PETITIONER:
ATMENDRA

Vs.

RESPONDENT:
THE STATE OF KARNATAKA

DATE OF JUDGMENT: 31/03/1998

BENCH:
M.K. MUKHERJEE, SYED SHAH MOHAMMED QUADRI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

QUADRI, J.

The sole appellant, Atmendra, and his father Ganapati, were tried in Sessions Case No. 5 of 1987 for offences punishable under Section 302 read with sections 34, 114 IPC and Section 27 of the Indian Arms Act by learned Sessions Judge, Karwar and were acquitted by judgment dated 3.9.1987. The State of Karnataka filed Criminal Appeal No. 17 of 1988 against the said judgment. During the pendency of the appeal Ganapati died on 8.1.82. On April 23, 1992, a Division Bench of the Karnataka High Court set aside the judgment of the Trial Court and convicted Atmendra under Section 302 and sentenced him to suffer imprisonment for life and under Section 27 of the Indian Arms Act and awarded punishment of undergoing rigorous imprisonment for one year and to pay a fine of Rs. 200/- and in default to suffer further rigorous imprisonment for two months; substantive sentences were directed to run concurrently. Against that judgment of the High court Atmendra is in appeal before this court.

This case presents a glaring example of how a man getting enraged by trivial things has committed the most heinous crime of murder of the nearest relative. Here plucking coconuts from disputed tree ended up in the death of rival claimant Ashok Hedge, who was no other than the uncle of the appellant and the real brother of Ganapati, a practising advocate. The brothers were living in adjacent houses. But the relations between them were far from cordial and had reached such a stage that a criminal case was filed against Rajendra, the eldest son of Ganapati. At the backyard of their houses on the western side, there is a disputed coconut tree till their claim of ownership was settled, however, each was permitted to take away the coconuts falling on the side of the backyard of his house. On the fateful day of October 30, 1986 at about 11.00 Ashok, his wife Vijayalakshmi PW-1 and servants Parameshwar and Ramdas, PWs-2 and 3 respectively were in his house. They noticed that one Vittal Bhandari (CW-7) was plucking the coconuts in clusters and throwing them down, while the appellant and his father were standing on "chadi" (the raised platform) behind their house watching the coconuts.

Ashok, his wife and servants came on to the chadi of their house on hearing the noise of falling of the coconuts and questioned Bhandari as to why he was plucking the coconuts. In the course of exchange of words Ganapati instigated the appellant to finish Ashok stating that he had become arrogant and then there followed a shot from the gun, which resulted in instantaneous death of Ashok, the deceased, The appellant and Ganapati were charged and tried for the offences stated above. The defence of the appellant was that the deceased swung the reeper at the appellant and as he was turning to avoid the blow the gun also turned in the same direction on account of which the reeper touched the hammer of the gun which went off and hit the deceased.

It can be seen the controversy fell in a short compass, namely, as to whether the appellant shot at the deceased and thus killed him or whether the gun got fired due to the strike of the reeper swung by the deceased.

The prosecution examined as many as 20 witnesses (PWs 1 to PWs 20); and marked exhibits P1 to P33; the defence examined DWs 1 to 3 and marked as Ex.D1 to D15. M.Os.1 to 17 are material objects marked in the evidence. PWs-1 to 3 are eye-witnesses. PW-1 is the wife of the deceased; PWs-2 and 3 are the servants of the deceased. On the basis of the evidence on record, the Trial Court found that motive was established; though it did not believe the plea of self-defence which was also set up by the accused, however, it held that on the facts accidental firing of gun could not be ruled out and consequently acquitted the accused. On appeal by the State, the High Court confirmed the finding of the Trial Court with regard to motive; it concluded that Bhandari (CW-7) was plucking the coconuts from the disputed tree at the behest of the appellant and his father; it accepted the evidence of eye-witnesses (PWs-1 to 3) and held that the gunshot was not the result of striking of the reeper swung by the deceased but that the appellant fired at the deceased to commit his murder and thus convicted him and awarded sentence noted above.

