. The appellant Rashid took out a knife concealed in the fold of his chaddar and stabbed the deceased in his flank. The deceased raised hue and cry, which attracted his brother Muhammad Siddiq P. W. 7 and his nephew Khushi Muhammad P. W. 6 and one Gulab Din a shopkeeper who saw the occurrence and also chased the accused. These witnesses took away the deceased to his house. The deceased was taken to the police station on the next morning where the deceased lodged the report.

5. Initially the case was registered under section 307 of the P. P. C., but on the expiry of the deceased on 26-1-1971 at 5-30 p. m. in the hospital the registeration of the case was converted to one under section 302 of the P. P. C. Before his expiry in the hospital the deceased got a dying declaration recorded at 2-00 p. m. The dying declaration was recorded by Muhammad Ateeq, Magistrate Ist Class who appeared as P. W, :0 during the trial. Post mortem of the deceased was performed by Dr. Anis and the injury with the following description was found by the doctor: -

"(1) A stitched wound on the right side of the abdomen 3" above and to the lateral side of umblicus 1 below the margin of right chest, size 1 " in length. On dissection the wound was found to be leading inwards and upwards piercing on its inferior surface. The liver surface was cut for 1" x 1/8" x " The peritoneal cavity was full of blood which measured 2 lbs.

6. On 28-1-1971 the appellant was produced by one Siraj who was not examined during the trial, before P. W. 11 Muhammad Yaqoob S. I. Police Station, Pattoki who arrested the accused. The appellant on his arrest produced a blood-stained knife before S. 1. Police who took the same into pos session in the presence of P. W. 7 Muhammad Siddiq the brother of the deceased. Vide report of the Serologist the knife was found to be stained with human blood.

7. At the trial the prosecution relied upon ocular testimony; the dying declaration, the motive and the recovery of knife. Khushi Muhammad P. W. 6 nephew of the deceased was declared hostile and was cross-examined by the Public Prosecutor. P. W. 7 Muhammad Siddiq the brother of the deceased supported the prosecution version as narrated in the F. I. R. but was not relied upon by the trial Court. Similarly, the dying declaration was also discarded by the learned trial judge. The prosecution also produced Islam Din P. W. 8 another brother of the deceased who claimed to be an eyewitness before the committing magistrate, but at the trial he did not utter a single word about the occurrence having been witnessed by him.

8. In his defence both before the committing Court, as well as before the trial Court, the appellant pleaded self-defence and stated that at the time of occurrence' he alongwith the deceased were present in the shop of Gulab, when Khushi Muhammad and Muhammad Siddiq P. Ws. reached there, and directed him and the deceased to leave the shop to pursue their studies. According to the appellant he was persuaded by the deceased to go to Ihata of the deceased on the back of which there was a Dhari. The appellant further stated, that on reaching the Dhari the deceased took out a knife and threatened him with dire consequences, if appellant did not submit to the deceased for sodomy. The appellant refused and the deceased became serious and wanted to kill him. According to the appellant- he felt ashamed, and was compelled to obey the deceased, and was made naked, and compelled to bow before the deceased, who was still holding a knife in his hand. While preparing himself to commit sodomy, the deceased kept knife on the cot over which the appellant was bending. According to the appellant in such state of affairs, when the deceased was about to commit sodomy, the appellant picked up the knife lying on the cot, and with the object of saving himself inflicted injury without observing the part of the body where it was inflicted. According to the appellant the deceased raised a cry, and he escaped from the Dhari after throwing the knife.

9. It may be stated here that Gulab Din shop keeper and named as eye witness was not produced by the prosecution. The learned trial Judge summoned him as Court witness. According to his testimony both the deceased and the appellant were gossiping in his shop and were eating ground nuts in his shop. He further stated that no altercation took place between them. The witnesses further stated that soon after the occurrence the deceased told him that be had been stabbed by the appellant in a playful manner. The evidence led to prove the motive with regard to the refusal of the deceased to fetch the clothes from the house of Nusrat Perveen causing annoyance to Niamat was also disbelieved by the learned trial Judge. The dying declara tion was rejected on the ground that versions of the occurrence in the F. I. R. and the dying declaration, were at variance with each other.

10. I have perused the evidence on the record. The examination of the evidence by me reveals that the learned trial Judge had rightly discarded the ocular testimony from consideration, inasmuch as P. W. 6 Khushi Muhammad nephew of the deceased was declared hostile and, therefore, his testimony could not have been of any avail to the prosecution. So far as, the testimony of P. W. 7 Muhammad Siddiq is concerned his statement was also rightly rejected from consideration because before him Khushi Muhammad P. W. had reached the scene of occurrence, when the knife injury bad already been inflicted. According to P. W. 7 he and Khushi Muhammad P. W. 6 saw the appellant and the deceased at the shop of Gulab, and both the witnesses had asked the appellant and the deceased to leave the shop and to go to their houses for studies. Fifteen minutes thereafter P. W. 7 heard the alarm which attracted him to the scene of occurrence, and they noticed that deceased was lying injured. In these circumstances, it is improbable that the witnesses would have seen Niamat accused holding the deceased in his grip and the appellant inflicting the knife injury.

