State Of Orissa vs Bhagaban Barik on 2 April, 1987

Equivalent citations: 1987 AIR 1265, 1987 SCR (2) 785, AIR 1987 SUPREME COURT 1265, 1987 (2) SCC 498, (1987) IJR 230 (SC), (1987) 2 SCJ 188, 1987 SCC(TAX) 396, 1987 ALLAPPCAS (CRI) 197, (1987) EASTCRIC 449, (1987) 2 RECCRIR 181, 1987 CRILR(SC MAH GUJ) 353, (1987) 2 CRILC 329, (1987) 2 CURLJ(CCR) 97, (1987) 2 JT 96 (SC)

Author: A.P. Sen

Bench: A.P. Sen, V. Balakrishna Eradi

PETITIONER:
STATE OF ORISSA

Vs.

RESPONDENT:
BHAGABAN BARIK

DATE OF JUDGMENT02/04/1987

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
ERADI, V. BALAKRISHNA (J)

CITATION:
1987 AIR 1265 1987 SCR (2) 785
1987 SCC (2) 498 JT 1987 (2) 96
1987 SCALE (1)712

ACT:
Indian Penal Code, 1860--s. 79 or 304 Part II--Strained relations between deceased and respondent--Lathi blow inflicted with full force on deceased's head causing his death--Respondent claiming to have acted in private defence of his property believing the deceased to be a thief--Incident took place near the house of Respondent--Whether right of private defence available--Mistake of fact and good faith not established--Whether s. 79 attracted or conviction under s. 304 Part II justified.
Words and Phrases: 'Mistake of fact' and 'good faith'-Meaning of.

HEADNOTE:

On the date of incident when the deceased was returning from the 'house of PW 2 after reciting Bhagbat, where some other villagers including the respondent were also present, and reached near the house of the respondent he was assaulted by the respondent. On hearing a hue and cry several villagers including PWs. 2, 3, 4 and 5 ran to the place and saw the deceased lying on the ground in a pool of blood with a head injury. The respondent along with his mother and wife were tending the deceased and wiping out blood. The deceased told the villagers that the respondent had assaulted him. The respondent stated that during the day time his bell-metal utensils had been stolen and he was keeping a watch for the thief, he saw a person coming inside his premises and thinking him to be a thief he dealt a lathi blow but subsequently discovered that it was the deceased. The deceased also told his wife that he had been assaulted by the respondent. On the basis of the evidence on record the trial court convicted and sentenced the respondent under s. 304 Part Il of the IPC.

On appeal the High Court accepted the defence plea and held that the respondent had not committed any offence and was protected under s. 79 of the IPC and acquitted him.

Allowing the appeal of the State,

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HELD: 1. The judgment of acquittal entered by the High Court was apparently erroneous and has caused manifest miscarriage of justice. It is surprising that the High Court should have given credence to the defence plea of mistake of fact under s. 79 of the IPC 1860. [787E-F]

2. Under s. 79 of the IPC although an act may not be justified by law, yet if it is done under a mistake of fact, in the belief of good faith that it is justified by law it will not be an offence. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. In view of s. 52 of the IPC "good faith" requires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case. It may be laid down as general rule that an alleged offender is deemed to have acted under that state of things which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. Section 79 is attracted where the circumstances showed that the accused acted under a bona fide belief that he was legally justified in doing the act owing to ignorance of the existence of relevant facts, or mistake as to them. [789A-E; 790A]

Rattan Lal and Dhirajlal's Law of Crimes, 23rd edn., p. 199 and Russel on crimes, vol. 1, p. 76; 79 relied upon and Emperor v. Jagmohan Thukral & Anr., AIR (1947) All. 99, Dhara Singh v. Emperor, AIR (1947) Lahore 249 and Chiranji v. State, AIR (1952) Nag. 282, distinguished.

3. But the present case was not the one where a person being ignorant of the existence of the relevant facts or mistaken as to them is guilty of conduct which may produce harmful result which he never intended. There was complete absence of good faith on the part of the respondent. Undoubtedly the deceased and the respondent were having strained relations. From the dying declaration as well as the extrajudicial confession it is apparent that the deceased after the recital of Bhagbat had gone near to the pond to take the bell-metal utensils. Apparently, the respondent was waiting for an opportunity to settle the account when he struck the deceased with the lathi blow and there was no occasion for him in the circumstances proved to have believed that he was striking at a thief. Even if he was a thief, that fact by itself would not justify the respondent dealing a lathi blow on the head of the deceased. The deceased had not effected an entry into the house nor he was anywhere near it. It appears that the respondent stealthily followed him and took the opportunity to settle score by dealing him with lathi
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with great force on a vulnerable part of the body like the head which resulted in his death. There is no suggestion that he wielded the lathi in the right of self defence. The respondent, therefore, must face the consequences. Although it cannot be said from the circumstances appearing that the respondent had any intention to kill the deceased, he must in the circumstances be attributed with knowledge when he struck the deceased on the head with a lathi that it was likely to cause his death. Therefore, the respondent is convicted under s. 304 Part I1 of the IPC and sentenced to undergo rigorous imprisonment for three years. [791C-G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 405 of 1978.

