

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

**JUDGMENT**

1. D.B. Criminal Appeal No. 251/1985  
State Vs Kachaba & Anr.
2. D.B. Criminal Appeal No. 325/1983  
Kachaba Vs. State

Against the judgment dt. 28.07.1983 passed by  
District and Sessions Judge, Jalore in Sessions  
Case No. 43/1982.

Date of Order : 31 st March, 2009

**PRESENT**

**HON'BLE MR. JUSTICE N.P. GUPTA**  
**HON'BLE MR. JUSTICE C.M. TOTLA**

Mr. A.R. Nikub, Public Prosecutor.  
Mr. Vishal Saraswat for Mr. Sanjay Mathur for accused respondent.

**BY THE COURT: (PER HON'BLE GUPTA, J.)**

These two appeals arise out of the same judgment passed by Sessions Judge, Jalore dated 28.07.1983, in Sessions Case No. 43/1982, whereby he convicted the accused appellant Kachba for the offence under Section 304 Part I IPC, and sentenced him to rigorous imprisonment for ten years and fine of Rs. 200/-, in default, to undergo one months rigorous imprisonment. While acquitting him of the offence under Section 302 IPC, also acquitted the other co-accused Gorkha, of the charges under Section 109, 114 read with Section 302 IPC.

Appeal No. 251/1985 seeks conviction of both the accused persons for the offence under Section 302 IPC, while Appeal No. 325/1983 seeks acquittal of accused Kachba.

Brief facts of the case are, that one Malla lodged a report on 22.08.82, at Police station Chitalbana, to the effect, that his sister's husband Moti, resident of Padardi had gone out two years ago for earning livelihood, and returned last year, and demanded share of land from his brothers, who started declining. It was then alleged, that when his sister and sister's husband started clearing the land day before yesterday, the accused persons gave beating to his sister, and her husband came running to him at Ranodar, then he, alongwith his associates Heera Ram, Ram Kishan, Chatra, Balu Vishnois, collected Panchas, and went to Padardi, last morning. The Panchas extended good counseling, but the accused persons flatly declined to give any share in the land, and also gave out, that if Moti comes on the land, he would be killed. Then Moti, and his wife, alongwith their daughter, went to the field at about 6 PM, whereupon the accused Kachba came from the house, armed with Kudali, and dealt with first blow on the left scapula of Moti, then another blow on his left shoulder, and when the informant's sister and niece started crying, the two other persons Mangla and Gorkha, who were standing nearby, instigated to kill, else he would create trouble in future. In the meantime,

Kachba dealt with third blow of Kudali on the head of Moti, as a result of which he fell down and died. On this FIR a case for the offences under Section 302/34 IPC registered, and after due investigation, challan was filed against Kachba and Gorkha only. The case was committed.

Learned trial court framed charges against Kachba for the offences under Section 302 IPC and under Sections 109, 114 read with Section 302 IPC against Gorkha. Accused denied the charges. During trial, the prosecution examined some 12 witnesses, while tendered in evidence some 17 documents. No evidence was led in defence.

In the statement under Section 313 Cr.P.C., Kachba gave out that Moti had no right in the land. He had gone in adoption, and that since dead body of Moti was lying in the field of his possession, he has been falsely implicated in this case. The brother-in-law of Moti, being Malla is annoyed since earlier also, and in order to get the land for his sister, he has cooked up the false case. The wife and daughter of deceased are under the thumb of Malla, and are giving false statements. Regarding witness Heera also, it was stated that he is giving false evidence on account of earlier enmity, and for monetary considerations having been received from Malla. Regarding Naina also, it was stated that they were not in speaking terms with him, and he was a man of group of Malla. Gorkha on the other hand, adopted the stand of denial, and stated

that Moti had no right in land, and he had gone in adoption.

Learned trial court after so completing the trial, convicted and sentenced the accused as above and acquitted Gorkha.

We have heard learned Public Prosecutor, and learned counsel for the accused, and have gone through the record.

