

IN TH E SUP R E M E COUR T OF INDI A
CRIM I N A L AP P E L L A T E JUR I S D I C T I O N
CRI M I N A L AP P E A L NO.9 9 9 OF 19 9 8

STA T E OF J & K

Appellant (s)

VER SUS

MOHD. SHA F I & ORS

Respondent(s)

O R D E R

This appeal is directed against the judgment dated 7.4. 1 9 9 8 passed by the High Court of J a m m u & Ka s h m i r in Criminal 1st Appeal No.2 3 of 19 9 5 decided by a Division Bench of the High Court of Ja m m u & Ka sh mi r at Ja m m u .

The appeal has been filed by the State of Ja m m u & Kas h m i r against 11 accused persons. The Additional Sessions Judge, Ja m m u convicted accused Mohd. Shafi and Mir Hussain under Sections 3 0 2 , 3 2 5 , 1 4 8 , 3 2 3 read with Section 34 R. P .C. and sentenced to undergo imprisonment for life and to pay a fine of Rs. 1 0 , 0 0 0 / - each under Section 302 R. P .C. and further sentenced to undergo rigorous imprisonment for a period of six months under Section 32 5 R P C; three months R.I. under Section 1 4 8 R P C and three months under Section 3 2 3 R P C and to pay a fine of Rs.5 0 0 / - each on each count. In

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default of payment of fine under Section 30 2 R P C accused Mohd. Shafi and Mir Hussain shall further undergo rigorous imprisonment for a period of one year each and in default of payment of fine in the other offences they shall further undergo R.I. for a period of one month each on each count. The sentence shall run concurrently.

Appellants Sadiq, Gani, Mir Hussain (S/o Haji Sain) and Nikk a were convicted under Sections 44 7 , 3 2 3 , 3 2 5 and 1 4 8 R P C and sentenced to 6 months imprisonment and to pay a fine of Rs.5 0 0 /- on

each count and in default whereof to undergo simple imprisonment for one month on each count. Appellants Farid Bakash, Binia Meen, Lal Hussain and Kasha, were sentenced to undergo rigorous imprisonment for six months each and to pay a fine of Rs. 500 / - each under Section 323 RPC and further to undergo rigorous imprisonment for three months and to pay a fine of Rs. 500 /- on each count under Sections 447, 323, 148 R P C and in default of payment of fine to undergo further rigorous imprisonment for a period of one month on each count.

Aggrieved by the said judgment of the Additional Sessions Judge, Jammu, the appellants preferred appeal before the Division Bench of the High Court of Jammu & Kashmir at Jammu. The High Court allowed the appeal on the ground that the prosecution has failed to explain serious injuries which were inflicted on vital parts of the bodies of the three accused persons. The State of Jammu & Kashmir

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aggrieved by the said judgment of the High Court has preferred this appeal against 11 accused persons. During the pendency of the appeal respondent No.11, Lal Hussain died and appeal qua respondent No.11 abated on that count.

Brief facts which are necessary to dispose of the appeal are recapitulated as under:-

On 18th October, 1989, at about 2.00 P.M., Ashok Kumar was ploughing the land covered by survey No.306 measuring 37 Kanals 12 marlas situate in village Umera (Khoon) of Tehsil Ramnagar, owned and possessed by his father Nana Chand. The accused armed with deadly weapons entered the said land and attacked Ashok Kumar. Accused Mohd. Shafi inflicted assault with Tabbar on the head of the deceased with the intention to kill him and the rest of the accused inflicted lathi blows resulting in serious injuries. On intervention by his father Nana Chand, Purn Chand, Parmanand, Satya Devi, Surjo and Vimla Devi, who arrived on the spot of occurrence to save Ashok Kumar were also assaulted with lathis by the accused persons. Ashok Kumar was shifted to hospital

where he succumbed to his injuries.

PW Nana k Chand, father of the deceased Ashok Ku m a r, lodged a report in the Police Station, Majalta on the same day and accordingly a case under Sections 30 7 / 4 4 7 / 1 4 8 / 1 4 9 R P C and 4/ 2 7
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of the Arms Act was registered at 3.0 0 P.M. which was subsequently converted into one under Section 30 2 R P C on the death of Ashok Ku m a r. The prosecution collected evidence and filed a challan for prosecution of the accused. The accused pleaded not guilty and were accordingly charge sheeted and tried.