From the Judgment and Order dated 9.8.1977 of the High Court of Orissa in Criminal Appeal No. 131 of 1975. Prithvi Raj and R.K. Mehta for the Appellant. G.S. Chatterjee for the Respondent.

The Judgment of the Court was delivered by SEN, J. After hearing learned counsel for the parties, we are satisfied that the judgment of acquittal entered by the High Court was apparently erroneous and has caused manifest miscarriage of justice. We are rather surprised that the High Court should have given credence to the de- fence plea of mistake of fact under s. 79 of the Indian Penal Code, 1860. The evidence on record shows that the respondent and the deceased had strained relations over grazing of cattles. On the date of incident the deceased had gone to the house of PW 2 for recital of Bhagbat. Some other villagers including the respondent was also present there. At about 10 p.m. recital of Bhagbat was over and the de- ceased returned to the house. Some time thereafter, a

hue and cry was raised from near the house of the respondent. Several villagers including PWs 2, 3, 4 and 5 ran to the place. They saw the deceased lying on the ground in a pool of blood with a head injury. The respondent along with his mother and wife were tending the deceased and wiping out blood. The deceased was till then in his senses and on query by the villagers stated that the respondent had assaulted him. On being questioned, the respondent stated that during the daytime his bellmetal utensil had been stolen and he was keeping a watch for the thief. He saw a person coming inside his premises and thinking him to be a thief he dealt a lathi blow but subsequently discovered that it was the deceased. On being taken back to his house the deceased told his wife PW 6 that he had been assaulted by the respondent in the presence of his son and grandson PWs 8 and 7. The Doctor PW 9 who performed the post-mortem examination found multiple injuries on the body. On dissection he found a depressed comminuted fracture over the right perietal bone and a transverse fracture extending below left parietal prominence. As per the doctor, the head injury could have been caused by a single stroke by means of a lathi if the stroke was dealt with great force. On this evidence, the learned Sessions Judge very rightly and properly held the respondent guilty of culpable homicide not amounting to murder punishable under s. 304 Part II of the Indian Penal Code.

According to the High Court, the dying declaration made by the deceased as also the extra-judicial confession made by the respondent showed that the deceased had kept the bell-metal utensil under water in the pond. At the time of occurrence, the deceased had been to the pond to take out the bell-metal utensil. Admittedly, it was a dark night. The defence plea was that the respondent had been apprehensive of further theft of his bell-metal utensils. When he found someone near the pond, he asked who the person was. As there was no response, believing that person to be a thief, he assaulted him but thereafter discovered that it was the deceased. The High Court held that in the circumstances, the respondent had not committed any offence and was protected under s. 79 of the Indian Penal Code. It accepted that the onus to establish the facts to sustain the plea of mistake of fact under s. 79 lay on the respondent and he had to establish his plea of reasonable probability or, in other words, on preponderance of probability either by adducing evidence or by cross-examining the prosecution witnesses. It referred to some cases where different High Courts under the facts and circumstances of the particular case appearing extended the benefit of s. 79 of the Indian Penal Code to the accused where it was proved that the accused had acted under a mistake of fact i.e. an honest and reasonable belief in the existence of circumstances which, if proved, would make the act for which the accused is indicted an innocent act.

Section 79 of the Indian Penal Code provides that noth- ing is an offence which is done by any person who is justi- fied by law, or who by reason of mistake of fact and not by reason of mistake of law, in good faith, believes himself to be justified by law, in doing it. Under this section, al- though an act may not be justified by law, yet if it is done under a mistake of fact, in the belief in good faith that it is justified by law it will not be an offence. Such cases are not uncommon where the Courts in the facts and circumstances of the particular case have exonerated the accused under s. 79 on the ground of his having acted in good faith under the belief, owing to a mistake of fact that he was justified in doing the act which constituted an offence. As laid down in s. 52 of the Indian Penal Code, nothing is said to be done or believed in good faith which is done or believed without due care and attention. The question of good faith must be considered with reference to the position of the

accused and the circumstances under which he acted. 'Good faith' re- quires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and cir- cumstances of each case. 'Mistake of fact.' as put succinct- ly in Ratanlal and Dhirajlal's Law of Crimes, 23rd edn, p. 199 means:

> "'Mistake' is not mere forgetfulness. It is a slip 'made, not by design, but by mischance'. Mistake, as the term is used in jurisprudence, is an erroneous mental condition, conception or conviction induced by ignorance, misappre- hension or misunderstanding of the truth, and resulting in some act or omission done or suffered errone- ously by one or both of the parties to a transaction, but without its erroneous charac- ter being intended or known at that time."