In our view, the most important witnesses in this case are PW/1 Hirki and PW/2 Babudi, who are wife and daughter of the deceased respectively. Both of them are eyewitnesses. Before proceeding to discuss their evidence we observe, that even if the FIR and statement of Kachba under Section 313 Cr.P.C. are read together, this much is clear, that the parties are ad idem on the aspect, that the deceased Moti was demanding his purported share in the property, which the accused persons were not prepared to give, and that is the root cause of the trouble.

Coming to the evidence of Hirki PW/1, she has stated, that six months ago in the evening, they were going in the field alongwith belongings, being a box, her husband was carrying a cot, and her daughter was carrying a iron Kunda. She then stated that her husband are five brothers, eldest being her husband, then Gorkha, then Kachba,

then Uda and then Teja. Her father-in-law Hamira is alive. Then she has stated, that there is a dispute between her husband and his five brothers, about partition of agricultural land, regarding which Panchayat was also convened. Then she has deposed, that she, alongwith her husband and her daughter had gone on the lower part of the field, at that time, two accused persons Kachba and Gorkha came, whose Dhanis are in that very field. Accused Kachba was armed with Kudali, and Gorkha was armed with Lathi. Gorkha came forward to prevent her, and accused Kachba dealt with a Kudali blow on her husband, which landed at scapula, then other blow was given, which landed on knee. Accused Gorkha was telling him to kill her husband, so that it will finish the trouble once and for ever, whereupon, accused Kachba dealt with another blow on the head, as a result of which the deceased fell down and died. On her raising hue and cry, Heera Vishnoi came but the accused persons went away to their dhanis. She and her daughter kept setting near the dead body whole of the night, and in the morning Panch Naina, then her brother Mala came, alongwith Sarpanch Ramchandra. Malla called Naina to whom she narrated the incident, then Malla went to lodge the report. She has stated, that the field on which the dispute occurred is of her father-in-law, and is joint property of her husband and his brothers, and there was dispute of this very field. Kcahba had sown guar on the land, on which her husband had fallen.

In the cross-examination, she has stated that her husband was not given in adoption to Joga in village Aradiya eight years ago, rather she had gone to earn her livelihood. She alongwith her husband and daughter had gone on field to take possession, while Kachba and Gorkha did not allow them to take possession. She was confronted with the police statement, Ex. D/1, wherein she has stated that Jagga was third or fourth cousin of her father-in-law who lived in Aradiya, who being issue less, her husband was taken in adoption by them, and then they started living at Aradiya. The witness denied to have given that statement. Then she was confronted with portion C to D of Ex.D/1 wherein she has stated, that last year her husband had sold the land at Aradiya, and came back to father. She denied to have given this statement either. She maintained that they have no land in Aradiya. She admitted that on earlier day also, they forcibly wanted to clear the land, but Uda and Teja did not allow them to clear it. She had admitted, that Mangla had beaten her on the previous day. At that time, Kachba and Gorkha were with him, and they did not save her, and she is annoyed with all the three persons on that point. She has stated that at the time of incident, Hamira, Uda and Teja were not there. Then, she was confronted with portion E to F of Ex.D/1 wherein, she had stated about Kachba having come with Kudali and to that she stated that she had informed the S.H.O about both the accused persons having come. She has denied the suggestion, about Gorkha having come on hearing cries of her daughter.

Then, she was confronted with portion G - H of Ex.D/1 wherein, it is stated that her daughter cried, thereupon, Gorkha came. She denied to have given that statement. Then she has stated that she saw Heera Ram that day only on the field. She did not include the name of Mangla in the persons killing her husband. She did not give out name of Mangla to her brother also. Ofcourse she has stated that on earlier day, Mangla had given beating to her. She denied that the land was already partitioned between brothers, or that her husband had no share in the property, as he had gone in adoption. She has denied the suggestion about falsely implicating the accused on account of enmity. She has denied her husband to be armed with Kudali, with which he wanted to inflict injury on Kachba, and in the process of snatching, the injury landed on Moti, and third blow was caused by Kachba, in the right of private defence.