P W Nana k Chand has stated in his statement that he is the owner in cultivating possession of the land under Survey No.3 0 6 . Before a month of the occurrence he came to know from one Khem Raj P atwa r i that the accused appellants Mohd. Shafi and Mir Hussain have got the land along with house situated in the said Kha s r a number, entered in their names by correction of record of rights. Nana k Chand preferred an appeal before the Assistant Commis sioner, Udhampur against the correction of record in the names of the accused. He told this fact to Mohd. Shafi who told him that perhaps his son has got the land entered in their names. This was the motive of committing the crime. On the day of occurrence, i.e., October 18, 1 9 8 9 , at about 2.0 0 P.M. Nana k Chand was sitting in his courtyard when Ashok Ku m a r deceased and P W Pur a n Chand along with bullocks, went to the disputed land for ploughing. After 5/ 1 0 minutes, he heard Mohd. Shafi shouting loudly. When he heard the shouting for the second time, he ran towards the land and saw that accused Mohd. Shafi and Nikk a were standing there with weapons. Mohd. Shafi was having a sharp edged Tabba r and Nikk a having a lathi. He enquired
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from Shafi that he had promised that he will get the record corrected and why today he has come in the land having weapon in his hands. Thereupon Shafi accused told him that the land is in his name and he will not permit them to plough it. He went to P W Ra mes hw a r Bali and brought him on spot as the promise of correction of record of land

was admitted by the accused in presence of P W Ra mes hwa r Bali. In the meantime, P W Hans Raj also came on the spot.

Ra mes hw a r Bali asked Mohd. Shafi that when he has admitted that he will get the record corrected but instead why they have come with weapons. At that moment Mohd. Shafi whistled and 9 male and 3 female accused persons surfaced from bushes and the street and came on the spot armed with lathis except female accused who were empty handed. The accused Mir Hussain pointed to the other accused persons to eliminate Ashok Ku m a r . At that time deceased Ashok Ku m a r was ploughing the land. Ashok Ku m a r ran towards the western side and when he had hardly moved 5/ 7 ft. away, accused Mir Hussain s/o Kalu struck a lathi blow on his head. In the meantime Mohd. Shafi also hit him with Tabbar on his head. Ashok Ku m a r fell unconscious. Mir Hussain further inflicted lathi blow on the left arm of P W Nana k Chand whereas Lal Hussain, Ali Hussain and Nikk a accused each inflicted lathi blows on the left shoulder, waist and on legs of P W Nana k Chand. Thereafter when Mst. Satya Devi was trying to lift Ashok Ku m a r, accused Sadiq inflicted lathi blow on her right arm and all other accused gave beating to her.

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PW. Pur a n Chand and P W . Hans Raj corroborated the statement of Nana k Chand. The trial court accepted the prosecution version and convicted the appellants. In appeal, the main submission which has been advanced by the accused is that the prosecution has deliberately suppressed serious injuries on the person of Mohd. Shafi, Mir Hussain and Binia Meen.

Suppression of this material fact seriously affected credibility of the prosecution case. It is the obligation of the prosecution to explain injuries on the accused persons. Non- explanation of serious injuries on the accused is fatal to the prosecution.

PW.1 5 Khem Raj, P atwa r i, on the basis of the original record stated that as per Girdawa ri entries land in question comprising Survey No.3 0 6 had been in possession of Nanku right from 1 9 7 1 to 19 8 6 and after 19 8 6 the same has been shown in possession

of Mohd. Shafi and Mir Hussain. Therefore, according to his statement, it appears that on the date of the occurrence the accused persons were in cultivating possession of Survey No.3 0 6 where the alleged incident had taken place. When accused persons were in cultivating possession of Survey No.3 0 6 , then a serious doubt is cast on the prosecution version whether accused persons were in fact the aggressor or the injuries which have been caused by the accused persons on deceased Ashok Ku m a r were inflicted by them in their right to private defence.

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In the statement of accused recorded by the trial court under Section 3 4 2 R P C, the accused have pleaded innocence except accused Mohd. Shafi, Binia Meen and Mir Hussain who have stated that the complainants were the aggressors. Other accused stated that they were not present on the scene of occurrence.

Accused Mohd. Shafi has categorically stated that since the year 1 9 8 6 , accused persons were in cultivating possession of the land and had sown crops therein also till the date of occurrence. According to his statement, on the day of occurrence he was informed by a minor girl Mst. Sha mbi D/o Mir Hussain that P W Nana k Chand was ploughing the land. When he went on the spot he saw 30 / 3 5 persons on the spot including P W s Nana k Chand, Om P a r k a s h , Pur a n Chand, Chhailo, Amar Nath, Om P a r k a s h, Shanti, P a r m a n a n d, Hans Raj, Girdhari Lal and Ra mes h wa r Bali. P W Nana k Chand was ploughing the land. He enquired from him as to why he is ploughing the land. Upon this, Nana k Chand told that 'you are asking for the land, you will also not go alive today'. In the meanti me, at the instance of P W Ra mes h wa r Bali all the above named persons attacked them. P W Om P a r k a s h s/o Nana k Chand inflicted blow with Tabbar on the head of Mohd. Shafi and others beat him with lathis. Mir Hussain s/o Haji Sain and Binia Meen thereafter came on the spot and wanted to save Mohd. Shafi. In the process P W Om P a r k a s h inflicted Tabbar blow on the head of Mir Hussain who became unconscious and fell on the ground. Binia Meen was struck with lathi blow by P W Hans Raj.

