Supreme Court of India
Dwarka Prasad vs State Of Uttar Pradesh on 23 February, 1993
Equivalent citations: 1993 SCR (2) 70, 1993 SCC Supl. (3) 141
Author: S N.P.
Bench: Singh N.P. (J)

PETITIONER:
DWARKA PRASAD

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT23/02/1993

BENCH:
SINGH N.P. (J)
BENCH:
SINGH N.P. (J)
REDDY, K. JAYACHANDRA (J)

CITATION:
1993 SCR (2) 70 1993 SCC Supl. (3) 141
JT 1993 (2) 168 1993 SCALE (1)675

ACT:
Penal Code, 1860 : Sections 302, 307, 34-Charged under-Appreciation of evidence-Prosecution case-Free fight not proved-Injuries found on the person of the accused-Significance of-Delay in lodging FIR-Effect of-Motive disclosed by prosecution-Acceptability of-Accused's version Probability of.
Penal Code, 1860 : Section 97 read with Section 105,
Evidence Act 1872 : Right of private defence-When available-Accused causing injury with a Ballam in the chest of the victim resulting death-"Whether right of private defence available.
Code of Criminal Procedure, 1974: Section 313 Statement made by accused under-Duty of Court while using.

HEADNOTE:
The prosecution's case was that on the date of occurrence, the pw.2 and the deceased were returning after answering the call of nature at about 6 P.M. At that time the appellant along with co-accused came there. Seeing the p.w.2 and the deceased the accused came rushed towards them with knives. Appellant chased the deceased and gave a knife blow on his chest. The P.W.2 received a knife blow from the co-accused. Thereafter the accused fled away. The victim died on the

way while he was being taken to Debai. The P.W. 2. lodged the first information report on the same night at about 11.30 P.M.

The motive for the occurrence was that about 10 or 12 days before the date of occurrence, the appellant abused the P.W.2 and the deceased. They gave two/three slaps to the appellant

The appellant-accused's case was that for last two days prior to the date of occurrence the crop of his grand-father was being damaged. Therefore, he was keeping a watch on the field. During night the P.W.2 and the deceased came to the field. Seeing them, the appellant raised an alarm Chor-Chor. They started running. The appellant chased them to catch

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them. But they turned back and started assaulting the appellant with lathies. The appellant attacked them with a 'ballam' to save his life. The injuries on the person of the appellant were examined, in the next morning. He filed an application before the Superintendent of Police and a case was registered at about 10.25 A.M. on the next day of the date of occurrence on the basis of appellant's petition.

The trial Court acquitted the appellant of the charges under sections 302 and 307 read with section 34 of the penal Code.

The State's appeal was allowed by the High Court and the present appellant was convicted under section 302 of the Penal Code and was sentenced to undergo rigorous imprisonment for life.

Present appeal was filed by the accused against the High Court's judgment.

The State contended that if the version of appellant was accepted, it would amount to a case of free fight between the prosecution party and the accused, both being armed and that in a case of free right no party could claim right of private defence.

Partly allowing the appeal, this court,

HELD: 1.01. A free right is that when both sides mean to right a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival party. In such cases of mutual rights, both sides can be convicted for their individual acts, [76E]

1.02. So far the facts of the present case are concerned, if the version disclosed by the accused can be held to be a probable version of the occurrence then it cannot be held to be a case of free fight. [76G]

1.03. In any particular case the injuries found on the person of the accused being serious in nature may assume importance in respect of the genesis and manner of occurrence alleged by the prosecution. In other case the injuries being superficial, by themselves may not affect the prosecution case; the version disclosed by the prosecution having been proved by witnesses who are independent,

reliable and trustworthy, supported by the circumstances of that particular case, including the promptness with
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which the first information report was lodged on behalf of the prosecution. But if the first information report has not been lodged promptly and there is no reasonable explanation for the delay-, the witnesses who support the version of the prosecution are not only inimical but even their evidence is not consistent with the circumstances found during the course of investigation, then in that situation, injuries on the person of the accused which are not very serious in nature assume importance for the purpose of consideration as to whether the defence of the right of private defence pleaded by the accused should be accepted. [80B-D]

1.04. So far the present case is concerned the injuries found on the person of the appellant are not serious in nature and merely on the ground that prosecution has suppressed those injuries, the appellant is not entitled to the acquittal. But those injuries can certainly be taken into consideration while judging whether the defence version of the accused is probable. [80H]