In our view, from this statement, if read with confronted portion of Ex.D/1, including portion G – H, it is very much doubtful, as to whether Gorkha had accompanied Kachba. However, from this evidence, this much is amply clear, that there was a dispute between brothers about the land, in the sense, that the deceased was claiming share, which other brothers were not ready to give, on the pretext of deceased having gone in adoption. In that process, on the earlier day also the deceased etc had gone to take possession, which they were not allowed to take, and this Hirki PW/1 was given beating by Mangla. Then, on the fateful day also,

according to PW/1, they had gone on the land for taking forcible possession.

Then we come to the evidence of PW/2 Babudi. She ofcourse is a child witness being aged 12-13 years. Learned trial court had put preliminary questions to her. She gave out to be understanding in God. Ram Dev ji being their God, and gave out that telling lie is bad, and she would tell truth. Thus, being satisfied about the intelligence of the witness, her statements were recorded. She gave out, that her father are five brothers. Kachba and Gorkha are her uncles, and on account of land dispute, Kachba and Gorkha killed her father. Then she stated, that some 6-7 months ago, her father, mother and herself had gone on the land. She was carrying iron kunda. Her father was carrying cot, and mother was carrying the box. When they reached on the land, accused persons came from their Dhani. Kachba was armed with Kudali, and Gorkha was armed with stick. Kachba inflicted first blow on shoulder of her father, and second blow on his scapula. Then her mother cried, whereupon, Heera Vishnoi came, and asked as to why beating is being given, and at that time, in presence of Heera, accused Kachba dealt with one blow on the head of the deceased. Accused Gorkha was standing and instigating to kill. Her father fell down and died. However in the night both of them kept sitting near the dead body. In the morning, Sarpanch alongwith her maternal uncle Malla came. Naina, Ward Panch also came.

In cross-examination she stated, that they had gone on their field for erecting a hutment. They had carried necessary material for that. Earlier also, they wanted to erect hutment, but they were not allowed to do so. She has stated, that they live outside the village, where from, they had brought the belongings on the field. She has also stated, that since around a month before incident, they had started living at village Padarli. Earlier they had gone to village Aradiya for around 8 – 10 years. She stated that in Aradiya, her father had no land. Then she stated, that Joga Bhambi is resident of Aradiya. He was her grandfather (dada) and that, they were living at the house of Joga only, and her father was cultivating the land of Joga. Then she has stated, that Heera Vishnoi was not told by them to intimate their maternal uncle. Heera Vishnoi did not come on the field. He was informed on the way, and he returned from the way itself. She has denied the suggestion about herself and her mother having gone to the field at 10 PM, to ascertain as to whether her father had done something on the land or not, and at that time they saw the dead body lying there. She has maintained, that they had gone on the land one 'ghadi' before sunset, and had gone alongwith all their belongings. She has maintained, that Gorkha had pushed away her mother, and at that time, inflicted blow on the head of the deceased, with Kudali. She has denied, that she is falsely stating at the instance of her maternal uncle.

Then, there is evidence of one Heera Ram PW/3 which has

also been referred to by two witnesses. He has stated that, within his seeing, Gorkha was telling to kill, and accused Kachaba inflicted one Kudali blow on the head of the deceased, as a result of which, he fell down.

In our view, since it is an admitted case of the prosecution, that the deceased alongwith his wife and daughter had gone for taking forcible possession of the land, as they were claiming share, which the other brothers were not ready to give and, earlier attempts of such forcible possession had been foiled, obviously therefore, it is clear, that the accused persons had right of private defence of their property. More so, in the background, that the daughter of the deceased, PW/2 Babudi has admitted, that Joga Bhambi of Aradiya was her grandfather (dada). They were living for last 8-10 years at the house of Joga, and her father was cultivating the land of Joga. It is in the background of confronted portion of the police statement of PW/1 Hirki, it does appear, that Moti had gone in adoption to Joga. Joga had died, and after disposing of the land at Aradiya, Moti shifted back to Paderli and wanted to live on the land of his natural father. We may make it clear that we do not mean to adjudicate upon the factum, of Moti having gone in adoption to Joga. The above discussion is only for the purpose, as to whether any right of private defence existed to accused persons or not.