It may be laid down/as a general rule that an alleged of- fender is deemed to have acted under that state of things which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. In the classical work Russel on Crime, vol. 1, p. 76, the concept of mistake of fact is tersely stated thus:

> "When a person is ignorant of the existence of relevant facts, or mistaken as to them, his conduct may produce harmful results which he neither intended nor foresaw."

At p. 79, the law is stated in these words:

> "Mistake can be admitted as a defence provided (1) that the state of things believed to exist would, if true, have justified the act done, and (2) the mistake must be reasonable, and (3) that the mistake relates to fact and not to law."

The cases on which the High Court has relied were cases where the circumstances showed that the accused had acted under a bona fide belief that he was legally justified in doing the act owing to ignorance of the existence of relevant facts, or mistake as to them. There is no need to encumber the judgment with many citations. We would only refer to three illustrative cases. In Emperor v. Jagmohan Thukral & Anr., AIR 1947 All. 99 the accused while travelling from Saharan- pur to Dehradun near the Mohand pass picked up the loaded gun when he saw the eyes of an animal and fired at it which unfortunately hit two military officers. There was nothing to show that the accused knew that there was a military camp or that any military exercise was going on. The question was whether the accused was liable for having committed an offence punishable under s. 307 of the Indian Penal Code. The Court held that the accused was protected by s. 79 observing.

> "If he mistook something else as an animal, then s. 79 Penal Code comes to his rescue."

That was a case where the accused under a bona fide mistake shot at an object thinking him to be an animal and the mistake was held to be one made in good faith. In Dhara Singh v. Emperor, AIR 1947 Lahore 249 it was held that the accused was labouring under a mistake of fact with regard to the identity of the persons who had surrounded his house followed by an exchange of fire, thinking

them to be his adversaries and by reason of that mistake of fact, Explana- tion I to s. 99 gave to him a right of private defence. This again was a case where the accused shot and killed another person under a mistaken belief, in good faith, that such person had intruded his house for the purpose of killing him and that he has a reasonable belief that he was entitled to open fire in exercise of his supposed right of private defence. In Chirangi v. State, AIR (1952) Nag. 282 where an accused under a moment of delusion, considered that his own son, to whom he was attached, was a tiger and he accordingly assaulted him with an axe, thinking by reason of mistake of fact that he was justified in destroying the deceased whom he did not regard to be a human being but a dangerous ani- mal. It was held that the accused was protected under s. 79 of the Indian Penal Code. The Court held that the poignant case which resulted in a tragedy was due to delusion of mind, and stated:

> "It is abundantly clear that if, Chirangi had for a single moment thought that the object of his attack was his son, he would have desisted forthwith. There was no reason of any kind why he should have attacked him and, as shown, they were mutually devoted. In short, all that happened was that the appellant in a moment of delusion had considered that his target was a tiger and he accodingly assailed it with his axe."

These considerations do not arise in the present case. There was complete absence of good faith on the part of the re- spondent. It cannot be doubted that the deceased and the respondent were having strained relations and the respondent knew full well that the deceased had come for the recital of Bhagbat at the house of PW 2 which he attended along with others. From the dying declaration as well as the extra- judicial confession it is apparent that the deceased after the recital of Bhagbat had gone near the pond to take the bell-metal utensil. Apparently, the respondent was waiting for an opportunity to settle the account when he struck the deceased with the lathi blow and there was no occasion for him in the circumstances proved to have believed that he was striking at a thief. This is not a case where a person being ignorant of the existence of the relevant facts or mistaken as to them is guilty of conduct which may produce harmful result which he never intended. Even if he was a thief, that fact by itself would not justify the respondent dealing a lathi blow on the head of the deceased. The deceased had not effected an entry into the house nor was he anywhere near it. He had gone to the pond to fetch his bellmetal utensil. It appears that the respondent stealthily followed him and took the opportunity to settle score by dealing him with a lathi with great force on a vulnerable part of the body like the head which resulted in his death. There is no suggestion that he wielded the lathi in the fight of self-defence. The respondent therefore must face the consequences. Although it cannot be said from the circumstances appearing that the respondent had any intention to kill the deceased, he must in the circumstances be attributed with knowledge when he struck the deceased on the head with a lathi that it was likely to cause his death. The respondent was therefore guilty of culpable homicide not amounting to murder under s. 304 Part II of the Indian Penal Code.

We accordingly allow the appeal, set aside the judgment and order of the High Court and convict the respondent for having committed an offence punishable under s. 304 Part II of the Indian Penal Code. The respondent is sentenced to undergo rigorous imprisonment for a term of three years. The bail bonds of the respondent shall stand cancelled and he shall be taken into custody forthwith to serve out the remaining part of the sentence.

A.P.J. Appeal allowed.