11. The rejection of the dying declaration from consideration is also not open to exception. There are material discrepancies between versions given in the F. I. R., and in the dying declaration, and both were recorded on the same day and interval between the recording of the both is not more than six hours. In the dying deciaration the deceased stated, that he was called from his house by the appellant, while in the F. r. R. it was stated the deceased, that he came out of the house on his own accord to ease him99elf. Further in the dying declaration it is stated that only Gulab and Khushi Muhammad witnesses reached the spot and the accused had left by that time, but in the F. I. R. name of Siddique has also been mentioned alongwith Khushi Muhammad and Gulab Din. and contrary to dying declaration it was stated that these witnesses attempted to apprehend the appellant, similarly in the dying declaration the deceased stated that after the receipt of injury with difficulty he had reached his house on his own. In the F. I. R. it was stated that the witnesses carried him to his house. In view of these discre panicies I am of the view that the learned trial Judge justifiably discarded the dying declaration froth consideration.

12. It is strange to note that having rejected ocular testimony, the dying declaration, the learned trial judge also rejected the defence pica, and evolved a theory of his own. The learned trial Judge rejected defence plea on the ground that per statement of the appellant the deceased was naked because he was preparing himself for committing sodomy, but since cut mark of the injury was found on the bunian, therefore, the appellant was falsified, because the deceased was wearing clothes. The learned trial Judge fell into error by ignoring the facts that there was no corresponding cut mark on the shirt which clearly means, that the accused had put off his shirt, and it was not necessary to put off the bunian as well for committing the sodomy. Another erroneous reason advanced by the learned trial Judge to reject the defence plea, was that the description and the nature of injury received by the deceased belied the defence plea. The learned trial Judge opined that such injury could not have been caused while the accused was in a bending posture. In my view such reason is also fallacious, in as much as, while inflicting the injury the appellant would not have been in the same posture.

13. The theory evolved by the learned trial Judge rested upon the state ment of Gulab Din who was examined as Court witness. The said C. W. had stated in Court that soon after the occurrence, on inquiry, the deceased told him that he received injury in a playful manner. In the same context the learned trial Judge further relied upon the statement of the doctor who examined the deceased in the hospital. The doctor had stated that on inquiry, the deceased informed him that the injury was result of an accident. Similarly in this context the learned trial Judge also relied upon the admission of the accused. In fact it seems that the learned trial Judge entered into realm of far-fetched probabilities, and drew inferences which were not justified on the record of the case. While appraising evidence the learned trial judge ought to have kept in view the normal course of human conduct and behaviour. It is impossible to imagine that in the circumstances of the case, the accused appellant would have remained bending while inflicting the injury. The learned trial judge relied upon a part of the statement of the appellant in support of his own theory, whereas the same was sufficient to react upon the prosecution case, to prove the defence plea, that the injury was caused in the exercise of right of self defence. The learned trial judge lost sight of the fact, that the deceased would not have disclosed the circumstances resulting into the receipt of injury by him on account of shameful conduct and that is why he put off Gulab Din P. W. by remarking that the injury was inflicted in a playful manner. Similarly the deceased could not have disclosed the background of the incident to the doctor. Both, these pieces of evidence relied upon by the learned trial judge go a long away to establish the defence plea, and therefore, could not have been pressed into service to reject the same.

14. The important question for determination in the case, would be that having rejected ocular testimony, the declaration, and the motive, could a part of the statement of the accused recorded under section 342, Cr. P. C. be used in support of one's conclusion by rejecting the other portion of such statement, as done by the learned trial judge. I am afraid that such course of action adopted by the learned trial judge is erroneous in flagrant disregard of the established principles of law on the subject. In such circumstances the law requires to take into consideration the statement of the accused in its entirety. Such statement cannot be bifurcated so as use a part thereof only, with a view to strengthen one's conclusion and to reject the other part. I am fortified in my view by the dictum laid down by Federal Court of Pakistan in a reported case Rahim Bux v. The Crown (P L D 1952 F C 1) and chain of other judgment delivered by the superior Courts.

I am further supported with this view by a division bench judgment of this Court, reported as Muhammad Idrees v. The State (P L D 1965 Lah. 553).

15. Thus, in the absence of any direct or indirect evidence led by the prosecution side to prove its version, I have no option out to per force fall back on the statement of the appellant, because there is nothing on the record of the case which negatives or contradicts the statement of the deceased.

16. After anxious consideration of the circumstances of the case, I am, convinced that the defence plea is true, because immediately before the occurrence, according to the statement of Ghulam Din C. W., both the appellant and the deceased were gossiping

with each other in his shop, and were eating ground-nuts. They were asked to leave the shop for their houses to pursue their studies, and after few minutes the occurrence took place. In these circumstances, I am inclined to believe that the deceased who was elder to the appellant by 10 years in age took him at his Dhari where he wanted to commit sodomy on the appellant who was aged 13/14 years at the time of occurrence. Absence of the cut mark on the shirt of the deceased, and its existence on the bunian also proves that in fact the deceased coerced the appellant to submit to him for sodomy.

17. The appellant who was aged 13/14 years, in fit of agitation and provocation, when he was being forced on knife point by the deceased for the satisfaction of his unnatural lust, in my view was justified to kill the deceased under section 100 exception fourth of Pakistan Penal Code. In the circumstances of the case the appellant did not exceed the right of private defence, because he did not cause more harm than was necessary. There is no evidence on the record that the appellant was catamite, and thus I have to accept the opposite inference that he was not, and therefore, must have resisted the dirty design of the deceased to commit sodomy on him. The appellant in the circumstances of the case, was justified to apprehend that death or grievous injury would be suffered by him in case of refusal on his part to subject himself to the sodomy intended to be committed by the deceased.

18. In view of the foregoing discussion this appeal must succeed. Accordingly the appeal is allowed and the appellant is acquitted of the charge.

M. A. K. Appeal accepted.

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