In such circumstances, more so, when the day before

incident also, Moti tried to clear the land, which he was not allowed to do, then as it appears from the FIR, on the day of incident also, the Panchayat was convened wherein, the other brothers had flatly refused to give any portion of the land, and immediately thereafter and notwithstanding that, the deceased had gone on the land for forcibly taking possession. In such circumstances, in our view, there is no escape from the conclusion, that the accused persons did have right of private defence of the property.

So far as the presence of accused Gorkha is concerned, and having instigated the accused Kachba, in our view, the statement of PW/2 is sufficient to negative the accusations against Gorkha. Apart from the fact, that in cross-examination, in confronted portion of police statement of Hirki, Ex.D/1, Gorkha is said to have come hearing the cries of Babudi. Thus, in our view, learned trial court cannot be said to have committed any error in acquitting Gorkha. Obviously, therefore, the State appeal is devoid of merit.

Then, we come to the appeal of the accused. A look at the postmortem report being Ex.P/12, which stands proved by PW/11 Dr. Kishan Singh Rathore, there was incised wound of 8 cm x 2.75 cm vertically placed in the occipital region, caused by sharp edged weapon. This injury had caused rupture of brain matter, which led to death of the

deceased. Another injury was incised wound 6 cm x 4 cm x 1.5 cm vertically placed on left side of shoulder joint. The third injury was incised wound 8 cm x .75 cm muscle deep on the left side of back in the left scapular region. Then left wrist joint was found to be dislocated, though not external injury mark was visible. Thus it is clear, that there were three injuries on the person of deceased. It is not the prosecution case that the deceased was armed. Prosecution case, as it was brought on record was, that deceased was not armed with any weapon, rather they had gone on land only for taking possession, and erecting a hutment. In such circumstances, as the sequence of things have come, firstly, injury was caused on the shoulder, then second was caused on scapula. It is required to be comprehended, that after receiving first injury, the victim must be falling and therefore, the second injury landed on the scapula, and that was enough for disabling him from taking forcible possession of the land, and in any case, infliction of third injury of the magnitude, found on the head, was clearly an act of exceeding the right of private defence, as found by the learned trial court. Learned counsel for the accused also did not very seriously dispute, that it was a case of exceeding of right of private defence.

The main stress of the argument was, that the offence does not fall in first part of Section 304 IPC, but falls in Second part, and for that purpose, long drawn arguments were raised, that Kachaba had

inflicted only two injuries, and according to prosecution, it was only at the instigation of Gorkha, that he made up his mind to inflict third injury. The learned trial court has found this theory of instigation of Gorkha to be not acceptable, for the reason, that accused Kachba never made up his mind to cause such injury, as he knew to be sufficient in the ordinary course of nature to cause death, or even likely to cause death. This argument was projected, by repeating it, in different ways.

We are afraid, the argument cannot be accepted. May be, that the instigation by Gorkha has not been believed, and we have also found it to be rightly not believed, but the fact remains, that the accused Kachba had inflicted third injury on the head, with the same weapon, magnitude of which is visible in the postmortem report. The quick succession in which injuries have been caused, the weapon used, and the part of body selected for causing injury, in the circumstances of the case, sufficiently shows, that the injury was caused with intention of causing such body injury, as was likely to cause death, and it cannot be said, that the said injury was caused only with a knowledge, and without the intention.

Thus, in our view, it cannot be said, that the learned trial court was in error in finding the accused Kachba guilty under First part of Section 304 IPC, instead of finding him guilty under Second part.

The result of the aforesaid discussion is, that both the appeals are devoid of merit, and the same are therefore dismissed. Since the accused Kachaba is on bail, the learned trial court is directed to take steps for arresting the accused, to serve out the remaining term of sentence.

**(C. M. TOTLA), J.**

**(N.P. GUPTA), J.**

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