Supreme Court of India
Periasami And Another vs State Of Tamil Nadu on 25 September, 1996
Author: T K.T.
Bench: Thomas K.T. (J)

PETITIONER:
PERIASAMI AND ANOTHER

Vs.

RESPONDENT:
STATE OF TAMIL NADU

DATE OF JUDGMENT: 25/09/1996

BENCH:
THOMAS K.T. (J)
BENCH:
THOMAS K.T. (J)
ANAND, A.S. (J)

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T THOMAS.J.

We have pronounced the verdict in this appeal on 29.8.1996 by altering the conviction of the two appellants to the offence under section 304 part I read with section 34 of the IPC and sentencing them each to rigorous imprisonment for seven years. However, we reserved our reasons thereof and hence we now state the reasons as under:-

First appellant (Periasamy) and second appellant (Ramaswamy) were prosacuted along with one Murugesam for offences under section 302/34 IPC on the allegation that they with common intention to murder deceased Ranganathan attached him with billhook, spear and lathi at about 9.30 a.m. on 12.6.1989. Sessions Court acquitted all the three accused, but the High Court of Madras, on appeal by the State, set aside the acquittal and convicted the two appellants under section 302/34 IPC. The other accused Murugesan was, however, convicted only under section 324 IPC. Appellants have filed this appeal under section 2 of the Supreme Court (Enlargement of Criminal Appellate) Jurisdiction Act 1970.

Prosection story, in brief, is the following:- periasamy (first appellant) is the son and Murugesan is the nephew of Ramaswamy (second appellant). About five years prior to the murder, second appellant's daughter Mallika was indecently assaulted by deceased Ranganathan for which there was a criminal case and Ranganathan was convicted in that case. A couple of years thereafter the plantain crops of deceased Ranganathan were destroyed by the goats of second appellant over which there was some altercation between them. Thus, bad blood existed between the deceased and second appellant's family.

On the morning of the occurrence day deceased Ranganathan in association with four other persons (including PW1 and PW2) engaged themselves in the work of shifting an oil engine to a field for irrigation purposes. By about 9.30 a.m. deceased Ranganathan alone went to a nearby plantain grove to ease himself. After a little while PW1 and PW2 heard the squeal of a pig followed by the yells of Ranganathan. PW1 and PW2 rushed to the place and then they saw the first appellant inflicting a blow on the neck of Ranganathan with a billhook and the second appellant stabbing him with a spear on the chest. When deceased tried to escape he was assaulted by Murugesan with lathi, Second appellant again stabbed him with the spear. Deceased fell down but first appellant cut him on the neck with the billhook two or three times more. Assailants thereafter took to their heels. Deceased Murugesan succumbed to his injuries within an hour.

PW1 went to the local village administrative officer (PW-8) and informed him of the incident. PW8 went to the spot of occurrence and verified the correctness of the information furnished by PW1. After returning to his office PW8 recorded the statement of PW-1 (Ext.P-1) which was forwarded to Velur Police Station. FIR was prepared on its basis and during investigation appellants were arrested. On completion of the investigation the police charge-sheeted the appellants and Murugesam arraying them as A1, A2 and A3, respectively.

PW1 and PW2 are the only eye witnesses examined by the prosecution PW5 (Gunasekharan) deposed that PW2 rushed to his house soon after the occurrence and told him of what the three accused did to the deceased and that he went to the spot with PW 2 and found his brother badly mauled. He made efforts to remove the injured to the hospital but his brother died before reaching the hospital. PW6 said that she saw the three accused running away from the scene with the weapons, PW7 said that he over-heard some pedestrians mumbling between each other that these three accused had given cut blows to the deceased and a little later he saw the accused washing themselves and cleaning the weapons beneath a bridge. PW7 further said that he over-heard a conversation as between the accused that the weapons should be concealed and that they should consult a legal practitioner at Selam.