Shri Javali, the learned senior counsel, appearing for the appellant, contended that the appellant did not shoot at the deceased but it was an accidental fire due top the deceased throwing the reeper which struck the gun and that then the Trial Court had accepted the defence and acquitted the appellant, the High Court ought not to have upset the acquittal. Among the eye-witnesses, PW-1 is the wife of the deceased and her presence on the scene of the occurrence is but natural. She stated that Bhandari was plucking the coconuts from the tree situated behind their house and the appellant and his father were standing on the chadi of their house at that time. The deceased asked Bhandari not to pluck the coconuts as there was dispute with regard to the coconut tree. Then, Ganapati remarked he had become very arrogant, finish him. Thereafter the appellant fired a bullet with the gun at her husband who fell down saying "Ayyo - 1 am dead". They started shouting and immediately PW-4 and others came there. PW-2 (P. Gouda) who was working with the deceased for more than 6/7 years corroborated the evidence of PW-11; so also another servant PW-3 (Ramdas Gouda). A perusal of the judgment of the Trial Court shows that their evidence was not disbelieved except to the extent of growth of shrubs around the disputed coconut tree. Indeed, the Trial Court observed that the evidence of those three eye-witnesses, was amply corroborated by the circumstantial and the evidence of PW-4, PW-8 and PW-12 who were the persons who came and saw the deceased immediately after the occurrence. The High Court also accepted their testimony and in our view rightly

so. The ocular evidence accepted by the both the Trial Court as well as by the High Court, established that on the instigation of Ganapati, the appellant fired at ashok. Therefore it was an intentional act of the appellant. PW-9, the doctor who conducted the Post Mortem examination on the dead body of the deceased stated that there was a gun wound on the right side of the chest, anteriorly over 2nd, 3rd, 4th and 5th ribs at their anterior ends, irregularly shaped, measuring 2" horizontally and 2-1/2" vertically surrounded by a multiple pellet wound over an area of 18" transversely and B" vertically. PW-14 is the ballistic expert who spoke to the presence of lead particles in the barrel of the gun; he further stated that in this case characteristics of firing from a short distance of 2-3 feet were totally absent and that the approximate distance of firing was beyond 8' and within 20' from the muzzle of the gun, which is in conformity with the case of the prosecution. The cross-examination of this witness was directed to establish the possibility of gunfire due to jerk. DW-3 was examined to speak to distance from which the gun might have been fired. This witness was an advocate and was deposing on the basis of his experience. In view of the evidence of PW-14, no importance can be attached to his testimony and in any event nothing helpful to the appellant can be found in his evidence. There are more reason than one as to why the defence of gun getting fired accidentally cannot be believed. first, though the plea of defence of accident is a complete answer under Section 80 of the IPC, it is not attracted to the facts of this case. Section 80 says that if anything is done by accident or misfortune it would not be an offence. To claim the benefit of this provision it has to be shown : (1) that the act in question was without any criminal intention or knowledge; (2) that the act was being done in a lawful manner by lawful means; and (3) that act was being done with proper care and caution. In view of the evidence of PWs-1 to 3 which is believed by both the courts and also by us the conclusion that the appellant fired at the deceased at the instigation of late Ganapati intentionally is irresistible; as such the first requisite of section 80 would be lacking. Secondly, the reeper said to have been swung by the deceased at the appellant , as spoken to in his statement under Section 313, Cr.P.C., was not found at the scene of the occurrence as could be seen from the Panchnama (Ex.P-20). All other object found at the scene of occurrence were seized as M.Os.3 to 7. Had the appellant who was present in the house immediately after the occurrence, spoken about the reeper and if it were there, it would have been seized from the scene of the occurrence along with other articles.

The learned counsel also argued that the High Court had committed a serious error in examining the gum which was rusting for more than two years and in coming to the conclusion that the shot could not have been accidental. It would be appropriate to read here that portion of the judgment which deals with the aforementioned contention, which reads as follows :

> "We secured the shot gun M.O.1 and examined it closely. Its butt portion measures 12" in length and above the butt portion the length of the barrel is 36-1/2" from the butt end. This roughly comes to 4 feet, which would be much above the waist of a person of normal height. We also examined the hammer and

> even with violent push with fingers we did not find the hammer to get released. It got released only when the trigger was pulled and this trigger is within a semi-circular metallic cover. Therefore the "Reeper" hitting the trigger is wholly impossible and that is not case of accused-1 either."

A perusal of this extract shows that the High Court did inspect the gun for ascertaining the possibility of the hammer getting released due to strike by the reeper and observed that even with a violent push with fingers, the hammer did not get released. Further, it found that the trigger was within a semi-circular metallic cover and that the hammer got released when the trigger was pulled and that the trigger hitting the trigger was an impossibility and that was not the case of the appellant. It is thus clear that the High Court considered the probability of accidental fire as spoken to by the appellant in his statement under Section 313 Cr.P.C. and which was sought to be supported by evidence of PW-14 and arrived at the conclusion not only with regard to testing its operation but also noting the physical features of the gun. We find no illegality in this approach of the High Court. The judgment under appeal warrants no interference.

The appeal, therefore, fails and it is accordingly dismissed.