

VS.

STATE OF GUJARAT

...RESPONDENT

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It is unfortunate that the trial court even after holding (though not in so many words) that appellant had exceeded his right of private defence, did not choose to give the benefit to the accused in determining the count of offence. Instead the trial court convicted him under Section 302 of the Indian Penal Code and sentenced him to imprisonment for life. Without adverting to that aspect a Division Bench of the High Court confirmed the conviction and sentence passed on the appellant and dismissed his appeal. Hence the appellant is before us by a special leave.

Appellant in the company of three other persons, who too were arrayed as accused in the trial court, were alleged to have beaten up the deceased with an axe on the head at about 12.30 P.M. in the noon on 2.2.1986. The deceased who sustained skull fracture thereby was removed to the hospital, but he succumbed to his injuries on 5.2.1986.

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Four eye-witnesses who were examined by the prosecution said that appellant was seen going behind the deceased and inflicting a blow with an axe on the head of the deceased. The prosecution case in short was that deceased and the accused had a wrangle over the sale proceeds of the skin of a cow. The altercation mounted up, during the course of which the appellant dealt the blow with the axe on the deceased who was moving away from the scene of altercation.

This is a case in which the second accused Harijan Pashabhai Nathobhai lodged a complaint on which an FIR was registered regarding the same incident. What happened to that FIR is not clearly known to us, though the FIR was marked by the prosecution as Exh.52/1. The second accused was examined by a doctor at 5.00 P.M. on the same day of occurrence and noted an injury on his skull 1.5 cm x 0.3 cm in size. The appellant was also examined by the same doctor at 5.10 P.M. on the same day and found that he had a haematoma 6 cm x 3 cm on the left shoulder. According to PW7- doctor those injuries could have been caused by beating with some sharp weapon.

If the above accused had those injuries which in normal circumstances could not have been self-inflicted, a duty is cast on the prosecution to show how the accused

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sustained those injuries. It is in the above context we have to appreciate the defence version that they were first attacked by the deceased party. Nobody has a case that any one from the deceased's side attacked the accused subsequent to the injury which the accused inflicted on the deceased. It is therefore reasonable to infer that the accused sustained injuries prior to the attack which they launched on the deceased.

It is in the wake of the said background that the

trial court had chosen to make the following observations:-

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"Looking to the injuries being caused to both the accused persons and looking to the scene of offence, this was not any such place where the accused persons can not get any opportunity to make self-defence in any other way. This injury being caused to both these accused persons were ordinary injuries. Looking t that fact, it can be said clearly that accused no.1 Mohan Bhai Nathabhai had caused period kind of injury to Mafa Tokar going too much ahead while causing injury."

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Even on the showing of the trial court the appellant was not liable to be convicted for anything beyond Section 304-Part I of the Indian Penal Code. It is un-understandable to us how the Division Bench of the High Court escaped to notice that aspect when it chose to

confirm the conviction and sentence passed on the appellant.

We, therefore, alter the conviction to Section 304-Part I of the IPC. We are told that the appellant has already been in jail for more than eight years. We. therefore, impose the sentence of imprisonment for the period already undergone by him. In other words we direct the jail authorities to release him from jail forthwith unless he is required in any other case.

Mr. Yashank Adhyaru, learned senior counsel appearing for the State of Gujarat had pointed out the above aspect in favour of the appellant. We are indeed grateful to him for the fairness shown to the appellant.

This appeal is disposed of in the above terms.

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.....J
(K.T. Thomas)

New Delhi
May 2, 2001
.....J
(R.P. Sethi)