1.05. The motive disclosed on behalf of the prosecution for the occurrence is not acceptable. Even if it is assumed that because of some altercation 10/12 days before the date of occurrence, the appellant had decided to cause the murder of the deceased, then more injuries would have been caused on the person of the victim by the appellant. [81B]

1.06. The delay in lodging the first information report by PW-2 has not at all been explained. The occurrence according to prosecution took place at 6.00 P.M. in the evening. The victim while being taken to Debai which is at a distance of five kilometers expired on the way. Then why first information report was lodged at 11.30 P.M., there is no explanation. On the other hand the appellant's case is that the occurrence did not take place at 6.00 P.M. in the evening but at later part in the night. That appears to be more probable. [81C]

1.07. The injury found on the chest of the deceased is inconsistent with the prosecution case that appellant chased the deceased and then gave a blow by knife. But it is consistent with the defence version that soon the deceased and PW.2 returned and started assaulting the appellant when the appellant gave a ballam blow in the chest of the deceased. If the appellant had given the ballam blow while chasing the deceased, in that event it would have caused injury on the back of the deceased. [81F]

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1.08. Taking all facts and circumstances into consideration the version of the accused of the occurrence appears to be probable and acceptable. [82G]

Gajanandv.State of Uttar Pradesh, AIR1954SC 695;Kanbi Nanji Virji v. State of Gujarat AIR 1970 SC 219; Puran v. State

of Rajasthan, AIR 1976 SC 912; Vishvas Aba Kurane v. State of Maharashtra, AIR 1978 SC 414; The State of Gujarat v. Bai Fatima, AIR 1975 SC 1478; Lakshman Singh v. State of Bihar, AIR 1976 SC 2263; Bhaba Nanda Sarma v. The State of Assam, AIR 1977 SC 2252; Hare Krishna Singh v. State of Bihar, AIR 1988 SC 863 and State of Rajasthan v. Madho, AIR 1991 SC 1065, referred to. [76F]

2.01. Once it is established by the prosecution that the occurrence in question is result of a free fight then normally no right of private defence is available to either party and they will be guilty of their respective acts. [76G]

2.02. Accused pleading the right of private defence need not prove it beyond reasonable doubt. It is enough if on the basis of the circumstances of a particular case, applying the test of preponderance or probabilities the version becomes acceptable. [80E]

2.03. There are no two parallel versions before the Court, one on behalf of the prosecution and other on behalf of the accused and the Court is required to choose as to which of the two versions is the correct version of the occurrence. The burden placed on the accused is discharged no sooner he creates a doubt in the mind of the Court and satisfies the Court that the version disclosed by him in the facts and circumstances of that particular case is more probable. [80E-F]

2.04. If the right of private defence is available. While judging the question whether the accused has exceeded such right, should not be weighed in a golden scale. But the right of private defence does not extend to the infliction of more harm than is necessary for the purpose of defence. When the appellant caused the injury with a ballani (spear) in the chest of the victim which resulted in his death, certainly he exceeded his right of private defence. [82H, 83A]

Partap v. )le State of U.P., [1975] 2 SCC 798; Mohan Singh v. State of Punjab, AIR 1975 SC 2161; Seniyal Udayar v. State of Tamil Nadu, AIR 1987 SC 1289; Vijayee Singh v. State of U.P., [1990] 3 SCC 190 and Buta

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Singh v. State of Punjab, [1991] 2 SCC 612, referred to. [80G]

3. An admission has to be taken as a whole. It was not open to the High Court to reject one part so far the aggression and assault by the prosecution party which according to the appellant preceded giving of the ballam blow, and to accept only the later part of the statement that appellant gave a ballam blow, for the purpose of convicting the appellant [82D].

Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343, referred to. [82E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 827 of 1981.

From the Judgment and Order dated 22.7.81 of the Allahabad High Court in Government Appeal No. 1861 of 1975. P.K. Dey, Rakesh Goswami and Ms.Rani Jethmalani (N.P.) for the Appellant.

R.C. Verma for the Respondent.

