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the mutation Exhibit P. 1. Section 58 of the Transfer of Property Act is really applicable to mortgages which are in fact ostensible sales. I do not think the principles embodied in section 58 provide any useful guidance for adjudication of the problem involved in the present controversy. The plaintiffs have based their claim on the conditions which have been set out in the mutation. As I have said before, it is no answer for the defendants to assert that while they agreed to the transaction of sale they never agreed to the plaintiffs exercising their option to repurchase as the two hang together. The defendants must either accept the transaction as a whole with all its incidents and obligations or repudiate it altogether. Having accepted the sale, they are also bound by the stipulation to reconvey it to the plaintiffs. There is no question of any privity of contract as the mutation itself gives a right to the sons of the vendor to repurchase. The conclusion of the learned District Judge is, therefore, correct and I would dismiss this appeal with costs.

B.R.T.

APPELLATE CRIMINAL.

Before Mehar Singh and Dua, JJ.

THE STATE,—*Appellant.*

versus

PIARE AND TWO OTHERS,—*Accused-respondents.*

Criminal Appeal No. 84 of 1959.

1959

Sep., 1st

Code of Criminal Procedure (Act V of 1898)—Section 417—Interference with the order of acquittal—When can be made by the High Court.

Held, that in appeal against an order of acquittal the High Court in the absence of compelling reasons, should

not reverse the order of the trial Judge. The presumption of innocence to which every accused is entitled under the law is further re-inforced or strengthened by the acquittal by the trial judge. If, however, a person who has committed an offence is wrongly acquitted on the erroneous view of the trial judge that probably the first blow was given by the deceased and that the accused acted in the exercise of the right of self-defence and if the evidence on the record clearly establishes that this view of the Judge as to the probabilities is wholly unsustainable and defective, then the conclusion of the trial judge is tainted with the infirmity which affords a sufficiently compelling reason justifying the High Court in reversing the order of acquittal. The High Court has full power even to review the entire evidence on which the order of acquittal is based and to come to its own conclusions, as the power conferred under Section 417, Code of Criminal Procedure is in terms unqualified.

State appeal against acquittal of the respondents ordered by Shri H. S. Bhandari, Sessions Judge, Rohtak; on 5th November. 1958.

K. L. JAGGA, for the State.

H. L. SIBBAL & D. S: TEWATIA, for Respondent.

HAR PARSHAD, for Complainant:

JUDGMENT

DUA, J.—This is an appeal by the State of Punjab against the judgment of the learned Sessions Judge, Rohtak, acquitting Piare, son of Giani, Brahma, son of Ram Narain and Dalel Singh, son of Risal Singh who had been sent up for trial under section 302/34, Indian Penal Code, for comitting the murder of Chandgi, deceased on 22nd of July, 1958. Dua, J.

The prosecution story is that the houses of the accused and Chandgi deceased are situated in the same street in village Nilothi. Piare and Brahma

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accused are first cousins, their fathers being brothers, and Dalel Singh is son of Piare's brother. At about 3.30 p.m. on 22nd of July, 1958, Piare was digging earth from the street in front of his house with his *kasola*, Exhibit P. 1, and was throwing it against the wall of his *baithak*. Ram Kanwar P.W. 2 and Ramphal P.W.6 sons of Chandgi came up and asked Piare not to dig the earth from the street because by doing so a pit was likely to be formed which would inconvenience them in going to their house and coming from it. Piare ignored this request. In the meantime Chandgi, father of Ram Kanwar and Ram Phal, also turned up from his field and he too tried to impress upon Piare not dig the earth. This proved equally ineffective. In the meantime Brahma and Dalel Singh accused also came to the spot from their houses armed with *lathis* and encouraged Piare to dig the earth remarking that they would see who dared to stop him from doing so. Piare thus continued the process of digging the earth though Chandgi again asked him not to do so. Piare then gave a blow with his *kasola* on the head of Chandgi who fell down and became unconscious. The other two accused who were armed with *lathis* also rushed towards him to attack him but in the meantime Malhe P.W. 5, a cousin brother of Chandgi, also reached the spot armed with a *lathi*. He and Ram Kanwar P.W. 2, used their *lathis*, on account of which Brahma received some injuries. Dalel Singh and Piare stepped back a few paces to avoid being hit. Brahma, it is said, during this occurrence gave a *lathi* blow to Ram Phal P.W. 6. Hearing the noise Mansa P.W. 7, Dharma and Risala also came to the spot and on alarm being raised the assailants went away to their houses. Chandgi was put in a cart and brought to the hospital at Sampla which is at a distance of about 8 miles from the place of occurrence where he was examined by Dr. Rajinder Singh, P.W