Learned Sections Judge declined to place reliance on the teescimony of any of the above witnesses. The delay in registering the FIR and a recital found in the inquest report showing the time of death of the deceased as 10.30 in the night on 12 6..1989 were highlighted by the learned Sessions Judge.

High Court of Madras in reversal of the order, found the evidence of PW1 and PW2 trustworthy. Learned Judge also placed reliance on the testimony of PW5, PW6 and PW7. Howaver, Court did not accept the prosecution version that the third accused Murugesan had common intention to

murder the deceased. Hence, the appellants were convicted and sentenced as aforesaid.

Shri Siva Subramaniam, learned senior counsel who argued for the appellants has taken us through the material evidence and advanced several contentions, main among them is that High Court ought not have lightly intarferred with the acquital passed by the trial court. Alternatively, he argued that the conviction should not, in any view of the matter, have gone beyond the offence of culpable Homicide not amounting to murder.

After going through the evidence of PW6 and PW7 we too are not impressed by their testimony. We are in agreement with the learning Sections Judge that no credit can be given to their evidence. But the evidence of PW1 and PW2 stands on a different footing.

The first hurdle which stands in the way of accepting PW-1's evidence is the delay involved in preparing the FIR. PW8 did not take down the statement of PW1 when it was made to him, but he went to the spot to ascertain the truth of account given by PW1. There was the possibility for deliberations and confabulations. In this context, we may refer to the observations made by one of us (Dr.Anand J.) in Meghraj singh vs. State of U.P. 1994 SCC 188.

> "The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them , the weapons if any, used, as also the names of the eye withnesses if any. Delay in lodging the FIR often results in smbellishment. which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

However, the above weakness attached to Ext.P-1 is not enough to vitiate the entire testimony of PW-1. We have to see whether assurance can be obtained from other evidence regarding the truth of his version.

PW-2 also said that he saw the appellants striking the deceased with the weapons when he went to the scene along with PW1. His evidence is consistent with the testimony of PW-1. It is appropriate, in this context, to refer to PW-5 (Gunasekharan) who is the brother of the deceased. He said that by about 9.30 A.M. PW-2 ran to his house and told him that the three accused had dealt blows on Ranganathan with billhook, spear and stick. PW-5 then rushed to the scene and saw the deceased lying badly mauled. The witness, then narrated the efforts made to take his injured brother to the hospital and how the efforts failed. The testimony of PW-5 inspires confidence. It renders the version of PW-2 also believable.

The recital in the lnquest report regarding the time of death of the decceased as 10.30 P.M. on 12.6.1989 has no utility whatsoever now. Firstly, because the said recital in the inquest report is only a reproduction of what witnesses would have told the investigating officer. It falls within the sweep of the interdict contained in section 162 of the Code of Criminal Procedure (for short 'the code') and hence could not be used for any purpose (except to contradict its author). The mere fact that such a

rscital found a place in the inquest report is not enough to save it from the prohibition provided in the section. Secondly, even otherwise we are satisfied that the time 10.30 P.M. shown in the inquest report is only a mistake for 10.30 A.M. and hence no implication would flow out of such an error.

Learned counsel contended that evidence of the eye witnesses is in conflict with the medical evidence and hence the sessions judge has rightly discarded it. Both eye- witnesses (PW-1 & PW-2) said that first appellant inflicted three cuts with the billhook on the neck, but only one incised injury was noted by the doctors on the neck of the deceased. The description of that injury in the post-mortem certificate is this:

> "An incised wound 20cm x 10cm x 19cm over the left side of the neck extending from the left side of the clavicle to the nape of the neck. Muscles and blood vessels were cut. Cervical vertebra was cut at C5."

When Dr. Ilango (PW-3) was asked in cross-examination whether such injury can be caused in one cut he answered in the affirmative. But no question was put to the doctor whether the said injury could as well have been the result of multiplicity of cuts on the same situs. Looking at the width of the injury as 10 cm. extending from left clavicle upto the nape of the neck having a depth of 19 cm. involving blood-vessles and also the 5th cervical vertibra we have no difficulty in countenancing the possibility of multiple blows with a billhook resulting in that injury.