The Judgment of the Court was delivered by N.P. SINGH, J. The appellant was acquitted of the charges under sections 302 and 307 read with section 34 of the Penal Code by the Trial Court. On appeal being filed on behalf of the State of Uttar Pradesh he has been convicted under section 302 of the Penal Code by the High Court and sentenced to undergo rigorous imprisonment for life. It is the case of the prosecution that on 25.2.1974 at about 6.00 P.M. Chandrapal (PW-2) along with Jagdish (hereinafter referred to as "the deceased") were returning after answering the call of nature. It is said that at that time this appellant along with co-accussed Ramesh came from the side of the village; seeing Chandrapal (PW-2) and the deceased, the appellant and Ramesh rushed towards them with knives. After some chase the appellant gave a knife blow on the chest of the victim. The co-accused Ramesh gave a knife blow to Chandrapal (PW-2). Thereafter the appellant and Ramesh fled away. The victim while being taken to Debai, died on the way, Chandrapal (PW-2) lodged the first information report at the Police Station Debai at about 11.30 P.M. the same night.

The motive of the occurrence, according to the prosecution, is that about 10 or 12 days before the date of the aforesaid occurrence, there was some altercation between Chandrapal (PW-2) and the deceased on the one side and this appellant on the other, in which the appellant is said to have abused them. Chandrapal (P.W-2) and the deceased had given two/three slaps to the appellant.

The defence of the appellant was that the prosecution has suppressed the real manner of occurrence. According to the appellant,. for last two days prior to the date of occurrence the crop of his grand-father Sohan Lal was being damaged. Because of that he was keeping a watch on the said field. During night Chandrapal (PW-2) and the deceased came to the field. The appellant raised an alarm chor-chor. Thereafter Chandrapal (PW-2) and the deceased started running. The appellant chased them to catch them. But soon they turned back and started assaulting the appellant with lathies. To save his life the appellant attacked with a 'ballam' (spear). The injuries on the person of the appellant were examined the next morning. He also filed an application before the Superintendent of Police, giving his version of the occurrence in which he admitted that when he was being assaulted by Chandrapal (PW-2) and the deceased, he bad used a ballam. A case was registered by the Police at about 10.25 A.M. on 26.2.1974, on the basis of the petition filed on behalf of the appellant. The injuries on the person of the appellant were examined by Dr. R.P. Rastogi at the District Hospital, Bullandshahar, on 26.2.1974. He found the following injuries on his person:-

"(1) Faint contusion 2 cm x 1/2 cm back of left shoulder upper part.

(2) Faint contusion 10 cm x 2 cm on outer side left back at the lower angle of scapula. (3) Faint contusion 4 1/2 cm x 1 cm on back of upper part 1/3rd left forearm. (4) Faint contusion 12 cm x 1 cm on the back and inner aspect left forearm upper 1/3rd."

During the post mortem examination of the deceased which was also held on 26.2.1974, the following injury was found on his person:-

"Stab wound 1" x 1/2" x 1.3/4". On probing, on left side front of chest, 2.1/2" inner to left nipple at 10 O' clock position pointing the onwards and downwards."

The Doctor (PW-1), who held the post mortem examination, ad- mitted that the aforesaid injury could be caused by ballam. So far Chandrapal (PW-2) is concerned, the Doctor noted the following injury on 26.2.1974:-

"Abrasion 1-1/2 x 1/3" on the left side front of chest, horizontally with shallow edge, medically, 7" below ancillary pit. The wound was not bleeding afresh, but had got clotted blood over it."

The Doctor in Court stated that possibility of self- infliction of that injury could not be ruled out. According to the State, even if the version disclosed by the appellant is accepted, it will amount to a case of free fight between the prosecution party and the accused, both being armed and when there is a free fight there is no question of right of private defence accruing to any side. A free fight is that when both sides mean to fight a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival party. In such cases of mutual fights, both sides can be convicted for their individual acts. This position has been settled by this Court in the cases of Gajanand v. State of Uttar Pradesh, AIR 1954 SC 695; Kanbi Nanji Virji v. State of Gujarat AIR 1970 SC 219; Puran v. State of Rajasthan, AIR 1976 SC 912 and Vishvas Aba Kurane v. State of Maharashtra, AIR 1978 SC 414. As such once it is established by the prosecution that the occurrence in question is result of a free fight then normally no right of private defence is available to either party and they will be guilty of their respective acts.