1 who found a swelling on the left side of his head over the ear which was diffused. Chandgi remained semi-unconscious and died at 1.10 p.m. on the following day. After leaving his father in the hospital, Ram Kanwar P.W. 2 went to the police station and lodged the first information report at about 9.50 p.m. The Assistant Sub-Inspector went to the hospital, but found Chandgi lying unconscious. He went to the spot next morning at about 7 O'clock and arrested Piare accused. *Kasola*, the weapon of the offence, was duly recovered from Piare's *baithak*. As soon as Chandgi died Dr. Rajender Singh sent a *ruqqa* to the police station, as a result of which the dead body was duly sent to the mortuary at Rohtak, for the post-mortem examination. The medical evidence discloses a large bruise on the left side of the scalp of the deceased and large subcapitular haemotoma of the left side and also a linear fracture of the left side of the skull starting from the left of the mid-line extending downwards across middle menigeal groove towards the greater wing of sphenoid. There was also a large extradual hamorrhage from middle menigeal vessels. Death, according to the doctor, was due to extradural hamorrhage of skull which had occurred on account of rupture of middle meningeal vessels. The injury caused to the deceased was, according to expert opinion, sufficient in the normal course to cause death.

According to the defence version Dalel Singh was not present at the time of occurrence and Piare was levelling the street in front of his house by digging the earth from the place where the level was higher so as to make the passage level. Chandgi, according to Piare, along with Ram Kanwar, Malhe and Ram Phal, came up and asked him as to why he was removing the earth from the street in front of their house. Piare replied that he was

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not doing so. This led to some altercation and abuses were exchanged. In the meantime Brahma accused came up but he was unarmed, and Malhe P.W. 5 hit Brahma with a *lathi*. Chandgi and Ram Kanwar thereupon joined Malhe and attacked Brahma. Piare stepped forward in defence of Brahma when Chandgi hit him with a *gandasi* which injured him on his ankle. Piare thereupon gave him a push as a result of which he fell down against a piece of wood causing injury on his head on account of which he later died in the hospital. Brahma accused stated that he was coming from his field with his cattle and stopped at the spot on hearing the altercation; he remonstrated with the parties not to fight with each other, but Ram Kanwar and Malhe started hitting him as a result of which he fell down. He, however, snatched the stick of Ram Phal and warded off several blows during which Ram Phal also received an injury on his arm. He expressed ignorance as to how and by whom injury to Chandgi was caused.

The learned Session Judge refused to accept the defence version that Chandgi had received the fatal unjury as a result of fall on a piece of wood when he was pushed by Piare. According to the Court below madical evidence negatived this suggestion. Out of the prosecution witnesses Ram Kanwar P.W. 2, Malhe P.W. 5, Ram Phal P.W. 6 and Mansa P.W. 7, being eye-witnesses have deposed to the actual occurrence supporting the prosecution story, as stated above. The learned Sessions Judge has expressly observed that he saw no reason for doubting the evidence of the witnesses that the blow to Chandgi had been given by Piare from the blunt side of *kasola*, Exhibit P. 1. He has also held the explanation given by Brahma that he did not know how and by whom Chandgi has been caused to be improbable. The

learned Sessions Judge has not relied upon the evidence of Mansa P.W. 7 on the ground that his name was not mentioned in the first information report. The other three witnesses, Ram Kanwar, Malhe and Ram Phal, were considered by the learned Sessions Judge to have made some improvements during the trial by stating that Brahma and Dalel Singh had come armed with lathis to the spot and had exhorted Piare to dig the earth and also that they went forward to attack Chandgi after he had fallen on the ground. These circumstances having not been mentioned in the first information report or in the statements of the witnesses to the police where it had been stated that injuries to Brahma had been caused by Ram Kanwar and Malhe in the exercise of the right of self-defence, the learned Sessions Judge felt a serious doubt whether the real truth had not been supressed by the prosecution witnesses. On this view learned Sessions Judge tried to sift the probable truth from false version because admittedly there was a scuffle between the parties and Chandgi had received the injury which later proved fatal. The learned Sessions Judge seems to have apparently been influenced by the fact that only single injury had been caused to Chandgi and small contusion to Ram Phal. Holding, on the evidence of the witness for the prosecution, that the blow to Chandgi was given by Piare from the blunt side of *kasola* and repelling the suggestion that deceased had sustained the injury by a fall on a piece of wood, the learned Sessions Judge felt that the blow by Piare accused from the wrong side of his *kasola* must have been given in exercise of the right of self-defence. The other two accused were held not to be constructively liable, with the result that all the three were acquitted.

On appeal, Mr. Jaga has cantended that the wrong judgment of the learned Sessions Judge is on

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the face of it when it says that Piare accused gave the blow in question to Chandgi in exercise of the right of self-defence; it is argued that there is absolutely no evidence in support of this finding. Mr. Sibal has, on behalf of the accused respondents, strenuously urged that the learned Sessions Judge has disbelieved the prosecution evidence that Piare first gave a blow to Chandgi. He submits that Mansa whose name was not included in the first information report having not been believed, the remaining three witnesses are highly interested and, therefore, their evidence should be taken with caution. I do not think the learned counsel is right in his contention. Out of the three witnesses Ram Kanwar, P.W. 2, Malhe, P.W. 5, and Ram Phal, P.W. 6, I find P.W. 5, is also related to the accused being connected with them though in 7th or 8th degree. It is true that the Court below has entertained a doubt and has observed that the real truth seems to have been suppressed by the prosecution witnesses, but it has expressly believed the evidence of the witnesses who said that the blow to Chandgi had been given by Piare from the blunt side of *kasola*, Exhibit P. 1. The learned Sessions Judge has arrived at his conclusion with respect to the right of self-defence by considering the probabilities of the case. In my view, the probabilities of the case very strongly point towards the blow having been given by Piare to Chandgi in the first instance. Had Chandgi decided to give the initial blow to Piare who was digging the earth, the blow would have been far more serious and forceful than what is disclosed by the small cut $1'' \times \frac{1}{4}''$ found on the right ankle joint on the lateral side of Piare accused. This injury is indisputably superficial. Chandgi was a fully developed *Jat*, 45 years of age, and an aggressive initial blow by him would not have resulted merely in a small cut.