We, therefore concur with the conclusion of the High Court that appellants have inflicted the fatal injuries on the deceased with lethal weapons and find no conflict between the occular testimony and the medical evidence.

We shall now deal with the alternative contention advanced by Sri Siva Subramaniam, learned senior counsel, that the offence would not go above section 304 part 1 of the IPC. This contention is made on the premise that deceased was the aggressor in the incident and hence appellant had initial right of private defence though they would have exceeded that right. We may point out that appellants have not stated, when examined under section 313 cf the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to denude them of the right if the same can he made out otherwise.

While dealing with the said alternative contention we have to bear in mind section 105 of the Evidence Act. A rule of burden of proof is prescribed therein that the burden is on the accused to prove the existence of circumstances bringing the case within any of the exceptions "and the Court shall presume the absence of such circumstancs. "The said rule does not whittle down the axiomatic rule of burden (indicated in section 101) that the prosecution must prove that the accused has committed the offence charged against. The traditional rule that it is For prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in section 105 with the words "the Court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. It is only where the prosecution has proved its case with reasonable certainity that the court can rest on the presumption regarding absence of circumstances bringing

the case with any of the exceptions. This presumption helps the Court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by 'preponderance of probabilities' unlike the prosecution. But there is no presumption that an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then benefit of that reasonable doubt has to be extended to the accussed, no matter he did not adduce any evidnece in that direction.

The above legal position has been succintly stated by Subbarao J. (as he then was) in a case where an accused pleaded the excepetion under section 84 IPC (Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat: AIR 1964 SC 1563):

> "The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused with the requisite intention described in S.299 of the Penal Code. This general burden never shifts and it always restson the prosecution ....If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged his burden. The evidence soplaced may not be sufficient to discharge the burden under section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards, one or other of the necessary ingredients of the offense itself".

In Partap vs. The State of Uttar Pradesh 1976 (2) SCC 798 a three judges bench was considering a case where the accused failed to adduce evidence to establish the under section 95 IPC. It was held that even if the accused failed to establish his plea, in a case where prosecution has not established its case beyond reasonable doubt against the appellant on an essential ingredient of the offence of murder, the plea of right of private defence cannot reasonably be ruled out from prosecution evidence the benefit of it must go to the accused. In Yogendra Morarji vs. The State of Gujarat: (AIR 1980 SC 660) another bench of three judges of this Court deal with section 105 of the Evidence Act and observed thus:

> "Nothwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus, there may be cases where, despite the failure of the accused to discharge his burden under section 105 the material brought on the record may, in the totality of the facts and cicumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens tea requisite for an offence under section 299 of the Code".

Keeping the above legal position in mind, we scrutinised the evidence to ascertain whether the deceased could have been the aggressor. Neither PW1 nor PW2 could say how the occurrence started. The possibility that before they reached the place, some events would have already taken

place cannot be ruled out. PW1 and PW2 over-heard the squeal of a pig. They also over-heard the sound of a quarrel. When they reached the scene they saw the carcass of a slain pig lying nearby. The motive suggested by the prosecution was sufficient for the deceased as well to entertain animus towards second appellant. Further, both sides would have confronted with each other on that morning abruptly without any prior knowledge or inkling that deceased might go to the plantain grove at the crucial time for answering the call of nature.

The above circumstances are broad enough to instil reasonable doubt in our mind that accused would have picked up a quarrel with the second appellant and then the other events had followed. Law entitles the appellants to have benefit of that reasonable doubt concerning the begining part of the occurrence and renders them liable for culpable homicide not amounting to murder.

The above are our reasons to alter the conviction to section 304 part 1 of IPC and for imposing a sentence of rigorous imprisonment for seven years on each of them.