But so far the facts of the present case are concerned, if the version disclosed by the accused can be held to be a probable version of the occurrence then it cannot be held to be a case of free fight. According to the appellant, the crops of the field of his grand-father were being damaged for last two days prior to the date of the occurrence; because of that appellant claims that he was watching the said field. During the night the deceased and Chandrapal (PW-2) came to the same field and the appellant chased them. But soon they turned back and started assaulting the appellant with lathies. At this stage the appellant wielded his ballam (spear) which caused an injury to the deceased which ultimately proved fatal. It is an admitted position that the appellant filed a petition before the Superintendent of Police giving his version of the occurrence in the morning of 'basis of that a case was registered at about 10.25 A.M. on 26.2.1974, the occurrence having taken place during the night of 25.2.1974. This fact has been admitted by Shri Manohar Singh (PW-6) who has proved the first information report lodged on behalf of the prosecution. On the examination, Dr. R.P. Rastogi (PW-3) of the District Hospital, Bullandshahar, did find four injuries including one on the scapula of

the appellant. It is true that injuries were simple in nature. But even on the deceased only one injury 1" x 1/2 1.3/4" was found on the left side front of the chest, which according to the Doctor who held the post mortem examination, could have been caused by a weapon like ballam (spear). In the statement under section 313 of the Code of Criminal Procedure (hereinafter referred to as "the Code") given by the appellant, it was stated by the appellant in detail as to how the standing crops on the land of his grand-father were being damaged and on the night of the occurrence he was guarding the field when he saw the deceased and Chandrapal (PW-2) destroying the crops in the field. He also stated that he shouted chor-chor and then chased them to catch them. But soon they turned round and started giving lathies blows and in self- defence the appellant used a ballam. It appears that all this happened in the aforesaid field which the apppellant was guarding.

From time to time this Court has pointed out that merely because some injuries are found on the accused, which have not been explained by the prosecution, by itself shall not be a ground for rejecting the whole prosecution case. It will depend on facts of each case what inference should be drawn by the Court. In the case of The State of Gujarat v. Bai Fatima, AIR 1975 SC 1478, it was said that when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow :-

> "(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.
>
> (2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.
>
> (3) It does not affect the prosecution case at all."

The aforesaid three inferences drawn on basis of the nature of injuries were reiterated in the case of Lakshmi Singh v. State of Bihar, AIR 1976 SC 2263, and it was further observed:-

> "It seems to us 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 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."

A three-Judge Bench in yet another case of Bliaba Nanda Sarma v. The State of Assam, AIR 1977 SC 2252, said:-

> "The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused."
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> In the case of Hare Krishna Singh v. State of Bihar, AIR 1988 SC 863, it was said: "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." But in the case of State of Rajasthan v. Madho, AIR 1991 SC 1065, it was held: "If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt."

As first impression there appears to be some conflict in the views expressed in the different judgments of this Court referred to above. But on proper reading with reference to the facts of each case, there is no basic difference and according to us this Court rightly in the case of The State of Gujarat v. Bai Fatima (supra) put in three categories the result which may follow from the facts of each case. It is well-known that guilt of the accused is to be judged on the basis of the facts and circumstances of the particular case. In any particular case the injuries found on the person of the accused being serious in nature may assume importance in respect of the genesis and manner of occurrence alleged by the prosecution. In other case the injuries being superficial, by themselves may not affect the prosecution case; the version disclosed by the prosecution having been proved by witnesses who are independent, reliable and trustworthy, supported by the circumstances of that particular case, including the prompt- ness with which the first information report was lodged on behalf of the prosecution. But if the first information report has not been lodged promptly and there is no reasonable explanation for the delay; the witnesses who support the version of the prosecution are not only inimical but even their evidence is not consistent with the circumstances found during the course of investigation, then in that situation, injuries on the person of the accused which are not very serious in nature assume importance for the purpose of consideration as to whether the defence of the right of private defence pleaded by the accused should be accepted.

It is well-known that accused pleading the right of private defence need not prove it beyond reasonable doubt. It is enough if on the basis of the circumstances of a particular case, applying the test of preponderance or probabilities the version becomes acceptable. There are not two parallel versions before the Court, one on behalf of the prosecution and other on behalf of the accused and the Court is required to choose as to which of the two versions is the correct version of the occurrence. The burden placed on the accused is discharged no sooner he creates a doubt in the mind of the Court and satisfies the Court that the version disclosed by him in the facts and circumstances of that particular case is more probable. The onus of the accused under section 105 of the Evidence Act has been examined by this Court in the cases of Partap v. The State of U.P., [1976] 2 SCC 798; Mohan Singh v. State of Punjab, AIR 1975 SC 2161; Seriyal Udayar v. State of Tamil Nadu, AIR 1987 SC 1289; Vijayee Singh v. State of U.P., [1990] 3 SCC 190 and Buta Singh v. State of Punjab, [1991] 2 SCC 612.