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Upon their raising alarm, Hussain s/o Sain, Mst. Bano and Atru also came on the spot. Complainant party was pelting stones and in return Hussain, Atru and Bano also threw stones. After causing injuries to them, the complainant-party left the spot.

The injured persons were taken and admitted in the Majalta Hospital wherefrom Mohd. Shafi and Mir Hussain were referred to District Hospital, Udhampur. Mir Hussain in his statement has stated that he was inflicted an injury with a sharp edged Tabbarr on his head by P W Parkash and while he was protecting his head a finger of his left hand received a cut injury. He became unconscious and fell on the ground. From Jammu Hospital he was shifted to Sher-I-Kashmir Institute of Medical Sciences, Srinagar (SKIMS). He remained under treatment in Jammu Hospital for about 10 days and in SKIMS, Srinagar for over a month from where he was brought by the police for production of challan.

P W Dr. A.K. Gupta, had examined the accused Mir Hussain and found the following injuries on his person:

1. Lacerated wound on scalp 4 cm. x 0.5 cm. x 0.5 cm.
2. Lacerated wound on left index finger.
3. Fragment of bone protruding out of the fracture site at the left little finger.

Dr. found the following injuries on the person of Mir Hussain.

1. Injury on head (bleeding).
2. Left ear bleeding.
3. Little finger of the left hand had a cut
4. Bruise on back, he was unconscious.

Similarly, Binia Meen also received injuries on his head and bruise on the back because of these injuries he had loss of consciousness and vomiting.

The injuries on all three accused were neither superficial nor minor. All three of them received injuries on the vital parts. As a

matter of fact accused Mir Hussain had to remain in the Hospital for over 40 days and Mohd. Shafi also had to be hospitalized.

It is the settled legal position that in a murder case, the non-explanation of the injuries sustained by the accused at the time of occurrence or in the course of altercation seriously affects the credibility of the prosecution version.

While examining the legal position on this point, reference can be made to the following judgments of this court.

In the case of *Lakshmi Singh & Ors. etc. v. State of Bihar* AIR 1976 SC 2263, this Court laid down that:

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very

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important circumstance from which the court can draw the following inferences:

- (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
- (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one..... there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

In *Hare Krishna Singh & Others v. State of Bihar* AIR 1988 SC 863, this Court held that:

".....the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other

words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable

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doubts. If the witnesses examined on behalf of the prosecution are believed by the court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused."

The High Court, in our opinion, was justified in giving benefit of doubt to the accused because of this serious lacunae in the prosecution version.

In the impugned judgment the High Court was justified in coming to the conclusion that "It is not discernible from this evidence as to who either of the parties was aggressor and which party acted in exercise of right of private defence or exceeded it". In our considered opinion, the

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view which has been taken in the impugned judgment is certainly a plausible view and no interference is called for. The appeal being devoid of any merit, is accordingly, dismissed.

.....J.
(Dalveer Bhandari)

.....J.
(Harjit Singh Bedi)

New Delhi;
November 04, 2008 .

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IT E M NO.1 0 2

COUR T NO.9

S E C T I O N II

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S
C R I M I N A L A P P E A L N O (s) . 9 9 9 O F 1 9 9 8

VER SUS

MOHD. SHA F I & ORS

Respondent(s)

(With appln(s) for substituted service)

Date: 04 / 11 / 2008 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUS T I C E DA L V E E R BHA N D A R I
HON'BLE MR. JUS T I C E HAR J I T SIN G H B E D I

For Appellant(s) Mr. Anis Suhr awa rdy,Adv.

Mr. Sam m a n a Anis, Adv.
Mr. Mehdi Iman, Adv.
Mr. Tebrez, Adv.

For Respondent(s)

Mr. U.U. Lalit, Sr. Adv.
Mr. N. P. Midha, Adv.
Ms. Manjula Gupta, Adv.
Mr. Nitin Sangra, Adv.
Mr. N. Ganpathy,Adv.

UPON hearing counsel the Court made the following
OR D E R

The appeal is dismissed in terms of the signed order.

(K.K. Chawla)
Court Master
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(Neeru Bal a Vij)
Court Master

[Signed order is placed on the file]