

1982 P Cr. L J 58

[Peshawar]

Before Allah Bakhsh, J

ZAHFRAN-Appellant

Versus

THE STATE--Respondent

Criminal Appeal No. 28 of 1978, decided on 24th June, 1981.

Penal Code (XLV of 1860)---

--- S 100-Private defense, plea of-No cogent evidence to indicate that mother of accused was being beaten by deceased when accused arrived and stabbed him nor plea of self-defense finding corroboration from prosecution evidence-Accused also suffering no injury at all during occurrence negating accused's apprehension of death or any grievous injury at hand of deceased-Plea of self defence held, would not prevail in circumstances.

Ali Mohammad alias Ali Ahmad v. The State 1971 P Cr. L J 1224 and Munawar Hussain v. The State 1976 P Cr. L J 471 ref.

Khalid Rehman Qureshi for Appellant

Abdul Khaliq Khan for the State.

Date of hearing : 24th June, 1981.

JUDGMENT

Zahfran (17-18) and his mother Mst. Safida Jan (45) faced their trial under section 302/34, P.P.C. for, in furtherance of their common intention, committing the murder of Fazalur Rehman by stabbing him on 7th April, 1978 at 12 noon in the 'kotha' of Ghulam Haider situate within the limits of village Rattian-cuin-Telhad. Mst. Safida Jan was acquitted whereas Zahfran was convicted under section 304, Part II, P. P. C. and sentenced to undergo seven years R.I. and to pay a fine of Rs. 2000/- or in default to undergo further one year R. I. On realisation of the fine it was to be paid to the heirs of the deceased as directed by Mr. Rasool Khan Khattak, Additional Sessions Judge, Haripur per his order dated 8th July, 1978. Aggrieved from the order Zahfran has come on appeal whereas the complainant Mohammad Salim has preferred Criminal Revision

No. 4 of 1979 for enhancement of sentence. I propose to dispose of the appeal and the revision per this order.

2. The prosecution story is a simple one. Mohammad Salim (P. W. 6) and Zarin (P. W. 7) were studying together when they heard commotion and rushed to the courtyard of the house of Ghulam Haider. They saw Fazalur Rehman and Zahfran grappling and the latter gave a churri blow to the former, who received the injury on the left side of his chest and fell down dead. Zahfran left the churri on the spot and ran away. Besides them, Mst. Shanai Khanan, and Safreen who were attracted to the spot had seen the incident. The motive was that Safreen who was son of the deceased and Daray Khan who was brother of the appellant had a quarrel over kite flying.

3. Both the accused denied the allegations of the prosecution and pleaded not guilty to the charge, Zahfran inter alia claimed to have caused the solitary injury under grave and sudden provocation and to have acted in self-defence.

4. Mohammad Salim lodged the F.I.R. which was recorded by S.H.O. Mohammad Amin (P. W. 9). On arrival at the spot he prepared the injury sheet and inquest report. He took into possession the blood stained 'churri' and collected blood from the spot. He prepared the site plan and took up the investigation of the case.

5. Dr. Taj Mohammad Malik (P. W. 10) performed the post-mortem examination on the dead body of Fazalur Rehman at 8-00 a. m. on 8th April, 1978 and found the following injury:-

Stab wound 2 ½" x ¼" x 1 ¼" on left side chest I' lateral to upper sternal end horizontal in direction. Chest cavity deep.

On internal examination chest wall on the left side, left pleurae, left lung, pericardium, heart and blood vessels were found injured. The injury, in the opinion of the doctor, 'was sufficient in the ordinary course of nature to cause death.

6. Appellant Zahfran was produced before Amir Zaman Khan (P. W. 2), Magistrate 1st Class, Hariapur on 9th April, 1978 and he after observing the formalities recorded the confession of the appellant.

7. The entire edifice of the prosecution case rested on an eye-witness account of the incident furnished by P. Ws. Mohammad Salim and Zarin, recovery of blood-stained 'churri' from the spot, confession made by the accused and motive attributed to him. . The learned trial Judge was of the view that there was grappling between the deceased and the appellant over the quarrel of the boys in kite flying, that the appellant caused the sole injury in the heat of passion at the spur of the moment without premeditation and the offence fell within the mischief of section 304, Part II, P. P. C.

8. The learned counsel for the appellant did not doubt the presence of the P. Ws. Mohammad Salim and Zarin at the spot when the incident took place and as a matter of fact they have given a consistent account of the incident. They stated unanimously that it being Friday they were sitting in the Baithak' when they heard an alarm from the courtyard of Ghulam Haider and rushed there.