Mr. Sibal has next contended that this is after all an appeal against an order of acquittal and, therefore, unless there are compelling reasons this Court should not reverse the order of the trial Judge. He submits that the presumption of innocence to which every accused is entitled under the law of this Republic is further re-inforced or strengthened by the acquittal by the trial Judge. There is no dispute with this proposition of law, but, in my opinion, on the existing record the conclusion of the learned Sessions Judge is clearly wrong and deffective, and is not sustainable on the evidence on the record. We are, in no way, minimising the effect of the view of the trial Judge as to the credibility of witnesses but are giving to his views full weight and consideration. If a person who has committed an offence is wrongly acquitted on the erroneous view of the trial Judge that probably the first blow was given by the deceased and that the accused acted in exercise of the right of self-defence and if the evidence on the record clearly establishes that this view of the Judge as to the probabilities is wholly unsustainable and defective, then, in my view, the conclusion of the Judge is tainted with the infirmity which affords a sufficiently compelling reason justifying this Court in reversing the order of acquittal. It must in this connection be observed that though the above proposition of law advanced by Mr. Sibal is to be applied not withstanding the dissenting note of Venkatarama Ayyar, J., in *Aher Raja Khinna,* v. State of Saurastra (1), there is also good authority for the view that this Court has full power even to review the entire evidence on which the order of acquittal is based and to come to its own conclusions, as the power conferred under section 417, Code of Criminal Procedure, is in terms unqualified: See Atley v. State of Uttar Pradesh (2). In the

(1) 1955 (2) S.C.R. 1285
(2) A.I.R. 1955 S.C. 807

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present case, however, we find that the learned trial Judge has drawn an inference as to what, according to him, must have actually happened by losing sight of the material circumstances that the injury on Piare was most superficial and it could be presumed to have been caused by the deceased in the first instance. This apart, the learned Sessions Judge has also dealt with the question of self-defence in a rather superficial and perfunctory manner. It is true that if on the evidence led by the prosecution it clearly appears that the accused had acted in the exercise of the right or private defence then the Court should give effect to it,but in the instant case the trial Judge does not seem to have properly and fully applied his mind to this aspect ; he has not even discussed as to how far the injury caused to the accused was justifiable in the circumstances of the case. The existence of reasonable apprehension of danger to Piare and the extent of harm to Chandgi which may be called for in the circumstances of the present case have also not been given the consideration they deserved at the hands of the learned Judge. On the existing record, therefore, I am clearly of the view that the acquittal of Piare is unjustified and suffers from serious infirmity and has thus resulted in failure of justice.

This brings me to the question of the guilt of the accused. It appears that there was certainly some altercation between the parties and in all probability hot words, possibly even abuses were exchanged. Some kind of resort to violence between the parties may also be imminent or foreseeable. The blow to Chandgi having been given by Piare in these circumstances does not, in my view, constitute an offence under section 302 or even under section 304, Indian Penal Code. In my opinion, intention to cause grievous injury

under section 325, Indian Penal Code, alone can on the existing record be safely imputed to Piare accused. There is, however, hardly any evidence implicating the other accused by constructively imputing to them the required intention.

For the reasons given above, the appeal as against Brahma is dismissed, but as against Piare it is allowed and setting aside his acquittal he is sentenced to three years' rigorous imprisonment under section 325, Indian Penal Code.

MEHAR SINGH, J.—I agree. Mehar Singh, J.

B.R.T.

APPELLATE CIVIL

Before Mahajan, J.

BALWANT RAI KUMAR,—*Judgment-debtor-appellant.*

versus

AMRIT KAUR,—*Decree-holder-respondent.*

Execution Second Appeal No. 276 of 1959.

Code of Civil Procedure (Act V of 1908)—Section 47—Application to set aside the sale after confirmation—Whether maintainable.

1959

Sep., 1st

Held, that on the plain reading of section 47 of the Code of Civil Procedure it is clear that the question, whether the sale should or should not be set aside, is one relating to the execution, discharge and satisfaction of the decree, and as it is between the parties to the suit it can only be decided by the executing Court. If the sale is set aside on either of the grounds alleged, it is set aside because it is treated as a nullity and as such has no existence in the eyes of law. In this situation it cannot be said that in fact there was any sale which could be confirmed or that the decree is fully satisfied as a result of such a sale. An application