So far the present case is concerned the injuries found on the person of the appellant are not serious in nature and merely on the ground that prosecution has suppressed those injuries, the appellant is not entitled to the acquittal. But those injuries can certainly be taken into consideration while judging whether the defence version of the accused is probable. The motive disclosed on behalf of the prosecution for the occurrence is not acceptable. Even if it is assumed that because of some altercation 10/12 days before the date of occurrence, the appellant had decided to cause the murder of Jagdish then more injuries would have been caused on the person of the victim by the appellant instead of an injury 1" x 1/2 x 1 3/4". The prosecution case regarding assault by Ramesh with a knife on Chandrapal (PW-2) has been disbelieved by the Trial Court as well as the High Court. The delay in lodging the first information report by Chandrapal (PW-2) has not at all been explained. The occurrence according to prosecution took place at 6.00 P.M. in the evening. The victim while being taken to Debai which is at a distance of five kilometers expired on the way. Then why first information report was lodged at 11.30 P.M., there is no explanation. On the other hand the appellant's case is that the occurrence did not take place at 6.00 P.M. in the evening but at later part in the night. That appears to be more probable. The appellant appeared before the Superintendent of Police, the next morning and disclosed his version of the occurrence on basis of which a case was registered. His injuries were also examined only the next morning. He also took a firm stand during his statement under section 313 that he give a ballam blow when the deceased and Chandrapal (PW-2) started assaulting him with lathies. Out of the four injuries one was on the scapula,. The doctor has not opined that they were manufactured or self- inflicted. Those injuries, according to the doctor, had been caused by a blunt weapon which is consistent with the defence version of the occurrence. The injury found on the chest of the deceased is inconsistent with the prosecution case that appellant chased the deceased and then gave a blow by knife. But it is consistent with the defence version that soon the deceased and Chandrapal (PW-2) returned and started assaulting the appellant when the appellant gave a ballam blow in the chest of the deceased. If the appellant had given the ballam blow while chasing the deceased, in that event it would have caused injury on the back of the deceased.

The High Court has not disbelieved 'the version disclosed by the appellant. The High Court on consideration of the evidence and the circumstances of the case has observed:-

> "It is true that this respondent gave a different time of the occurrence and his version of the occurrence was also different and it has been disbelieved by the learned Sessions Judge, obviously on cogent grounds. But this cannot wash out the effect of his clear stand all through that there was a marpit between him and the informant and the deceased in which he had wielded a spear on them. This part of this respondent's version was clearly severable from the rest of his version and it was not at all necessary that if the learned Sessions Judge disbelieved his version regarding the manner of the occurrence, he was bound to rule out of consideration this admission of the respondent which was clearly separate and severable from the rest of his story."

The High Court has used a part of the statement of the appellant as an admission. According to us, that part of the statement made by the accused under section 313 of the Code cannot be used as an admission, supporting the prosecution case. It is well-known that an admission has to be taken as a whole. It was not open to the High Court to reject one part so far the aggression and assault by the prosecution party which according to the appellant preceded giving of the ballam blow, and to accept only the later part of the statement that appellant gave a ballam blow, for the purpose of convicting the appellant. In the case of Hanumant Govind Nargunadkar v. State of Madhya Pradesh, AIR 1952 SC 343. it was said:-

> "It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all."

The High Court should have taken the whole statement made by the appellant as an admission and then should have examined what shall be the effect thereof on the prosecution case. According to us, taking all facts and circumstances into consideration the version of the accused of the occurrence appears to be probable and acceptable.

The next question is as to whether in the circumstances of the case appellant could have caused the death of Jagdish. While accepting the plea of right of private defence it has been said that if the right is available, while judging the question whether the accused has exceeded such right, should not be weighed in a golden scale. But the right of private defence does not extend to infliction of more harm than is necessary for the purpose of defence. When the appellant caused the injury with a ballam (spear) in the chest of the victim which resulted in his death, certainly he exceeded his right of private defence. Accordingly, the conviction of the appellant under section 302 of the Penal Code is set aside. But the appellant is convicted under section 304, Part-1, and sentenced to rigorous imprisonment for seven years which according to us shall meet the ends of justice. The appeal is allowed in part to the extent indicated above.

V.P.R. Appeal allowed partly.