The saw Mst. Safida Jan catching hold of Fazalur Rehman while the latter was stabbed with the 'churri' by her son Zahfran, Fazalur Rehman was grievously injured, fell down and expired at the spot. It is true that Mohammad Salim, the maker of the F.I.R. did not mention of A1st. Safida Jan in it and the learned trial Judge disbelieved both these witnesses viz-a-viz Mst. Safida Jan but it is equally true that merely on account of it their testimony cannot be discarded altogether. They find corroboration from the recovery of the blood stained churri' left by the appellant at the spot. The confession of the appellant lends further corroboration to them and he inter alia has admitted their presence at the time of incident.

9. The incident took place on 7th April, 1978 and the appellant made confession on 9th April, 1978 before the Magistrate. The confession when rendered into English reads as under :-

On Friday, namely, day before yesterday after cutting grass I came back at noon and saw my maternal uncle Fazalur Rehman beating my mother. I put the grass, caught hold of my maternal uncle and released my mother. My mother ran away from the spot. My maternal uncle Fazalur Rehman began to beat me. My cousins Salim and Zarin were standing there. Salim had a 'churri' in his hand which he had prepared for slaughtering his sick buffalo. When Fazalur Rehman was beating me my cousin Salim gave the 'churri' to me and with it I gave one blow only to my maternal uncle Fazalur Rehman. When I saw blood coming out of the body I ran away from the spot. I presented myself yesterday to the local police at Tolhad. I had killed my maternal uncle in self-defence.

When questioned at the trial about the confession all that the appellant replied was that his confessional statement was not recorded in detail: It can, in the circumstances, be said that the appellant had voluntarily made the confession and it suffered from no legal infirmity. During the course of his statement recorded under section 342, Cr. P. C. he reiterated the contents of his confession and added that the deceased being a stout person fell him to the ground, sat on his chest and he felt his grips on his neck. Finding himself helpless he took out a small double edged sharp weapon from his pocket and inflicted an injury without any premeditation. He further added that he had acted on grave and sudden provocation and in self-defence.

10. The learned counsel for the appellant strenuously contended that the incident had taken place without premeditation in a sudden fight in the heat of passion upon a quarrel and the appellant had neither taken an undue advantage nor had acted in a cruel or unusual manner. The case, therefore, falls within the ambit of Exception IV, section 300, P. P. C. His contention to this extent is not without force and substance. He, however, emphatically urged that the appellant had acted in self-defence. The appellant, no doubt, raised the plea of self-defence but it finds no corroboration from the prosecution evidence nor he produced any evidence in defence to substantiate it. His plea obviously stands unsupported. There is nothing on record to suggest that the deceased was beating the mother of the appellant when the appellant arrived, released his mother from the grips of the deceased, was overpowered by the deceased and in self-defence he used his weapon on the deceased. There is no denying the fact that the deceased was empty handed and during scuffle the appellant did not receive a scratch on his person. The appellant was armed with a deadly weapon and he acted unwisely in inflicting a blow with it on his unarmed maternal uncle. The learned counsel for the appellant referred to *Ali Mohammad alias Ali Ahmad v. The State* (1971 p Cr. L J 1224) wherein the accused on seeing his mother being

injured by the deceased and his companion rushed to protect her but the assailant fell upon him and the accused caused fatal injuries to the deceased. There were as many as 28 injuries and it was held that the accused had exceeded the right of private defence but the conviction was altered to one under section 304, Part II, P. P. C. In the instant case, as remarked above, there is no cogent evidence to indicate that the mother of the appellant was being beaten by the deceased when the appellant arrived and stabbed him. In *Munawar Hussain v. The State* (1976 P Cr. L J 471) the accused had exercised the right of private defence and had sustained one contused wound on the scalp, one incised wound and a swelling on the eyebrow during the scuffle and was acquitted. The facts are distinguishable inasmuch as the appellant before me had suffered no injury at all. It follows that the contention of the learned counsel for the appellant with regard to the plea of self-defence would not, in the circumstances, prevail.

11. The learned counsel for the appellant next contended that the appellant was a teenager, had not acted with premeditation and the sentence awarded to him being a severe one merited considerable reduction. It escaped his notice that in the aforesaid authorities cited by him at the Bar the sentence of seven years imprisonment had generally been awarded to the accused. I am of the view that the sentence awarded to the appellant is an adequate one and requires no reduction.

In the result, the appeal and the revision fail and are dismissed.

Appeal dismissed.